

NOTES

COMMANDEERING UNDER THE TREATY POWER

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*In this Note, Janet Carter argues that the anticommandeering principle announced in *Printz v. United States* should not constrain congressional implementation of treaty obligations. The *Printz* Court struck the balance between federal goals and states' rights knowing that Congress had alternative means of achieving its ends: the spending power and the threat of conditional preemption. Carter argues that those alternative means are largely unavailable, or at least less likely to work, when Congress is seeking to implement a treaty obligation. Therefore, the *Printz* Court's federal/state compromise will weigh too heavily against federal interests if applied to treaty-implementing programs, suggesting that an absolute prohibition on federal commandeering pursuant to the treaty power is inappropriate.*

INTRODUCTION

The powers of Congress, limited to those enumerated in the Constitution, are constrained further by the Tenth Amendment¹ and the general principles of federalism it embodies.² However, in *Missouri v. Holland*,³ the Supreme Court held that federalism does not constrain

* I would like to thank Professor Christopher Eisgruber for his generous guidance and advice, and Professors Barry Friedman and David Golove for their helpful comments. Thanks also to my wonderful editor Maggie Lemos, and to Paul Hayes, Alex Reid, Sally Kesh, and David Karp.

¹ U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

² According to current Supreme Court jurisprudence, that is. See *Printz v. United States*, 521 U.S. 898 (1997) (holding that federal government may not commandeer state executive); *New York v. United States*, 505 U.S. 144 (1992) (holding that Tenth Amendment forbids Congress from commandeering state government by forcing states either to legislate in accordance with federal plan or to take title to radioactive waste). This has not always been the controlling interpretation of the Tenth Amendment: Until very recently, the Court almost invariably found the Tenth Amendment to have no substantive component, acting only as a reminder that Congress's powers were limited to those enumerated. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 3.8, at 222-23, 228-32 (1997).

³ 252 U.S. 416 (1920). In *Holland*, the petitioners attacked a statute implementing a treaty that protected migratory birds on the ground that its subject matter—treatment of wild animals within a state's borders—was exclusively within the purview of the states. *Id.* at 417, 434. Justice Holmes, writing for the majority, found no explicit prohibition in the Constitution, nor any "invisible radiation" from the Tenth Amendment, that would forbid the federal government from enacting such a treaty-implementing statute. *Id.* at 433-35.

the treaty power⁴ as it does other federal powers. Thus, Congress may enact statutes pursuant to treaties that would, if enacted as purely domestic legislation under Article I, violate the Tenth Amendment.⁵ This Note explores the interplay between *Holland*'s key insight—that the exigencies of the treaty power justify enhancing Congress's power vis-à-vis the states—and the Supreme Court's prohibition in *Printz v. United States*⁶ of federal commandeering of state executive officers.⁷

At issue in *Printz* was the constitutionality of a federal statute, the Brady Handgun Violence Prevention Act,⁸ which imposes restric-

Although it never has been overruled, if the Supreme Court revisits the issue, *Holland* may be distinguished on the grounds that the subject matter of treaties has changed enormously over the last eighty years. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 429-33 (1998) (discussing erosion of subject matter limitation on treaty power). Whereas it once was "widely accepted" that the content of treaties would be exclusively matters of "international concern," Louis Henkin, *Foreign Affairs and the United States Constitution 196-97* (2d ed. 1996), the Restatement (Third) of Foreign Relations Law of the United States § 302 cmt. c (1987), now states that, "[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'" With that shift comes an increase in the potential for incursion on state prerogatives. Bradley, *supra*, at 397 ("Because treaties now regulate matters that countries traditionally have considered internal, there is an increasing likelihood of overlap, and conflict, with domestic law.").

⁴ U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."). While the federal government participates in treaties without using the Article II mechanism, through congressional-executive agreements (approved by a simple majority of both Houses and the President), see Henkin, *supra* note 3, at 215-18, and "sole" executive agreements (approved by the President acting alone), see *id.* at 219-25, this Note's discussion is limited to Article II treaties.

⁵ See *Holland*, 252 U.S. at 434 ("No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."). The Court cited two district court cases invalidating on constitutional grounds a statute similar to the one at issue, but enacted pursuant to Congress's Article I powers instead of the treaty power. *Id.* at 432 (citing *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (D. Ark. 1914)). But it went on to explain that "[w]hether [those cases] were decided rightly or not they *cannot be accepted as a test of the treaty power.*" *Id.* at 433 (emphasis added).

⁶ 521 U.S. 898 (1997).

⁷ Although this Note focuses on the interaction between the treaty power and the anticommandeering directive of *Printz*, it bears notice that other recent decisions signal the Supreme Court's willingness to limit Congress's power in the name of federalism. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating Violence Against Women Act as beyond Congress's legislative power under either Commerce Clause or Section 5 of Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding regulation of guns around schools to be outside Congress's Commerce Clause power); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may neither commandeer state legislature nor compel states to take title to radioactive waste). Such federalism-based constraints on the scope of domestic federal legislation might carry over into the treaty power.

⁸ §§ 101-106, 18 U.S.C. §§ 921-925A (1994), 42 U.S.C. § 3759 (1994). The Brady Act was enacted in 1993 to amend the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat.

tions on the sale of handguns.⁹ The Brady Act requires the chief law enforcement officers of each county to perform background checks on potential handgun buyers.¹⁰ The petitioners, two chief county law enforcement officers, argued that such “congressional action compelling state officers to execute federal laws [was] unconstitutional.”¹¹ The Supreme Court agreed, reasoning that the federal aggrandizement flowing from the ability to co-opt the state executive into federal service would undermine the relative power of the states, and thus compromise one of liberty’s constitutional stilts.¹²

Two recent capital cases demonstrate the tension that now exists between *Holland* and *Printz*. The defendants in *Breard v. Greene*¹³ and *LaGrand v. Stewart*,¹⁴ all foreign nationals, argued that their convictions should be overturned because they had not been informed of their right to contact their consulates,¹⁵ a right guaranteed by Article 36(1) of the Vienna Convention on Consular Relations,¹⁶ to which the United States is a party. Implementing that treaty through state police officers, however, runs straight into a *Printz* problem: commandeering the state executive to achieve a federal end.¹⁷ After *Printz*, if acting solely under its domestic powers, the federal government could

1213 (codified as amended in scattered sections of 18 U.S.C. and 26 U.S.C.) (forbidding, *inter alia*, transfer of guns to, or possession of guns by, convicted felons).

⁹ *Printz*, 521 U.S. at 902.

¹⁰ *Id.*

¹¹ *Id.* at 905.

¹² See *id.* at 920-21.

¹³ 523 U.S. 371 (1998) (*per curiam*) (denial of petition for certiorari).

¹⁴ 133 F.3d 1253 (9th Cir. 1998) (affirming denial of habeas corpus with respect to brothers Walter and Karl LaGrand), cert. denied, 525 U.S. 971 (1998).

¹⁵ See *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (*per curiam*) (declining to exercise original jurisdiction with respect to Germany’s claim, on behalf of Walter LaGrand, seeking injunction to stay his execution until International Court of Justice had adjudicated Vienna Convention claim); *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998) (affirming District Court’s holding that claim under Vienna Convention had been procedurally defaulted), cert. denied sub nom. *Breard v. Greene*, 523 U.S. 371 (1998).

¹⁶ Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention]. Article 36(1)(b) provides:

[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner The said authorities shall inform the person concerned without delay of his rights under this subparagraph[.]

Id. art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

¹⁷ See Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 Colum. L. Rev. 1630, 1651-55 (1999) (arguing that *Printz* and *Breard* present conundrum because “notification obligations are affirmative duties imposed on state executive officers for the administration of a federal policy”).

not directly compel state executive officers to inform foreign nationals of their Vienna Convention rights.¹⁸ The question remains whether *Printz*'s anticommandeering principle applies with equal force to legislation implementing a treaty obligation.¹⁹

This Note argues that Congress's need to commandeer the states is greater when it acts pursuant to the treaty power than when it exercises its domestic lawmaking powers.²⁰ If, in practice, a treaty requires action by state executive officers,²¹ a prohibition on commandeering would effectively prohibit the United States from entering into or complying with that treaty. In the case of federal domestic legislation that requires action by the state executive, on the other hand, the anticommandeering principle does not spell the death of the federal plan. There exist means of exacting state compliance with a federal domestic plan other than commandeering.²² Those alternative means are largely unavailable when the federal plan involves a treaty.²³

Part I of this Note discusses the nature of and justification for federalism constraints on the national government, and identifies distinctions between the federal government's treaty-making and domestic lawmaking powers that are relevant to federalism protections in general and commandeering in particular. Part II argues that the states' interest in not being commandeered should not be held su-

¹⁸ See, e.g., Carlos Manuel Vázquez, *Breard, Printz and the Treaty Power*, 70 U. Colo. L. Rev. 1317, 1322-29 (1999) (arguing that such requirements pursuant to Vienna Convention would violate *Printz*, except insofar as they could be characterized as conditional preemption). For an explanation of conditional preemption, and a rebuttal of Vázquez's application of the doctrine to the *Breard* problem, see *infra* Part I.B.3.

¹⁹ Procedural obstacles prevented the consideration of a Vienna Convention claim (and thus of the *Printz* problem) in both *Breard* and *LaGrand*. See *Breard*, 523 U.S. at 374-75 (reporting in denial of certiorari that district court had denied Vienna Convention claim on procedural default grounds, and agreeing in dictum that claim had been so defaulted); *LaGrand*, 133 F.3d at 1261-62 (holding both *LaGrand* brothers' Vienna Convention claims to be procedurally defaulted, without cause).

²⁰ This Note does not consider whether Congress constitutionally can participate in a treaty that would, if enacted as a purely domestic statute, be outside its Article I powers. *Holland* answered that question in the affirmative. *Missouri v. Holland*, 252 U.S. 416, 432-33 (1920) (explaining that test for constitutionality of statute enacted pursuant to treaty power is different from that for purely domestic legislation). For a historical analysis of the issue, see generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).

²¹ The Vienna Convention is an example. The only practical way to ensure compliance with its provisions is to have state police officers inform foreign nationals of their rights under the convention upon arrest. For the text of the provision requiring consular notification upon arrest, see *supra* note 16.

²² See *infra* Part I.B.

²³ See *id.*

preme, but rather should be balanced against the national interest at issue. When the national interest involves a treaty obligation, the differences outlined in Part I suggest that federal commandeering should be permitted. Part II concludes by arguing that such a balancing approach should be applied to the treaty power despite *Printz's* blanket prohibition on commandeering.

I

DISTINGUISHING THE TREATY POWER

Both federalism and treaties²⁴ have significant virtues. Federalism, at the very least, has turned out to be a reliable mechanism for administering devolved power and therefore structuring a political system capable of satisfying diverse interests.²⁵ Treaties enshrine international bargains, entered into by nations expecting them to yield net benefits. Treaties, for example, can establish obligations that promote peace,²⁶ enhance mutually beneficial trade relations,²⁷ and strengthen human rights.²⁸ At the same time, however, neither treaties nor federalism protections are costless: Treaties involve recipro-

²⁴ A treaty can be either self-executing, in which case it creates rights in individuals by its own operation, or non-self-executing, in which case such rights will not arise until the treaty party enacts legislation implementing the treaty obligation. See *People of Saipan v. U.S. Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (setting forth "contextual factors" under which treaty will be considered self-executing); see also *United States v. Postal*, 589 F.2d 862, 876-82 (5th Cir. 1979) (same). This Note is concerned only with non-self-executing treaties.

²⁵ See, e.g., Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 *Colum. L. Rev.* 215, 222 (2000) ("The whole point of federalism (or, at least, the best reason to care about it) is that, because preferences for governmental policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking."); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 *U. Chi. L. Rev.* 1484, 1494 (1987) (illustrating same point through example: Assume existence of nation of two states, each with population of 100, where seventy percent of state A and forty percent of state B wish to outlaw smoking in public buildings; then nationwide majority rule would please 110, but two statewide majority rules would please 130 (and even more if smokers move from A to B and vice versa)); see also Alan P. Hamlin, Decentralization, Competition and the Efficiency of Federalism, 67 *Econ. Rec.* 193, 194-99 (1991) (discussing choice-enhancing effects of decentralization).

²⁶ See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 485, 729 U.N.T.S. 161, 171 (entered into force Mar. 5, 1970) (seeking to "undertake effective measures in the direction of nuclear disarmament").

²⁷ See, e.g., Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994) (agreeing to establishment of World Trade Organization); Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 (agreeing to terms enabling fruitful economic relations between United States and Japan).

²⁸ See, e.g., International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] (binding state parties to treatment of own citizens in accordance with fundamental human rights).

cal burdens, such as the commitment to inform arrested foreign nationals of their consular privileges;²⁹ and judicial intervention to protect state interests results in the loss of beneficial federal legislation.³⁰

We bear these costs, of course, because we believe that they are outweighed by the benefits imparted. That is, the United States enters into treaties despite the fact that doing so requires it to accept sometimes onerous obligations, because the value of other countries fulfilling those same obligations outweighs the cost of the United States having to do so. Similarly, sacrificing the good of certain federal legislation is justified by the belief that the long-term benefit to democracy that will result from preserving the balance of federalism outweighs the short-term loss. In the latter instance, however, the result is somewhat ironic: The judicial task in protecting state prerogatives is effectively that of protecting people from themselves.³¹ As the federal constituency, Americans might bring about legislation that is useful in its own right, such as the Brady Act. But if that legislation undermines the independent existence of the states, a governmental structure fundamental to the protection of their liberty, Americans will do themselves more harm than good.

Under this story, if *Holland* allows Congress to circumvent states' rights through treaties, liberty will wobble.³² Like the Brady Act, the Vienna Convention is a good, standing alone. But if the reasoning in *Printz* is credited, implementing the Vienna Convention by "impressing state police officers into federal service"³³—requiring state law enforcement officers to inform arrested foreign nationals of their consular privileges—means the harm done to states and the federal system will outweigh that good.

It is therefore unclear why Congress's power to commandeer the states should be any greater simply because such commandeering is necessary in order to implement a treaty. The mere fact that a treaty lies behind a particular statute does not itself mitigate the deleterious effects of that statute on state institutions. Thus, if there is a wedge to be driven between Congress's treaty-making and domestic powers, it

²⁹ See *supra* note 16.

³⁰ See *supra* note 7 (citing cases).

³¹ See *New York v. United States*, 505 U.S. 144, 187 (1992) ("[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

³² This is the view suggested by *Printz*. Several commentators, however, have argued persuasively that there are "political safeguards" such that state institutions will be protected even without judicial intervention. See *infra* Part I.A.

³³ *Printz v. United States*, 521 U.S. 898, 923 n.12 (1997).

must be justified by a relevant difference in the nature of those two powers. The argument of this Part is that such a difference can be found, not in the process of treaty-making itself, but in the dearth of alternative means of achieving federal ends pursuant to the treaty power.

In *Holland*, Justice Holmes had only this to say on why the federal government should enjoy greater power over the states under the treaty power:

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.³⁴

This reasoning alone, however, is not an entirely satisfactory explanation of why the federal power vis-à-vis the states should differ depending on whether a treaty is involved. Admittedly, limiting the federal government's sweep under the treaty power to those acts that do not violate states' rights, while not altogether denying it the power to make treaties, would involve sacrifices: There would be treaties, beneficial ones, in which the United States could not participate.³⁵ Since

³⁴ *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

³⁵ If domestic federalism limitations were mapped directly onto the treaty-making power, treaties such as that involved in *Holland*, where the subject matter exceeds Congress's Article I powers, as well as treaties involving commandeering, such as the Vienna Convention, would be precluded. See Bradley, *supra* note 3, at 450 (advocating such limitations). Treaties in the latter category involve obligations that feasibly can be carried out only by the state executive. This Note will argue that the federal government's ability to ensure that such implementation is carried out is largely limited to direct commandeering of the state executive. See *infra* Part I.B. Without the power to commandeer, therefore, the United States will not be able to comply with its obligations under such treaties. That, in turn, will weaken its ability to negotiate future treaties. This Note refers to "Congress's treaty-making powers" as a shorthand for both the power to implement treaty obligations and the derivative ability to enter into future treaties.

Furthermore, these limitations on the treaties in which the federal government could participate are not avoided through the Senate's practice of attaching a statement of Reservations, Understandings, and Declarations (RUDs) to the treaties it approves. See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000) (discussing U.S. use of RUDs in human rights treaties); *id.* at 403 (lauding that use as "a sensible accommodation of competing domestic and international considerations"). Under international law, reservations operate against the reserving party vis-à-vis any party that objects to the reservation. Vienna Convention on the Law of Treaty, May 23, 1969, art. 21(3), 1155 U.N.T.S. 331, 337 ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."); Bradley & Goldsmith, *supra*, at 432-35 (discussing article 21(3) and its application to U.S. reservations to ICCPR). There-

states are prohibited by the Constitution from participating individually in treaties,³⁶ if a treaty beneficial to the United States cannot be made by the federal government because implementing it would violate states' rights, then that treaty cannot be made at all.

But is this any greater a problem in the context of the treaty power than with regard to Congress's domestic lawmaking powers? There are *domestic* "matters of the sharpest exigency"—such as controlling interstate externalities,³⁷ preventing a race-to-the-bottom,³⁸ and preserving important economies of scale³⁹—that only can be ac-

fore, if other treaty parties object to U.S. reservations, they are released from treaty obligations vis-à-vis the United States to the extent of the reservations. The United States cannot exact from those countries conduct it is unwilling or unable to take on itself, for federalism or any other reasons. But cf. Bradley & Goldsmith, *supra*, at 434-35 (positing that U.S. reservations to ICCPR are deemed accepted by all parties, because objections were made too late to be effective).

³⁶ See U.S. Const. art. I, § 10, cl. 1.

³⁷ Interstate externalities result from an activity undertaken in State A, from which State A receives all the benefits but not all the costs, since it is able to transfer some of those costs to State B. State A therefore has an incentive to produce those benefits and costs at a higher-than-socially-optimal level. Air pollution produced by a factory in State A drifting into State B is a typical interstate environmental externality. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996) (stating:

The problem of interstate externalities arises because a state that sends pollution to another state obtains the labor and fiscal benefits of the economic activity that generates the pollution but does not suffer the full costs of the activity. Under these conditions, economic theory maintains that an undesirably large amount of pollution will cross state lines.);

see also McConnell, *supra* note 25, at 1495 (discussing interstate externalities).

³⁸ A "race-to-the-bottom" is a variety of the Prisoner's Dilemma, in which states, competing for industry and able to impose externalities on each other, lock themselves into a contest of underregulation. See, e.g., Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 Iowa L. Rev. 713, 747 (1977) ("In the absence of a nondegradation requirement, 'clean' states might compete with one another for new development, leading to a 'commons' dilemma in which each state permits more degradation than it would prefer or allow if transaction costs did not preclude agreement with competing states."); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211-12 (1977) [hereinafter Stewart, *Pyramids of Sacrifice?*] (discussing Prisoner's Dilemma model leading to underregulation of environmental quality, but without titling it "race-to-the-bottom"). But cf. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1211-12 (1992) (noting that "the race to the bottom has been invoked as an overarching reason to vest regulation that imposes costs on mobile capital at the federal rather than the state level," but challenging that "accepted wisdom," particularly as applied to environmental regulation).

³⁹ Any nationwide problem, the resolution of which involves "recurring, technically complex issues," will be solved more cheaply if it is addressed once by the federal government rather than fifty times by the states. Stewart, *Pyramids of Sacrifice?*, *supra* note 38, at 1212 (outlining, as justifications for federal regulation, "steps [that] can often be taken far more cheaply once on the national level than repeatedly at the state and local level").

completed through action at the federal level.⁴⁰ What reasons are there to distinguish the treaty power?⁴¹ This Note will argue that the inability of the national government to act indirectly on the states pursuant to the treaty power justifies affording it greater authority to act directly on the states. First, however, an argument from the structure of government must be considered.

A. *Political Safeguards*

Some commentators have argued that, since the Senate functions to protect states' rights, those rights are protected better with respect to Article II treaties (where the approval of two-thirds of the Senate is required⁴²) than with respect to domestic lawmaking powers (where legislation is approved through the vote of a simple majority of both Houses⁴³).⁴⁴ Justifications for judicial intervention to protect states' rights therefore are implicated to a lesser extent for treaties.

The view that states' rights are protected through the political process, and therefore do not need, and should not be subject to, judicial protection, originated in Herbert Wechsler's article, "The Political Safeguards of Federalism."⁴⁵ Central to his thesis was the role of the

⁴⁰ See Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 407-10 (1997) (surveying these arguments for national authority, and discussing another: uniformity). But cf. *infra* text accompanying notes 65-70 (arguing that voluntary state cooperation is possible solution to these problems, but not available as alternative means through which United States can participate in treaties).

⁴¹ It would be enough if it were true—and perhaps this is Justice Holmes's point—that the exigency of international relations is sharper than that of domestic matters that demand federal regulation. But the merits of that claim are virtually impossible to verify or refute conclusively.

⁴² See *supra* note 4.

⁴³ U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him . . .").

⁴⁴ See Henkin, *supra* note 3, at 444 n.4 (noting that, in Framers' design, "[t]he choice of the Senate for the treaty-making process reflected also its character as the particular representative of state interests"); Nicholas Pendleton Mitchell, *State Interests in American Treaties* 155 (1936) ("[I]t is unlikely that [Senators], who so directly represent the states as such, will rush lightly into treaties which unnecessarily or unjustly invade state fields."); Harold W. Stoke, *Foreign Relations of the Federal State* 191 (1931) ("[T]he Senate has been the reliance of those who have wished to protect the rights of the States against further encroachments through the treaty power."); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 *Colum. L. Rev.* 1726, 1753-55 (1998) (arguing that political process protections, particularly from "[t]he strategic influence of Senate," have "special relevance in the context of the treaty power").

⁴⁵ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of National Government*, in *Principles, Politics and Fundamental Law* 49 (1961).

Senate.⁴⁶ Although arguing that *both* the House and the Senate function to protect states' rights,⁴⁷ Wechsler remarked that "the point [that state interests are protected] is so clear in the Senate" that it "does not call for much discussion,"⁴⁸ and later that "the Senate cannot fail to function as the guardian of state interests as such."⁴⁹

If Wechsler is right, then so are the commentators who urge that states' interests are better protected with respect to treaties than with respect to domestic legislation.⁵⁰ Two-thirds is more protective than one-half, so the conclusion that courts should stay out of federalism determinations holds a fortiori for treaties.⁵¹

Wechsler's view that the Senate is "intrinsically calculated" to protect state interests, however, has been subject to serious criticism.⁵² Larry Kramer argues:

⁴⁶ See *id.* at 54 ("If I have drawn too much significance from the mere fact of the existence of the states, the error surely will be rectified by pointing also to their crucial role in the selection and the composition of the national authority.").

⁴⁷ *Id.* at 55. Wechsler later made clear that the House is not as protective of state interests as is the Senate: "[T]he composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that dominant state interests wish preserved for state control Even the House is slanted somewhat in the same direction, though the incidence is less severe." *Id.* at 58.

⁴⁸ *Id.* at 56 (citing *The Federalist* No. 62, at 385 (James Madison) (Lodge ed. 1888)).

⁴⁹ *Id.* at 57. The Supreme Court accepted Wechsler's arguments in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."). *Printz* marked a retreat from this position. Friedman, *supra* note 40, at 363 ("Although [*Garcia*] has not been explicitly overruled, it apparently has been so tacitly, in part by new cases that are more forthcoming regarding the benefits of federalism." (footnote omitted)); cf. Neuman, *supra* note 17, at 1648 ("The life expectancy of the *Garcia* decision is uncertain . . .").

⁵⁰ See *supra* note 44 and accompanying text.

⁵¹ Wechsler's conclusion was that the political safeguards were sufficiently strong that courts need play no part in protecting federalism. Wechsler, *supra* note 45, at 81 ("[I]t is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism . . ."); see also Friedman, *supra* note 40, at 362 ("On [the political safeguards of federalism] point the [*Garcia*] Court essentially deemed challenges of congressional infringement of state autonomy nonjusticiable."); cf. *Garcia*, 469 U.S. at 550-52 (adopting Wechsler's view); *id.* at 556-57 (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1976), which required judicial scrutiny to detect federal overreaching, because it "underestimated . . . the solicitude of the national political process for the continued vitality of the States"). The political process argument therefore requires a small retreat, and an extra premise: If Senators act to protect states as states, then the approval of more Senators means more protection. Thus, we can be more confident that federalism is safe when sixty-seven Senators vote for a piece of legislation than when fifty do.

⁵² Even if Wechsler were right, and the Senate did function to protect states' rights, a problem remains: The increased prevalence of the filibuster means that most legislation needs the support of sixty Senators in order to pass. See Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 *Harv. L. Rev.* 29, 53-55 (1999) (discussing effects of "routine

With respect to the Senate, two things only need to be said . . . : First, it seems clear that direct representation in this body was the chief protection afforded to state institutions in the original plan of the Constitution Second, it seems equally clear that this protection basically evaporated with the adoption of the Seventeenth Amendment in 1913.⁵³

Wechsler's argument that states are protected in the Senate because representation is allotted state by state, furthermore, is "likely, if anything, to diminish the institutional role of state government[s]."⁵⁴ If members of Congress respond to state and local interests, it is to their advantage that those interests be served at the federal level, and thus they have an incentive to undermine the state and local governments, their rivals in serving the people.⁵⁵

In the Framers' original design, the Senate might have functioned to protect the interests of state institutions; today it does not. There cannot be a case, then, for state interests being protected better in the Article II treaty-making process.⁵⁶

filibusters" on legislative process). If only seven more Senators are needed to approve treaty-implementing legislation than are needed for domestic legislation, the argument that states' rights are more likely to be protected in the former situation than in the latter is weakened significantly.

Indeed, accepting this line of argument presumably requires courts to give more deference to any legislation, challenged on federalism grounds, that received two-thirds or more support in the Senate (whether passed over a presidential veto, or simply popular legislation). Research for this Note turned up no case in which the Court exhibited an inclination to do so.

⁵³ Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1508 (1994). The Seventeenth Amendment ended appointment of Senators by the state legislature, moving instead to direct election by the people of the state. U.S. Const. amend. XVII. Speeding the decline of state power in the Senate was the death of mechanisms by which state legislatures could instruct and discipline senators, see Kramer, *supra*, at 1508-09, and the role of primary elections in undercutting the influence state legislatures once had as senators' relevant electorates, see *id.* at 1509-10.

⁵⁴ Kramer, *supra* note 53, at 1510.

⁵⁵ *Id.* at 1510-11.

⁵⁶ Kramer has an affirmative thesis that state institutions are in fact protected because the fortunes of federal and state politicians are entangled, particularly through the operation of political parties. See *id.* at 1520-61 (attributing fact that states' interests are in fact advanced in federal government to combination of presence of political parties, operation of federal administrative system, formal federal structure of American politics, and "culture" of federalism). The treaty power fares no better here: Under Kramer's thesis, all federal politicians will respond to state interests, senators no more so than representatives. Therefore, unless there is a reason to think that two-thirds of the Senate will be more protective than one-half of both Houses, states' rights will be protected in the national government, but to the same extent for treaties as for domestic legislation.

It should be stressed that the position of this Note decidedly is not that those who think that state interests are protected adequately through political processes are mistaken. Rather, this Section acknowledges the retreat from that position in *Printz*, and argues that the treaty power is not exempted from that retreat.

B. Limited Alternatives

Although political safeguards do not provide a reasoned basis for distinguishing between Congress's domestic and treaty powers, perhaps practical necessity might. *Printz* was a prohibition on improper means of achieving legitimate ends: The federal government may not commandeer state executives to do its work for it. It may, however, bribe the states to do that work, through the spending power,⁵⁷ or threaten the states with federal legislative control, compelling the states themselves to legislate.⁵⁸ This Section argues that the federal government typically does not have these alternative means of achieving the ends available to it in the context of the treaty power. Furthermore, the formal act of treaty making only can be undertaken by the national government. Without the semicoercive means, discussed approvingly in *New York v. United States*,⁵⁹ for the federal government to induce state compliance with the federal plan, the ability to achieve national ends is lesser internationally than domestically. That is an anomalous result.

This argument is, admittedly, nothing but pragmatic: It advocates pulling back on states' rights simply because federal ends cannot be effected otherwise. Assuming, however, that the value of states' rights is instrumental rather than intrinsic,⁶⁰ the difficulties outlined below do implicate enhanced federal power over the states when Congress acts pursuant to the treaty power.⁶¹

I. Treaty Making Power

The Constitution prohibits the states from entering into treaties with foreign countries;⁶² that power is reserved exclusively for the na-

⁵⁷ See *infra* Part I.B.2.

⁵⁸ See *infra* Part I.B.3 (discussing such "conditional preemption"); see also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 *Harv. L. Rev.* 2180, 2211-12 (1998) ("The spending power, the power to tax and regulate private activity, and the powers of 'conditional preemption' of state regulation still offer Congress a fair amount of latitude to obtain state cooperation with federal policy." (footnotes omitted)).

⁵⁹ 505 U.S. 144, 188 (1992) ("The Constitution enables the Federal Government to preempt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes.").

⁶⁰ See *infra* Part II.A.

⁶¹ Such pragmatism appears to have been condoned by one member of the Court. Justice O'Connor wrote separately in *Printz* to stress that, even though the Court was diminishing the federal government's power to act directly on the states, Congress still could achieve its objectives "on a contractual basis with the States," through the spending power. *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

⁶² See U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . .").

tional government.⁶³ A treaty that imposes obligations on all United States officials, state and federal, might be in the interests of most Americans, or even most state governments.⁶⁴ But if federalism prevents the national government from entering into such a treaty, the opportunity to participate will be lost: It is not a matter that can be left to the states. If a treaty is held to violate the Tenth Amendment, therefore, it is simply impossible that the national ends sought through that treaty—binding another nation under international law—will be achieved. If federal domestic legislation is struck down on federalism grounds, in contrast, the national ends still could be accomplished. State law enforcement officers could have continued voluntarily to conduct background checks after *Printz*;⁶⁵ after *New York*, state legislatures voluntarily could have provided for the disposal of low-level radioactive waste generated within their respective states, or formed an interstate compact to the same end.⁶⁶ More generally, economies of scale⁶⁷ could be achieved through voluntary joint state action, and races-to-the-bottom⁶⁸ and interstate externalities⁶⁹ could be prevented by states refusing to act in their respective rational self-interests.

So, while it is *possible* that domestic matters will be treated appropriately by the states acting individually, it is *impossible* that the United States will be able, through state action, to enter into formal treaty relations guaranteeing particular conduct from other coun-

⁶³ See *supra* note 4.

⁶⁴ Extradition treaties, for example, benefit the states by increasing the likelihood that serious offenders will be prosecuted under state criminal law rather than find safe haven in another country. Yet pursuant to such treaties, state police officers could be required to find and detain a person who committed a crime in another country but has not violated any state law. See, e.g., Treaty on Extradition, June 8, 1972, U.S.-U.K., 28 U.S.T. 227 (providing for reciprocal extradition of offenders). Even if the FBI or U.S. marshals carried the burden of investigation, implementing the extradition treaty would still place *Printz*-like burdens on state law enforcement if, for example, a person subject to an extradition warrant turned up in a state police cell, and the state was required to keep her there longer than it would on the state charge.

⁶⁵ See *Printz*, 521 U.S. at 936 (O'Connor, J., concurring) ("Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program.").

⁶⁶ Such a compact would require congressional consent. See U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ."); see also *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 280-82 (1959) (finding Congress's power under Compact Clause to include power to impose binding provisos, even one under which states waive Eleventh Amendment immunity from suit).

⁶⁷ See *supra* note 39.

⁶⁸ See *supra* note 38.

⁶⁹ See *supra* note 37.

tries.⁷⁰ The anticommandeering principle therefore has a greater functional impact on the federal government's treaty power than on its domestic lawmaking powers: Coordinated state action is a noncommandeering means through which domestic programs, but not treaties, can be made. This discrepancy cuts in favor of enhancing the federal government's power to act directly on the states, when the national interest pursued involves a treaty.

2. *Spending Power*

The spending power, authorized by the Spending Clause,⁷¹ enables Congress to condition disbursement of federal funds to the states on a desired state action, including one it could not compel directly.⁷² When the federal government wanted the drinking age raised to twenty-one, for example, it conditioned its payment of highway money to the states on their making that change.⁷³ While effective in domestic matters, however, exercise of the spending power in the treaty context is complicated by the fact that the United States is trying to implement an international *obligation*, rather than a mere policy objective. Suppose the federal government decided to use the spending power to comply with its obligations under the Vienna Convention. If it participated in the treaty and then offered the states additional law enforcement money, attaching the string that state po-

⁷⁰ A related argument relying on voluntary state compliance is that the United States might enter into a treaty and then hope that the states will go ahead and implement it. This argument, however, faces the same problems addressed below in the context of conditional spending: Without guarantees of compliance, states might defect from the obligations they have taken on, thus putting the United States into breach and making other countries more hesitant to enter into treaties with United States in the future. See *infra* notes 74-75 and accompanying text.

⁷¹ U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .").

⁷² See *United States v. Butler*, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

⁷³ The constitutionality of this device was tested in *South Dakota v. Dole*, 483 U.S. 203 (1987). The federal government arguably is prevented by the Twenty-First Amendment from regulating the drinking age directly. *Id.* at 205-06; Friedman, *supra* note 40, at 341. Nevertheless, the Court in *Dole* held that an exercise of the spending power to encourage states to legislate that change was constitutional, so long as four conditions were met: the purpose sought and the means adopted were designed to promote the general welfare; the conditions on federal grants were stated clearly by Congress; the conditions on federal grants were related to the national interest sought to be advanced; and the exercise of the spending power was not barred by other constitutional provisions. *Dole*, 483 U.S. at 207-08. This last restriction ensures that Congress may neither compel the states to engage in unconstitutional activities, nor threaten to withhold such a large amount of money that the federal proposal operates as coercion. *Id.* at 210-11.

lice officers must inform arrested foreign nationals of their consular privileges, states could refuse the money and the United States would be unable to comply with the international obligation it already had incurred.⁷⁴ Even if the federal government exercised the spending power before negotiating the treaty, states could accept the strings-attached funding and then defect after the treaty had been ratified, causing the United States to breach.⁷⁵ Not only does this raise *ex post* liability problems, it also puts the United States in a weak international bargaining position. The United States cannot *guarantee* other negotiating parties that the treaty obligation will be implemented and maintained; compliance is dependent on choices made by fifty independent state legislatures.

All of the above is true of the United States government's ability to enter into treaties. However, if what is important to the United States is not the formal act of treaty making, but having other countries commit to acting in particular ways, a version of the spending power is still available to the federal government. The federal government can condition its payment of foreign aid to another country on a commitment from that country that it will undertake particular conduct; if that conduct ceases, then so do the payments.⁷⁶ Such payments do not raise a federalism problem. This strategy thus provides the federal government an alternative to participating in treaties that raise such problems, either because their subject matter lies outside Congress's delegated powers, or (the category relevant to this Note)

⁷⁴ See Vázquez, *supra* note 18, at 1325 (noting that using spending power to implement Vienna Convention "would still leave open the possibility that states would refuse to comply and thus produce a treaty violation").

⁷⁵ Furthermore, if the spending power is exercised before the treaty is negotiated, the federal government's ability to exact the same promise from other countries would be weakened. Seeing that states were committed to the course of action until the federal government released them, and that such a release would not be costless, other nations would be less likely to take on the obligation themselves.

⁷⁶ See, e.g., Duncan Campbell, *Drugs in the Firing Line*, *Guardian Wkly.*, July 27, 2000, at 11 (noting that

the US government has decided to devote a further \$1.3bn of its citizens' money towards fighting this war [on drugs] . . . by supplying military aid to the Colombian government . . . while Europe provides a carrot—or more likely a banana crop—in the form of aid for the development of crops that will replace the coca and the opium poppy);

Jon Jeter, *Angola Paradox: Awash in Oil, Mired in Poverty*, *Wash. Post*, Sept. 18, 2000, at A1 ("The Clinton administration . . . has been instrumental in brokering a deal between Angola and the International Monetary Fund that would require the government to open its books to outside auditors for the first time and spend more on domestic programs in exchange for donor assistance."); *The War on Drugs: First, Inhale Deeply*, *Economist*, Sept. 2, 2000, at 26, 26 ("America's 'certification' policy—which ties foreign aid and loans to its southern neighbours' co-operation in the drug war—is highly unpopular with those neighbours . . .").

they involve federal commandeering of state government. If the argument is right, then the federal government can and ought to achieve its international goals through selective dissemination of foreign aid, rather than by burdening the states with a commandeering treaty.

The virtues and status of treaties, however, go a long way toward defeating this argument. First, joining a treaty generally will be cheaper. Of course, treaty participation involves burdens (informing arrested foreign nationals of their Vienna Convention rights, for example, is not costless), but exacting compliant conduct by making payments to every would-be treaty participant is likely to be much costlier. Second, some acts will not be purchasable. Wealthy countries, for example, are unlikely to accept cash in exchange for guarantees that Americans would be afforded consular privileges, when their own citizens traveling or living in the United States could be sentenced to death without having the chance to receive consular assistance.⁷⁷ Third, participation in treaties—being seen as a sporting international player—is good public relations for the United States, bolstering its ability to assert its mandate in trade and other international relations.⁷⁸ Finally, there might be more to the making of treaties than simply (and cynically) getting other countries to act in ways that benefit the United States. The International Covenant on Civil and Political Rights,⁷⁹ for example, is a treaty under which signatory nations commit to treating their own citizens in accordance with fundamental human rights.⁸⁰ For treaties such as this, the model of self-interested and mutually disinterested states entering into treaties that

⁷⁷ Compare Treaty on Extradition, June 8, 1972, U.S.-U.K., art. IV, 28 U.S.T. 227, 230, under which the United Kingdom may refuse to extradite a person to the United States, in the absence of assurances satisfactory to the United Kingdom that the person will not be subject to the death penalty.

⁷⁸ See, e.g., Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 *Geo. L.J.* 381, 392-93, 447-57 (2000) (suggesting that U.S. refusal to sign Rome Statute of International Criminal Court despite near universal international support for Statute will lead to reduced U.S. influence and control over international relations in future); Shirley C. Wang, Note, *The Maturation of Gender Equality into Customary International Law*, 27 *N.Y.U. J. Int'l L. & Pol.* 899, 922 (1995) ("For [nation]-states, ratification of treaties that promote gender equality such as the Women's Convention, is good public relations at little cost.").

⁷⁹ ICCPR, *supra* note 28.

⁸⁰ See, e.g., *id.* art. 1, § 1, 999 U.N.T.S. at 173, 6 I.L.M. at 369 (guaranteeing right to self-determination); *id.* art. 7, 999 U.N.T.S. at 175, 6 I.L.M. at 370 (prohibiting "cruel, inhuman or degrading treatment or punishment"); *id.* art. 18, 999 U.N.T.S. at 178, 6 I.L.M. at 374 (protecting "freedom of thought, conscience and religion"); *id.* art. 27, 999 U.S.T. at 179, 6 I.L.M. at 375-76 (protecting right of minority peoples to their own culture, religion, and language).

work to their tangible advantage breaks down.⁸¹ There is more to modern treaty-making than this objection can capture; the formal act of commitment to a principled document is *itself* important.

The spending power is an extremely powerful tool through which the federal government can compel changes in domestic law.⁸² In its classic form, under which Congress achieves its national objectives by conditioning grants of federal funds on desired state action, its use in service of the treaty power presents the problems that a state can cause the United States to breach its treaty obligation, and that the United States will have difficulty negotiating a treaty when all it has to offer in return is voluntary state compliance.⁸³ In its internationalized form, under which Congress seeks to achieve its international objectives by conditioning foreign aid on commitments from recipient countries, the spending power is expensive and will not work uniformly.⁸⁴ Thus, the anticommandeering principle takes a greater toll on federal exercises of the treaty power than on federal domestic programs: The spending power enables federal domestic ends, but not exercises of the treaty power, to be achieved through noncommandeering means. Again, this discrepancy justifies enhancing the power of the federal government, when exercising its treaty power, to act directly on the states.

3. *Conditional Preemption*

Conditional preemption is a power available to the federal government by virtue of the fact that, under the Supremacy Clause, fed-

⁸¹ Other human rights treaties, in which the symbolic act of participation is significant, include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987); the Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (entered into force Sept. 3, 1981); the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); and the Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

⁸² See, e.g., Friedman, *supra* note 40, at 341 ("If Congress can circumvent limitations on its enumerated power simply by purchasing compliance in areas it could not regulate directly, then the enumeration of powers is practically meaningless."); Thomas McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 Sup. Ct. Rev. 85, 125-26 (concluding that *Dole* analysis is so permissive that spending power is virtual blank check for undermining federalism); Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in Its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. Rev. 469, 474 (2000) (advocating new limits on Congress's huge power under Spending Clause, when subject matter of regulation is constitutionally protected liberties).

⁸³ See *supra* text accompanying notes 71-75.

⁸⁴ See *supra* text accompanying notes 77-81.

eral law displaces inconsistent state law.⁸⁵ The federal government can compel state legislative action by “offer[ing] States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation.”⁸⁶ The key point is that, through conditional preemption, the federal government can compel the states to legislate, when to do so directly would be prohibited by the Tenth Amendment.⁸⁷

Can Congress use this power to compel the states to implement treaty obligations? Again, not as easily as if it were a purely domestic matter.⁸⁸ The attractiveness of conditional preemption, from the states’ point of view, lies in the fact that the programs at issue are largely under state control. So long as the federal goal is achieved, the states are able to fashion the programs as they wish. Regulation involves costs, which would be borne by the federal government were the states to decline to regulate when threatened with conditional preemption. Agreeing to regulate, therefore, manifests a belief that local control is more important than the costs of regulation. But this only will hold where the states genuinely do have control. If the federal plan were extremely specific, and the states could exercise no discretion over the details, the value to the states of agreeing to the plan

⁸⁵ See U.S. Const. art. VI, cl. 2.

⁸⁶ *New York v. United States*, 505 U.S. 144, 167 (1992). Conditional preemption plays a significant role in the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994 & Supp. IV 1998). The federal government sets the National Ambient Air Quality Standard (NAAQS) for a particular pollutant. *Id.* § 7409. Then, the statute requires each state to enact a State Implementation Plan to comply with the NAAQS, detailing how much of that pollutant each source or type of source can emit. *Id.* § 7410(a). If a state fails to do so, the federal government will step in and enact a Federal Implementation Plan for that state. *Id.* § 7410(c). The *New York* Court cited, as other examples of such “‘program[s] of cooperative federalism,’” *New York*, 505 U.S. at 167 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981)), the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. IV 1998), the Occupational Health and Safety Act of 1970, 29 U.S.C. §§ 651-678 (1994 & Supp. IV 1998), and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6902g (1994 & Supp. IV 1998), *New York*, 505 U.S. at 167-68.

⁸⁷ See *New York*, 505 U.S. at 188 (holding that federal government may not commandeer state legislature). Without the approach taken in the Clean Air Act, the federal government could not baldly force the states to enact State Implementation Plans. *Cf. id.* at 173-74 (holding incentive to states to regulate through threat of federal preemption to be constitutional, because “States are not compelled by Congress to regulate[;] . . . the choice remains at all times with the residents of the State”). Since the Clean Air Act was enacted at a time when the Supreme Court was less likely to find that useful federal programs impermissibly infringed on states’ rights, direct federal compulsion of State Implementation Plans might not have been found unconstitutional. There is no question, however, that it would be so found after *New York*.

⁸⁸ This discussion assumes that the subject matter of the treaty is something Congress could legislate as a purely domestic matter. The question is whether the federal government can compel the states to legislate (and then enforce) a treaty obligation in an area where the national government has power to act, but chooses not to.

would drop out. Specific mandates are not good candidates for conditional preemption, and treaty obligations tend to be specific.

Consider, again, the Vienna Convention. Not only the *object* of regulation (treatment of arrested foreign nationals) but the *details* (informing arrested foreign nationals of their consular privileges, informing the consular post if the foreign national so requests, forwarding communications between the two without delay⁸⁹) are set out absolutely and in advance. In the face of such a specific demand, no state in its right sovereign mind would yield to conditional preemption. Given that the states have no discretion as to the content of the implementing legislation, better to leave it to the federal government to do the work,⁹⁰ both in legislating and later in bearing the cost of enforcement.

More generally, the federal government has a stronger claim that it is entitled to commandeer the states into implementing a specific treaty obligation than it has with respect to a specific domestic federal law. In the context of international agreements, no one nation—not even the United States—uniformly succeeds in having its drafting suggestions adopted as treaty text.⁹¹ When the federal government ends up with a very specific treaty obligation, the states will have little incentive to yield to threats of conditional preemption. In the domestic context, on the other hand, the federal government cannot rely on the position that specific commands to states eviscerate the power of conditional preemption, because it itself decides how specific the obligations ought to be. This distinction prevents the federal government from making a very narrow proposal of conditional preemption—such as that the states must accept voter registration papers from someone applying for a driver's license, and establish procedures to facilitate that process⁹²—and then arguing that its very narrowness justifies greater federal power directly to compel the states to legislate those changes (and then bear the substantial burden of enforcement).

⁸⁹ See Vienna Convention, *supra* note 16, art. 36(1), 21 U.S.T. at 100-01, 596 U.N.T.S. at 292.

⁹⁰ Note that this assumes that *Printz* would require the federal government to implement such a scheme, *if enacted domestically*, using its own executive officials, and that the federal government does not have more extensive power to co-opt the states given that the scheme is embodied in a treaty.

⁹¹ See, e.g., Sadat & Carden, *supra* note 78, at 448 (stating:

Relations between the United States and other nations [at Rome conference debating text of Statute of International Criminal Court] deteriorated as each State became more entrenched in its position The U.S. delegation attempted, at the last minute, to reopen debate by introducing amendments to the text, only to be resoundingly defeated by the delegates.).

⁹² See National Voter Registration Act, 42 U.S.C. §§ 1973gg-2(a), -5(a) (1994).

Thus, with respect to very specific treaty obligations, the power of the federal government to act directly on the states ought to be enhanced to counter the fact that conditional preemption will tend to be unavailable.⁹³ The same is not true of domestic proposals of conditional preemption, however, because the federal government has complete control over the specificity of the proposal, and therefore the likelihood of it being accepted by the states.

All of the foregoing rests on the assumption that the conditional preemption doctrine requires that the federal government's "threat of preemption" is to regulate a particular area unless the states regulate *that very area* first. That assumption has been rejected by at least one commentator. Carlos Manuel Vázquez argues that the federal government could use the conditional preemption doctrine to have states legislate a requirement that detained foreign nationals be informed by state officials of their rights of consular access.⁹⁴ He claims:

If . . . a law [prohibiting the states from arresting persons who are nationals of foreign countries] would be constitutional, then . . . Congress could also give the states a choice between not arresting such persons and arresting them but giving them the required notification [S]uch a law would appear to be a valid "conditional exercise" of the treaty power.⁹⁵

This is a very strained understanding of preemption. Vázquez is suggesting that the federal government can threaten to enact a law that would make it impossible for the states to regulate a particular area by making that area cease to exist. Such compulsion by threat of impossibility is not described felicitously as preemption, and it is not a happy solution to the problem at hand, for two reasons.

First, if the federal government made the proposal Vázquez suggests, it would be surprising if the states did anything other than call its bluff. The federal government does not want foreign perpetrators to go unarrested, and would not be enthusiastic about expanding the

⁹³ To be clear: A very general treaty obligation will not provide a justification for the federal government to act directly on state legislatures. Under the Montreal Protocol, for example, the United States agreed to freeze production of CFCs at 1986 levels, and then to reduce CFCs by fifty percent over a ten-year period. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, art. 2, S. Treaty Doc. No. 100-10, at 2-3 (1987), 1522 U.N.T.S. 3, 31-32; Robert V. Percival et al., *Environmental Regulation: Law, Science and Policy* 1276 (1996). Discretion abounds as to *how* those emissions are to be reduced, and so implementation of the treaty obligation would be a likely candidate for passing on to the states indirectly, through conditional preemption. Indeed, the federal threat would be very similar to the one made in the Clean Air Act, see *supra* notes 86-87, where conditional preemption has been exercised with glowing success.

⁹⁴ See Vázquez, *supra* note 18, at 1325.

⁹⁵ *Id.* at 1325-26. The following discussion assumes that the law Vázquez proposes indeed would be constitutional.

FBI to fill the executive gap. Vázquez at least needs to propose a threat that the federal government would be willing to carry out.

Second, even if the federal government were making a realizable threat, finding such proposals to be within Congress's powers would open the door to complete circumvention of states' rights.⁹⁶ Analytically, there is no reason to distinguish between such "impossibility" proposals, and coercive proposals in which the legislation threatened is completely unrelated to the ends sought. The federal government could threaten something particularly ghastly (but still within its power), such as the dreaded National Curriculum,⁹⁷ and piggyback anything it wants on that threat.⁹⁸ This utterly would defeat the federalism constraints on Congress's power.

In sum, all three shortfalls—the inability of states to enter into treaties with other countries, the unavailability of the spending power, and the unavailability of conditional preemption—mean that the anticommandeering principle impairs the federal government's treaty power more than it impairs its domestic powers.

II

THE IMPLICATIONS OF HAVING FEWER ALTERNATIVE MEANS TO SERVE THE NATIONAL INTEREST

Greater congressional power to act directly on the states pursuant to the treaty power is justified by the fact that Congress's ability to effect its nation-serving ends is limited more under the treaty power than under its domestic powers. *Printz* was a limitation on means, not ends.⁹⁹ It prohibited only one method of achieving federal domestic

⁹⁶ This is exactly the objection that Curtis Bradley levels at expansive use of the treaty power, see Bradley, *supra* note 3, at 423-33 (arguing that erosion of Tenth Amendment and subject matter limitations on treaty power work to undermine all federalism restrictions on federal government's power), and that Thomas McCoy and Barry Friedman level at an unconstrained spending power, see McCoy & Friedman, *supra* note 82, at 125-26 (arguing that Supreme Court decisions have rendered constraints on Congress's spending power "illusory").

⁹⁷ Assuming, that is, that Congress has power under the Commerce Clause to enact a National Curriculum. For a statement implying that it does not, but accusing the four-Justice dissent of adopting a position that entails that it does, see *United States v. Lopez*, 514 U.S. 549, 565 (1995) ("[Under the dissent's proposed rule,] Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant 'effect on classroom learning,' and that, in turn, has a substantial effect on interstate commerce." (citation omitted)).

⁹⁸ This, naturally, is subject to voter response: A truly awful federal proposal just would not be made, for fear that the states might not cooperate and the federal government would have to implement a program that its constituents clearly do not want.

⁹⁹ The *Printz* Court's objection was not to the end sought by the federal government—fostering safer communities by demanding uniform background checks on handgun buyers—but to the means chosen to accomplish that end—directly co-opting state executive

goals; those goals still can be achieved through other, permissible, available means. But imposing the *Printz* prohibition on the treaty power creates what is functionally a limitation on ends: Without commandeering, and without the spending power and conditional preemption, the substantive power of the federal government to enter into treaties is jeopardized. Therefore, the analysis of how much leeway Congress should enjoy to commandeer the states to comply with its treaty obligations should be responsive to the differences analyzed in Part I.

Now, had the *Printz* Court approached the commandeering problem as one of balancing (the state interest in not being commandeered, against the federal interest in its legislative program), then the upshot of the observations made in Part I would be simple: The dearth of alternative means to serve federal ends under the treaty power tips the balance in favor of commandeering. However, the Court was rather clear that such a balancing approach was not being contemplated. When asked to consider the fact that the Brady Act was important legislation only efficiently administered by commandeering state executive officers, the Court replied:

[W]here, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a “balancing” analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.¹⁰⁰

The principal aim of this Part is to find a way for the functional considerations of Part I to fit into that analysis. Part II.A argues that the normatively attractive approach to judicial protection of federalism is a flexible one that takes into account both federal and state interests, rather than bowing to state “sovereignty.” Part II.B suggests ways in which departing from the all-or-nothing (or rather, nothing) *Printz* approach when considering treaty-implementing statutes might not be inconsistent with *Printz*.

officers to perform that task. See *Printz v. United States*, 521 U.S. 898, 932 (1997) (“[D]irect[ing] the functioning of the state executive . . . [offends] the very *principle* of separate state sovereignty . . .”).

¹⁰⁰ *Id.* (footnote omitted); see also Neuman, *supra* note 17, at 1653 (“The difficulty [in simply holding *Printz* inapplicable to the treaty power] is that the Court in *Printz* insists that its noncommandeering principle is absolute, and cannot be balanced against the federal government’s interest in imposing obligations on state officials.”).

A. *Should States' Rights Trump?*

Printz's creation of a bright line rule absolutely prohibiting federal commandeering could have a basis in two distinct notions of states' rights: First, that states' rights are trumps, just like individual rights on a deontological view; second, that state prerogatives should be circumscribed by bright line rules, and we should act as if those rights are absolute.

Rights that are conceptualized as instrumentally important are important not in and of themselves, but because respecting them serves values that are themselves important, such as greater citizen preference satisfaction through more effective participation in the political process. The value of respecting a right, on such a reading, can be overcome if a different course of action better serves those ultimate values; rights can be traded off against other goods. The view that rights are intrinsically important, on the other hand, does not admit of such balancing. Only the right itself serves the valued end.¹⁰¹

The latter reading, however, is based on too narrow a view of the nature of rights, at least as applied to the concept of states' rights. It is not inconsistent to speak of states' "rights"¹⁰² and still believe that they are not important for their own sake, but only for the benefits they impart. Certainly, one might have the intuition that *individual* rights are intrinsic (rather than instrumental) in nature, and therefore cannot be subsumed to the greater good. But political institutions exist to benefit the people whose interests they represent; their value can be nothing but instrumental.¹⁰³ As such, states' rights can, and

¹⁰¹ This is the position endorsed by Edwin Rubin and Malcolm Feely in their article challenging the superiority of federated states over a devolved national power in securing the central benefits of federalism. See Edwin L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 913 (1994) ("Rights are deontological, not instrumental, claims. Although we may justify the existence of rights by an instrumental argument, a right, once recognized, stands independent of that argument." (citing Ronald Dworkin, *Taking Rights Seriously* 197-204 (1977))). An instrumental view of rights, they argue, is not an account of rights at all, but merely a "specific mechanism for selecting strategies." *Id.* Their position, in sum, is that rights, by definition, are claims about intrinsic rather than instrumental value.

¹⁰² While it is true that the term "rights" normally is used to refer to deontological claims, it also functions to denote instrumental values. For example, John Stuart Mill's famous defense of the right to free speech was made through an instrumental analysis. See John Stuart Mill, *On Liberty* 22-63 (Prometheus Books 1986) (1859); see also Peter Singer, *Practical Ethics* (2d ed. 1993) (advocating animal "rights," despite author's being consummate utilitarian).

¹⁰³ As an analytic matter, that is. One might hold, of course, that the Framers conceived of states' rights as absolute, and argue that that view binds current interpretations. Cf. *New York v. United States*, 505 U.S. 144, 157 (1992) ("The benefits of this federal structure . . . need not concern us here. Our task would be the same even if one could prove

should, be balanced against the federal programs that are thought to undermine them.¹⁰⁴

The second view is more subtle: States' rights have instrumental (rather than intrinsic) value, but the greatest good will result from acting *as if* they were absolute rights. Under this view, analogous to rule utilitarianism, the sum of the benefits of federalism (public participation, citizen choice, interstate competition, experimentation), minus the disvalue of sacrificing useful federal legislation (such as the Brady Act) on the federalist altar, will be maximized by *never* allowing the latter to trump the former. Justice Scalia's *Printz* opinion has been characterized as adopting this approach.¹⁰⁵

The crucial question is which of the bright line but instrumental view and the more flexible balancing approach better serves the values of federalism when commandeering is the issue. Vicki Jackson has argued persuasively that the latter is preferable.¹⁰⁶ The key virtues of bright line rules—"promoting accessibility to and notice of the law, and, arguably, greater consistency in its application"¹⁰⁷—are of diminished importance when applied to a reflective body like a legislature (rather than, for example, police officers required to make on-the-spot judgments regarding the legality of their actions). Conversely, the key defect in bright line rules—"being either overinclusive or underinclusive in serving their substantive purposes"¹⁰⁸—is particularly pernicious

that federalism secured no advantages to anyone. It consists . . . of understanding and applying the framework set forth in the Constitution.").

¹⁰⁴ This argument does not defeat Rubin and Feely's project. Their argument can be reconceptualized as championing devolved national power against the view that maintaining the states as separate political entities, with exclusive spheres of competence, is what (instrumentally) makes for the best political system. These are the terms on which Larry Kramer responds to their argument: Agreeing that federalism is mostly about decentralization, he argues that a system where the decentralized government entities are politically independent from the national power is more likely to secure the benefits of decentralization. See Kramer, *supra* note 25, at 223; see also Jackson, *supra* note 58, at 2217-21 (arguing that Rubin and Feely underestimate values of federalism arising from fact that states are fixed alternative locations of power and are political units that create civic identity binding diverse people).

¹⁰⁵ Jackson, *supra* note 58, at 2255 ("*Printz* . . . quite explicitly adopts a categorical bright line. Bright line rules correspond to the notion of the Constitution as clear principle and serve rule of law purposes of promoting accessibility to and notice of the law, and, arguably, greater consistency in its application."). It must be noted, however, that some of the language of *Printz* admits of the interpretation that states' rights operate as trumps because their value is intrinsic. See *supra* text accompanying note 100.

¹⁰⁶ Jackson, *supra* note 58, at 2182 (concluding that *Printz* Court's "clear line" "does not necessarily inhere in the pragmatics of a workable federalism," and "is both underinclusive and overinclusive toward legitimate goals of protecting state governments and promoting political accountability").

¹⁰⁷ *Id.* at 2255.

¹⁰⁸ *Id.* at 2257.

scious when applied to an instrumental good, such as federalism.¹⁰⁹ Because it is hard to guess how instrumental values will play out, it is much less likely that the bright line will be set at the right point, *ex ante*, when the value served is instrumental rather than intrinsic.¹¹⁰

In sum, the aims of judicial protection of federalism would have been served better by adopting a flexible standard in *Printz*. Under such a standard, the balance comes out in favor of allowing commandeering under the treaty power. Where states' rights are permitted to trump beneficial domestic federal programs, it is because doing so secures greater benefits than losses in the long term. But the equation is different with respect to treaty-implementing legislation, because the losses are greater. Unable to rely on voluntary state action or indirect coercion of the states,¹¹¹ the federal government has to forego the benefits of a treaty entirely.

B. Consistency with *Printz*

The normative attractiveness of a "flexible, multifactor"¹¹² approach notwithstanding, *Printz*'s mandate was clear: Never commandeer. If undue limitations on the treaty power are to be avoided, then, some way must be found in *Printz* for applying such a flexible approach when the treaty power is at issue.

The practical considerations themselves might provide a way. Justice O'Connor's *Printz* concurrence professed confidence that the majority's bright line struck the appropriate compromise between state and national interests, in part because the national ends could be achieved through other means.¹¹³ Without those means, it thus seems,

¹⁰⁹ *Id.* ("[T]he necessarily pragmatic and instrumental nature of the constitutional role of federalism . . . [implicates] using a deferential, 'all-things-considered' approach."). The *New York* Court also expressed an instrumental understanding of federalism: "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992).

¹¹⁰ Where a value is intrinsic, bright lines are ideal. If, for example, we believe that preserving adult human life is intrinsically valuable, a bright line rule forbidding killing an adult human exactly serves that value. Where a value is instrumental, the analysis is much messier. If we believe that preserving adult human life is instrumentally valuable insofar as it promotes total human happiness, it might well turn out that permitting suicide and euthanasia will serve that ultimate value in most cases, but not in some. A bright line set *ex ante* in such a case will necessarily be under- and overinclusive, and that inaccuracy will be exacerbated by the impossibility of predicting all the possible value-serving permutations.

¹¹¹ See *supra* Part I.B.

¹¹² Jackson, *supra* note 58, at 2257.

¹¹³ *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring). Furthermore, by emphasizing that the Court's decision did not cover "other purely ministerial reporting requirements imposed by Congress on state and local authorities," *id.*, Justice

the compromise will weigh too heavily against the national interest. To put it another way: The fact that other means of achieving federal ends were available in *Printz*—and with regard to federal statutes enacted under the Commerce Clause generally—was a consideration in setting the bright line rule at zero commandeering. When those alternative means are unavailable, the line will be set in the wrong place. Therefore, exercises of the treaty power (and any other power under which conditional spending and conditional preemption are unavailable) should receive some leeway to commandeer.

Added to this is the pervasive understanding that the federal government's foreign affairs powers are very broad, and certainly broader than its domestic powers.¹¹⁴ In *United States v. Curtiss-Wright Export Corp.*,¹¹⁵ the Supreme Court maintained that "external sovereignty"—the power to act in relation to foreign nations—was not part of the constitutional bargain between the states and the national government.¹¹⁶ Since the power over foreign affairs was never the states' to bargain away, that power is not limited by the state interests that constrain the federal government's domestic powers.¹¹⁷ Although the historical foundation of *Curtiss-Wright* has been criticized fiercely,¹¹⁸

O'Connor intimated a solicitude for balancing, coming out in favor of commandeering when the burdens on state officers truly are minimal.

¹¹⁴ See, e.g., *The Federalist* No. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

¹¹⁵ 299 U.S. 304 (1936).

¹¹⁶ *Id.* at 316 ("[T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."). For other statements of the breadth of the foreign affairs powers, suggesting that federalism concerns do not limit those powers as they do domestic powers, see *United States v. Pink*, 315 U.S. 203, 233 (1942) ("We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[C]omplete 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.").

¹¹⁷ *Curtiss-Wright*, 299 U.S. at 316 ("[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.").

¹¹⁸ See, e.g., *Velasquez v. Frapwell*, 160 F.3d 389, 392-93 (7th Cir. 1998) (describing *Curtiss-Wright*'s historical analysis as "quite possibly incorrect []," and quoting Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *Yale L.J.* 1, 32 (1973), which described it as "shockingly inaccurate"), vacated in part on other grounds, 165 F.3d 593 (7th Cir. 1999); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 *Va. L. Rev.* 1617, 1660 n.184 (1997) (collecting articles criticizing *Curtiss-Wright*).

If *Curtiss-Wright*'s strongest statement of the federal government's foreign affairs power were good law, it would be a complete answer to the commandeering-under-treaties problem, and this Note would have little point. However, the academic furor sparked by

it still stands as an influential statement of the breadth of the federal government's foreign affairs powers,¹¹⁹ and suggests that the balancing of federal and state prerogatives will differ depending on whether the federal power is domestic or foreign. Therefore, imposing upon the foreign affairs powers the same prohibitions that ensure the proper balance in domestic matters would be unwarranted.

Finally, there are suggestions within *Printz* itself that some instances of federal commandeering will not be prohibited, if authorized by other provisions of the Constitution.¹²⁰ The Court cited as an example the Extradition Act of 1793,¹²¹ which was enacted pursuant to the Extradition Clause¹²² and "required the 'executive authority' of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled."¹²³

Which constitutionally granted powers will qualify here? As Evan Caminker observes, it cannot be only those powers for which the Constitution itself permits commandeering, because the Extradition Clause, the *Printz* Court's example, requires an implementing statute to be operative.¹²⁴ So, it must be those grants of power that "specifically encompass[] the authority to commandeer state officials"¹²⁵—raising, of course, the problem of pinning down "specific." A full-blown defense of the view that the treaty power would fall into this exception to the commandeering prohibition is beyond the scope

Breard and *LaGrand* suggests that few see *Curtiss-Wright* as foreclosing the question. See, e.g., Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089, 1100-01 (1999) (discussing *Breard* and *Printz* conundrum); Neuman, *supra* note 17, at 1651-55 (same); Vázquez, *supra* note 18 (same).

¹¹⁹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (stating principle that President has "a degree of discretion and freedom from statutory restriction" greater in foreign affairs than in domestic arena (quoting *Curtiss-Wright*, 299 U.S. at 320)); *Perpich v. Dep't of Def.*, 496 U.S. 334, 354 n.28 (1990) (quoting declaration in *Curtiss-Wright*, 299 U.S. at 318, that powers, inter alia, to declare and wage war and to make treaties, even "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality").

¹²⁰ See *Printz v. United States*, 521 U.S. 898, 908-09 (1997) (acknowledging that statute implementing Extradition Clause commandeered state executive).

¹²¹ Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302, 302 (current version at 18 U.S.C. § 3181 (1994)).

¹²² U.S. Const. art. IV, § 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

¹²³ *Printz*, 521 U.S. at 908-09.

¹²⁴ Evan H. Caminker, *Printz*, State Sovereignty, and the Limits of Formalism, 1997 Sup. Ct. Rev. 199, 241; see also *California v. Superior Court*, 482 U.S. 400, 406 (1987) ("The Extradition Clause . . . has never been considered to be self-executing.").

¹²⁵ Caminker, *supra* note 124, at 241.

of this Note. But if the exception encompasses not only a power that “inherently requires conscription of state officials,”¹²⁶ but also one that “functionally entail[s] commandeering of state officials,”¹²⁷ then there is a case to be made for it encompassing the treaty power.

CONCLUSION

Whatever the constraints on the exercise of the federal domestic lawmaking power over the states, the constraints on the exercise of the treaty power ought to be more relaxed. The dearth of alternative means to achieve the ends sought through the treaty power result in a serious limitation on that power, if it is subject to the *Printz* anticommandeering rule. That limitation, coupled with the necessity of a broad foreign affairs power, together suggest that *Printz*'s absolute prohibition ought not to apply.

¹²⁶ *Id.*

¹²⁷ *Id.*