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Breard, *Printz*, and the Treaty Power

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BREARD, PRINTZ, AND THE TREATY POWER

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Virginia's execution of Angel Breard last year, with the blessing of the United States Supreme Court[1] but in the teeth of an order of the International Court of Justice ("ICJ")[2] and a request of the United States Secretary of State,[3] raised a number of important questions concerning the distribution of powers and responsibilities among the state and federal governments in the area of foreign affairs.[4] This article addresses an issue that could have been raised in the *Breard* litigation but was not: whether the treaty provision Virginia violated contravenes the anticommandeering principle articulated in *Printz v. United States*[5] and *New York v. United States*.[6] If the treaty provision did attempt to commandeer

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1. *See* Breard v. Greene, 118 S. Ct. 1352 (1998) (per curiam); *see also* Federal Republic of Germany v. United States, 119 S. Ct. 1016 (1999); Stewart v. LaGrand, 119 S. Ct. 1018 (1999).

2. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. No. 99 (Apr. 9), *reprinted in* 37 I.LM. 810, 819 (1998), *available at* <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>; *see also* Case Concerning the Vienna Convention on Consular Relations (F.R.G. v. U.S.), 1999 I.C.J. No. 103 (Mar. 3, 1999), *available at* <http://www.icj-cij.org/ichwww/idocket/igus/igusframe.htm>.

3. *See* Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora:* Breard, *The Facts*, 92 AM. J. INT'L L. 666, 671-72 (1998).

4. I have addressed some of these issues elsewhere. *See* Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998) [hereinafter Vázquez, Breard *and the Federal Power*]; Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998) [hereinafter Vázquez, *Night and Day*].

5. 521 U.S. 898 (1997).

6. 505 U.S. 144 (1992). It is unclear why this issue was not raised in the *Breard* litigation. Although *Printz* was decided after the *Breard* litigation commenced, *see* Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996), *aff'd*, 134 F.3d 615 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S. Ct. 1352 (1998); Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S. Ct. 1352

Virginia's officials within the meaning of those cases, the question arises whether the anticommandeering principle applies to exercises of the treaty power as well as exercises of the legislative power. Some commentators have suggested that the rule of *Printz* and *New York* is not applicable to the treaty power,[7] but others disagree.[8]

Angel Breard, a national of Paraguay, challenged his sentence on the ground that Virginia had violated the Vienna Convention on Consular Relations ("Vienna Convention" or "Convention"),[9] a treaty to which the United States and Paraguay are both parties. The Vienna Convention provides in pertinent part that a national of one country "arrested or committed to prison or to custody pending trial or . . . detained in any other manner" by the authorities of another country has the right to confer with the consul of his country, if he so requests, and that "said authorities shall inform the person concerned without delay of his rights under this [provision]."[10] The treaty thus required the Virginia authorities who arrested Breard to inform him that he had a right to consult with his consul, something Virginia did not do. This provision appears *prima facie* to commandeer state officers in contravention of *Printz*.[11]

A closer examination, however, reveals that the question whether the Vienna Convention's consular notification

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(1998), the anticommandeering principle as articulated in *New York* at least arguably prohibited federal commandeering of state executive officials. Perhaps Virginia's lawyers concluded that *Printz* did not apply to exercises of the treaty power or that the Vienna Convention did not "commandeer" in violation of *New York* and *Printz*. Perhaps they overlooked the argument.

7. *See, e.g.*, Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 52 (1997); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1260 (1995).

8. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 409 (1998); James A. Deeken, Note, *A New* Miranda *for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of* Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997 (1998). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 467 n.75 (2d ed. 1996) (*New York* limits "presumably" apply to exercises of the treaty power).

9. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

10. *Id.* art. 36(1).

11. *See* Thomas Healy, Note, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726, 1746 (1998).

provision commandeers is quite complex. The complexity results from two ambiguities in the Court's anticommandeering doctrine. First, the Court in *New York* and *Printz* distinguished laws that commandeer from laws that merely "encourage," and it made clear that the latter are not barred. There is some question, however, where the line between commandeering and encouragement falls. Second, the Court in *New York* and *Printz* did not call into question Congress's power to preempt state law, yet the decisions leave uncertain where the line falls between unconstitutional commandeering and valid preemption.

Determining whether the Vienna Convention's consular notification provision commandeers requires an examination of both of these ambiguities. One of the categories of laws the Court in *New York* found to be valid "encouragement" consists of laws that "conditionally preempt" state law—that is, laws that give the states a choice between agreeing to do something that would otherwise constitute commandeering and submitting to a valid federal law preempting state law.[12] The consular notification provision could be viewed as valid conditional preemption on the theory that it gives the states a choice between giving aliens the notification contemplated by the Convention and refraining from arresting nationals of countries that are parties to the Convention. The provision would constitute valid conditional preemption, however, only if a law or treaty barring states from arresting such persons would be valid. In light of *Missouri v. Holland*,[13] a treaty barring the arrest of nationals of certain countries would not violate any subject-matter limitation on the treaty power deriving from the Tenth Amendment, as the Court in that case held that there were no such limitations. There is some basis, however, for concluding that such a treaty would violate the anticommandeering principle itself.

The answer to the broader question addressed by this article—whether the anticommandeering principle applies to the treaty power—similarly depends on the resolution of the two ambiguities identified above. If commandeering were defined broadly, as distinguished from both encouragement and preemption, then the anticommandeering principle could

12. *See New York*, 505 U.S. at 167-68.
13. 252 U.S. 416 (1920).

not plausibly be considered applicable to exercises of the treaty power, as it would condemn numerous treaties that the Supreme Court has upheld. The broad interpretation of this principle, however, seems implausible even in the nontreaty context. On the other hand, applying a narrower interpretation of the anticommandeering principle to the treaty power would pose no special problems, and in some respects has considerable appeal.

Part I of this article explains why a federal law requiring state officers to provide a notification to private parties under certain circumstances appears *prima facie* to violate the anti-commandeering principle, but suggests that the Vienna Convention's consular notification provision may be valid conditional preemption because it leaves the states the option of refraining from arresting the relevant aliens. My analysis of conditional preemption, however, exposes this technique as a cheap and easy way for the federal government to evade the anticommandeering principle. For example, the statute invalidated in *Printz* itself could be upheld as conditional preemption with only seemingly trivial modifications. Part I considers possible constraints on Congress's use of conditional preemption in the purely domestic, nontreaty context, but concludes that the constraints are weak.

Part II explains that conditional preemption is even less of a constraint on the federal government in the treaty context because, under *Missouri v. Holland*, there are no subject-matter limits on the treaty power having their source in the Tenth Amendment. Thus, even if the anticommandeering principle applied to exercises of the treaty power, Congress would retain an even broader capacity than in the nontreaty context to "encourage" states by threatening preemption. Part II considers and rejects various proposals to limit the substantive scope of the treaty power in the name of state sovereignty.

In both the treaty and nontreaty contexts, the breadth of the conditional preemption doctrine depends on where the line falls between invalid commandeering and valid preemption. For example, the consular notification provision is valid conditional preemption only if a hypothetical treaty barring the arrest of aliens would be valid preemption. Part III examines the plausibility of broad interpretations of *Printz* and *New York* adopted by two federal courts of appeals, either of which would

condemn such a hypothetical treaty. The Fourth and Eleventh Circuits have read those decisions to bar federal laws that impose regulations on states without imposing the same regulations on private individuals;[14] the Seventh Circuit has read them to bar federal regulations that regulate the states "in their role as governments."[15] Applying either of those interpretations to the treaty power would be highly problematic. Like the Constitution, but unlike statutes, treaties typically govern "state action." When the United States accepts an obligation by treaty, therefore, the obligation typically applies to the actions of the federal and state governments, but not to private conduct. The broad interpretations of the anticommandeering principle adopted by these courts would therefore represent a serious limitation on the treaty power. They also conflict with a number of Supreme Court decisions upholding treaties and statutes that would be invalid under those interpretations. I conclude that those broad interpretations of *Printz*, implausible even outside the treaty context, in any event should not apply to exercises of the treaty power.

In Part IV, I argue that there is little reason for exempting the treaty power from the anticommandeering principle if that principle were understood narrowly to encompass only the sort of directives involved in the *Printz* and *New York* cases. In light of the limitations and exceptions recognized in *New York* and *Printz*, the federal government retains significant options short of commandeering for inducing action by state officials where state officials are better situated than federal officials to do what the treaty contemplates. Perhaps ironically, one of the effects of applying the anticommandeering principle to the treaty power would be to call into question an "understanding" the United States has attached to recent human rights treaties, purportedly in the interest of state sovereignty. This sort of irony, however, pervades the Supreme Court's doctrine in this area. In my view, the fact that it calls these understandings into question gives considerable appeal to applying the narrow

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14. *See* Pryor v. Reno, No. 98-6261, 1999 WL 187050 (11th Cir. Apr. 6, 1999); Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *petition for cert. filed*, Mar. 15, 1999 (No. 98-1464).

15. Travis v. Reno, 163 F.3d 1000, 1004 (7th Cir. 1998).

interpretation of the anticommandeering principle to exercises of the treaty power.

I. COMMANDEERING VS. ENCOURAGEMENT

A. *What It Would Mean to Invalidate the Consular Notification Provision Under* Printz

When Angel Breard challenged his death sentence on the ground that Virginia officials failed to notify him of his right to consult with his consul, Virginia responded by arguing, among other things, that Breard had forfeited this claim by failing to raise it at trial and that vacatur of a conviction is not a remedy authorized by the Convention.[16] The State did not argue, however, that the obligation to notify Breard of his right to consult with his consul was an unconstitutional commandeering of state officials by the federal government. At the time Virginia first responded to Breard's Vienna Convention claims, Virginia officials may not have understood that the Constitution prohibited commandeering of state executive officials,[17] but the Supreme Court in *Printz* subsequently made it clear that it does. The Court in *Printz* also made it clear that the Constitution prohibits commandeering even if the burden on the states, financial or otherwise, is *de minimis*.[18] If the issue were to arise again, therefore, the validity of the consular notification provision could legitimately be raised.[19]

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16. *See* Vázquez, *Night and Day*, *supra* note 4, at 52-53.

17. *See supra* note 6.

18. *See* Printz v. United States, 521 U.S. 898, 931-33 (1997).

19. In *Breard*, and later in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999), the Court denied relief on the ground that the alien invoking the Vienna Convention had forfeited his claim by failing to raise it at the appropriate time. The *Printz* issue would be squarely raised, however, if an alien denied the required notification were to raise the issue at the proper time and satisfy other threshold requirements. *Cf.* United States v. Lombera-Camorlinga, No. 98-50347, 1999 WL 160848 (9th Cir. Mar. 25, 1999) (finding that, upon a showing of prejudice, violation by federal officials of Vienna Convention right to consular notification can constitute ground for suppressing statements subsequently given).

The Vienna Convention is not the only treaty that purports to impose obligations on state officials of this nature. For example, the Convention on the Transfer of Sentenced Persons provides that "[a]ny sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention." Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, art. 4(1), 35 U.S.T. 2868, 2872, 22 I.L.M. 530, 531.

Invalidating as unconstitutional commandeering the requirement that state officials notify arrestees of their right to consult with their consuls would in no way diminish the United States' responsibility towards other parties under international law. *Printz* would simply mean that, as a matter of domestic law, state officials could not be required to provide the notification. The result would be that the federal government would have to provide the necessary notification when state authorities arrested nationals of other states-parties to the Vienna Convention. This would of course raise significant practical difficulties for the federal government, not the least of which would be to learn of the states' arrests of foreign nationals. But the Court in *Printz* made it clear that federal commandeering of state officials is invalid even if such commandeering is clearly a more efficient means of accomplishing the desired end than direct federal enforcement.[20]

The survival of the international obligation to notify arrestees of their right to consult with their consuls,[21] however,

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20. The Court in *Printz* did leave open the possibility that a federal law requiring state officials to report certain information to the federal government might not violate the anticommandeering principle. *See Printz*, 521 U.S. at 932 n.17; *id.* at 936 (O'Connor, J., concurring). Because there does not seem to be a principled distinction between this sort of obligation and others that clearly violate *Printz*, some commentators have questioned this possible exception. *See* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 234-35. Without this exception, the federal government would have a difficult time learning of the arrest of aliens triggering the consular notification right. If the exception were recognized, on the other hand, the states could not be obligated to provide the notification to the arrestee, but they could be required to notify the federal government of the arrest, permitting the latter in turn to provide the notification to the arrestee—certainly a highly inefficient result.

21. The Vienna Convention clearly contemplates that the notification be given by the "authorities" who detained the alien. But if the Constitution prohibits the imposition of that obligation on state executive officials, then surely notification by federal officials would be preferable, from the point of view of the treaty, than no notification at all. Indeed, it is likely that the parties to the treaty were indifferent as to who does the notifying, as treaties do not generally address the allocation of responsibilities among particular domestic authorities. The language of the treaty no doubt reflects a recognition of the practical difficulties of requiring notification by anyone other than the arresting authorities, rather than a preference for notification by state as opposed to federal officials. But if these practical difficulties could be overcome, surely no one would complain if the notification were given by someone other than the arresting authorities. In other words, the requirement that the notification be given is severable from the

suggests another basis for upholding the requirement that state officials provide the notification. The Convention could, in theory, be satisfied even if neither state nor federal officials ever notified any alien of a right to consult with his consul. The Convention requires such notification only if such an alien is "detained"; if no alien is detained, no notification is required. Thus, a federal law prohibiting states from detaining aliens from countries that are parties to the Vienna Convention would, if valid, ensure compliance with the Convention. The federal government has not passed such a law, but Congress's power to pass such a law is relevant to the validity of the treaty provision the federal government did enact. The remainder of this part explains the relevance to our analysis of a congressional power to ban altogether the arrests of aliens by state officials. Parts II and III then consider whether the federal government in fact possesses such a power.

B. The Consular Notification Provision as Conditional Preemption

In *New York v. United States*, the Court struck down only one of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Court held that Congress could not compel or coerce the states into enacting or administering a federal regulatory scheme, but it upheld two provisions giving the states "incentives" short of compulsion. First, it upheld a provision offering the states money in exchange for their agreement to administer the federal regulatory scheme,[22] deeming such an offer mere "encouragement."[23] Second, and more importantly for present purposes, it upheld a provision giving the states a choice between administering the federal regulatory scheme and having state law preempted by a valid federal law.[24] On the

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requirement that it be given by the arresting authority, and thus the former would survive if the latter were to fall.

22. *See* New York v. United States, 505 U.S. 144, 173 (1992).

23. *Id.*

24. *See id.* at 174.

other hand, the Court struck down the so-called take-title provision, which transferred title to certain radioactive waste to the state if the state failed to administer the federal regulatory scheme.[25] This provision, the Court held, gave the states a choice between two options Congress could not constitutionally have imposed separately.[26] Both options, the Court said, constituted unconstitutional commandeering of state officials.[27] The take-title provision accordingly, "crossed the line distinguishing encouragement from coercion."[28]

New York thus leaves the federal government the option of inducing states to provide the required notification by offering them money or threatening to withdraw money they are already receiving. This sort of encouragement could be quite effective, but it would still leave open the possibility that states would refuse to comply and thus produce a treaty violation. The second set of incentives suggests a more effective strategy. Since the treaty would be complied with if no nationals of states-parties were arrested by the states, if Congress lacked the power directly to compel the states to provide the required notification, it could enact a law prohibiting the states from arresting persons who are nationals of such countries. If such a law would be constitutional, then the *New York* Court's reasons for upholding the second incentive suggest that Congress could also give the states a choice between not arresting such persons and arresting them but giving them the required notification. Just as the second incentive in *New York* was a valid "conditional exercise" of Congress's commerce

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25. *See id.* at 177.

26. *See id.* at 175.

27. *See id.*

28. *Id.* The Court's apparent conclusion that a forced transfer of title to waste is itself a violation of the anticommandeering principle has implications for the scope of this principle. *See infra* text accompanying note 95. Alternatively, one might view the Court's holding with respect to this provision as resting on the idea that the transfer of title is a penalty for the states' refusal to administer the federal regulatory scheme, and that it was by attaching a penalty to this refusal that Congress had "crossed the line" distinguishing encouragement from coercion. This would be consistent with the Court's practice in the Spending Clause area of regarding the payment of federal funds as "encouragement" (and the threatened withdrawal of such funds as merely the withdrawal of encouragement), while regarding the threat of even a minor fine as coercion. *See also infra* note 37; *infra* text accompanying notes 135-36.

power, such a law would appear to be a valid "conditional exercise" of the treaty power.[29]

Indeed, enactment of a law giving the states the choice between not arresting aliens and arresting but notifying aliens would appear to be unnecessary, as the Vienna Convention itself, properly read, gives the states precisely that choice. As already noted, the treaty does not impose an unconditional obligation to notify aliens of anything; rather, it requires that aliens be notified of their right to consult with their consuls only if such aliens are detained. By its very terms, therefore, the treaty imposes a conditional obligation of the sort the *New York* decision appears to permit.[30]

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29. Perhaps the validity of such a statute would depend on the feasibility of requiring the federal government to provide the necessary notification. If the federal government could provide the notification without much difficulty, then one might say that a law prohibiting the states from arresting aliens is invalid as an exercise of the treaty power because it is not sufficiently tailored to achieving the legitimate end of securing compliance with the treaty. Assuming this sort of limitation exists, it is easily met in the case of the Vienna Convention, as it is infeasible for the federal government to provide the necessary notification when state authorities arrest an alien. I note, moreover, that this sort of limitation brings in through the back door an issue the Court in *Printz* regarded as irrelevant—that is, the degree to which requiring the state officials to perform the acts instead of federal officials would be easier or more efficient.

30. Another of the limitations of the anticommandeering principle recognized in *Printz* and *New York* is that it prohibits only the commandeering of nonjudicial state officers. This suggests another way for Congress to secure state compliance with the consular notification provision: Congress could pass a law requiring state judges to provide nationals of states-parties the required notification and, if the notification had not previously been given and if the defendant so requests, to stay the prosecution to give the defendant adequate time to consult with his consul. Query whether the Court would strike down this obligation because it requires state judges to perform an executive function. The *Printz* decision suggests the Court would not strike the statute down, as the Court distinguished early statutes imposing seemingly executive obligations on the states on the ground that the obligations were imposed on state judges rather than executive officers. On the other hand, the Constitution's failure to define state "judges" or offer a basis for distinguishing them from state executive officials, *cf.* U.S. CONST. art. III, § 1 (defining federal judges as those having life tenure and salary protection), appears to require that this exemption from the anticommandeering principle turn on the nature of the activity required by federal law. This is indeed the approach the Court has taken in the converse situation. *See* Printz v United States, 521 U.S. 898, 928-29 (1997) (distinguishing *FERC v. Mississippi*, 456 U.S. 742 (1982), on the ground that the obligations the federal statute imposed on state executive officials were adjudicatory in nature).

Alternatively, Congress might pass a statute requiring state judges to dismiss indictments of nationals of states-parties unless the defendant had previously been advised of his right to confer with his consul. Such a statute seems to me more vulnerable than the one described above, since it more directly imposes the

It might be objected that, if this analysis were correct, *Printz* should have come out the other way. At issue in *Printz* was the constitutionality of an interim provision of the Brady Act requiring the "chief law enforcement officer" ("CLEO") of a prospective gun purchaser's residence to conduct a background check of the prospective gun purchaser.[31] The statute required gun sellers to obtain certain information about the prospective gun buyer and to provide that information to the CLEO.[32] It also required the gun seller to wait five days before selling the gun, and it prohibited him from selling the gun if the CLEO, after performing the background check, informed him that the prospective gun buyer was ineligible to buy it.[33] Could this scheme be characterized as an exercise of conditional preemption? By the terms of the statute, the obligation to perform the background check was triggered by, and conditioned on, an individual's request to purchase a gun, and surely it is within Congress's commerce power to ban entirely the sale of guns.[34]

To be sure, Congress could have achieved its goals by writing the Brady Act in such a way as to fit it within the

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obligation to notify on state executive officials. The instruction to state judges to dismiss indictments seems like a penalty for the state officials' failure to comply with this obligation. The hypothetical statute described in the preceding paragraph, on the other hand, would impose the notification requirement on state judges. It should, however, "encourage" state executive officials who do not want their prosecutions delayed to provide the required notification at an earlier stage.

Both of the foregoing statutes could be conceived as additional examples of conditional preemption: they give the states the choice between providing the notification and having their prosecutions either stayed or dismissed by a state judge. Indeed, the consular notification provision as it currently stands, properly construed, may offer state executive officials precisely that choice. *See* United States v. Lombera-Camorlinga, No. 98-50347, 1999 WL 160848 (9th Cir. Mar. 25, 1999). I regard the characterization of the consular notification provision offered in the text, however, as a less controversial exercise of conditional preemption than (at least) the second of the hypothetical statutes discussed in this footnote.

31. *See Printz*, 521 U.S. at 902-03.

32. *See id.*

33. *See id.*

34. Such a ban would appear to be within the commerce power, as interpreted in *United States v. Lopez*, 514 U.S. 549 (1995). Under the standard adopted in that case, Congress apparently may regulate anything that qualifies as "commerce," and certainly the sale of guns does. I discuss this issue further below. Of course, such a ban would be valid only if the Second Amendment does not limit Congress's power to impose it. *Cf. Printz*, 521 U.S. at 937-39 (Thomas, J., concurring) (suggesting the Brady Act violated the Second Amendment).

conditional preemption doctrine. A statute written along the following lines should have survived scrutiny:

> No gun shall be sold unless and until the prospective gun seller provides the CLEO [certain information about the prospective purchaser] and, within X days, the CLEO, having conducted a background check according to [specified standards], notifies the gun seller that the prospective purchaser satisfies [specified requirements]. Any gun seller who sells a gun without complying with this law shall be subject to [specified sanctions].

Such a statute would not have unconditionally required state officers to conduct background checks; it would merely have provided that, unless they did, no gun could be sold. If a federal ban on gun sales would be valid, this statute should also be valid, as it merely offers state officers a choice between conducting the background check and having their laws permitting the sale of guns preempted by an otherwise valid federal statute.

But the Brady Act did not merely give the officers such a choice. As the *Printz* majority noted, the statute imposed certain penalties on state officials who refused to perform background checks.[35] In light of these penalties, the statute could not be construed as merely giving the state officials a choice between administering the federal regulatory scheme and having their law preempted.[36] *Printz* thus does not

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35. *See Printz*, 521 U.S. at 904.

36. The statute did give the officers a choice between providing the notification and paying a fine, but this choice is no more valid than the choice between enforcing federal law and taking title to waste. Indeed, in both *Printz* and *New York*, it may have been the existence of the sanction that rendered the statute invalid, making it "coercion" and thus "commandeering" rather than mere "encouragement." *See infra* note 37. *But cf. infra* text accompanying notes 135-36. The distinction between an invalid penalty and valid encouragement, however, is not always straightforward. For example, as discussed *supra* note 30, a law that requires state judges to dismiss indictments against an alien unless the alien was provided the notification required by the Vienna Convention might be said to impose a penalty for the failure to provide the notification. Like a fine, the dismissal is triggered by the failure to provide the notification and is designed to induce state executive officials to provide the notification. On the other hand, every exercise of conditional preemption could be said to have the same characteristics. *New York* requires that both options be valid if imposed independently, and this appears to require that each option be defined without reference to the other. In examining the validity of an exercise of conditional preemption, therefore, the question must be whether the law (the one setting

undermine the argument outlined above for fitting the consular notification provision within *New York*'s rationale for upholding the second incentive.[37]

C. *Possible Constraints on the Use of Conditional Preemption*

My rewrite of the Brady Act suggests that, even in the purely domestic, nontreaty context, conditional preemption is a relatively cheap and easy way around the anticommandeering principle. While the federal government may not directly require state officials to conduct background checks, it can make the performance of a background check a condition of the

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forth the consequences of refusing to enforce the federal directive) would be valid if applied to all members of the relevant class, not just those who refuse to enforce the federal directive. Thus, in *New York*, the Court asked whether a law requiring all states to take title to waste would be valid. A law imposing a fine on CLEOs who refuse to perform a background check would be valid as conditional preemption only if a law requiring all CLEOs (and only CLEOs) to pay money to the federal government (in the amount of the fine) would be valid. *Printz* implicitly holds that it would not be. In examining the constitutionality of a statute requiring the dismissal of indictments of aliens who do not receive the notification required by the Vienna Convention, the relevant question would appear to be whether a law requiring the dismissal of indictments of all aliens would be valid. If so, then this hypothetical statute may in fact pose effectively the same choice as a statute giving state officials the choice between giving the notification and refraining from arresting aliens. If this is the analysis called for by *New York* and *Printz*, then whether a statute "coerces" (that is, imposes a sanction or penalty) or merely "encourages" turns on whether the other option would be independently constitutional, rather than on the degree or intensity of the inducing (or penalizing) it does.

37. If the presence of a personal sanction is ultimately what doomed the Brady Act, then one might legitimately wonder why the Court did not just strike down the penalty provision. *Cf.* Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1057 (1995). *But cf. infra* text accompanying note 135 (suggesting that absence of a sanction may not be sufficient to save a statute). On the other hand, one might interpret the *Printz* decision as having done just that: without the penalty provision, the requirement that state officials conduct background checks arguably becomes merely a request that they do so, and the Court made it clear in *Printz* that the federal government may request the assistance of state officials. See in particular Justice O'Connor's concurring opinion, 521 U.S. at 936, making it clear that, even after *Printz*, state officials remain free to conduct the background checks voluntarily. In any event, even if the Vienna Convention were interpreted to impose a penalty on state officials who arrest aliens without notifying them of their right to consult with their consuls (or if section 1983 imposes a penalty on such officials), the provision should be upheld because it gives the officials the third option of refraining from arresting aliens.

states' continued ability to do something it wants to do, such as permit the sale of guns in its territory. Commentators argue that there are significant doctrinal, economic, and political constraints on the federal government's ability to use conditional preemption to evade the anticommandeering principle. The rewritten Brady Act, however, suggests that, in certain contexts at least, the constraints are quite weak.

The constitutional limitations on the federal government's legislative powers are obvious constraints on its ability to evade *Printz* through conditional preemption. Conditional preemption allows the federal government to "encourage" states by giving them a choice between doing what they do not want to do and being barred from doing something they do want to do. The federal government thus extracts the states' "voluntary" consent by threatening them with preemption through a law they would consider more onerous. But the more onerous law has to be one that, if enacted separately, would itself pass constitutional muster.

This does not appear to be a significant constraint, however, even in the purely domestic, nontreaty context. (As discussed below, it may be even less of a constraint in the treaty context.) My conclusion that the hypothetical rewrite of the Brady Act would be valid rests on the premise that a flat ban on the sale of guns would be within the commerce power as construed in *United States v. Lopez*.[38] Before *Lopez*, it had widely been thought that the federal government's legislative power under the Commerce Clause was, as a practical matter at least, all but plenary.[39] Though *Lopez* showed that there were some limits, even after *Lopez*, the commerce power remains broad.[40] The precise ways in which *Lopez* modified prior doctrine are a matter of some uncertainty,[41] but at any rate it appears that the teeth the Court gave to the constitutional limits in this area have bite only where the subject matter regulated by the federal government is not "economic" or "commercial."[42] When the federal government

38. 514 U.S. 549 (1995).

39. *See, e.g.*, Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674-75 (1995).

40. *See id.* at 712.

41. *See generally id.*

42. Chief Justice Rehnquist's majority opinion states the test thus: "Where economic activity substantially affects interstate commerce, legislation regulating

regulates commercial or economic activity, the regulation should be no more vulnerable after *Lopez* than before. If so, then a federal statute banning the sale of guns would be valid, as the sale of guns is quintessentially a commercial activity.[43]

To the extent I have misread *Lopez*, of course, my conclusions about the validity of a flat ban on gun sales could be contested. If the test of whether an act of Congress falls within the commerce power turned on the legitimacy of Congress's purposes in enacting it,[44] or on the true need for federal legislation,[45] the constitutionality of the hypothetical rewrite of the Brady Act would be uncertain. The rewrite would be valid as conditional preemption only if a flat ban on gun sales, enacted separately, would be valid. But Congress did not actually enact such a ban. How does one determine the "purpose" of a hypothetical statute? Does one try to imagine a hypothetical purpose that would be valid? A hypothetical purpose test would have no bite. If one focuses on the statute Congress actually enacted, on the other hand, the ban on gun sales would be suspect under a purpose test, as Congress's purpose in enacting it was at least in part to induce the states

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that activity will be sustained." *Lopez*, 514 U.S. at 560. The Court's innovation in *Lopez* was to insert the term "economic" before "activity." Elsewhere, the majority described the test as requiring "the determination whether an intrastate activity is commercial or noncommercial." *Id.* at 566. Justice Kennedy's concurring opinion appears to treat the "commercial-ness" of the activity as a factor in a sliding scale: the more commercial the activity regulated by a federal statute, the more likely the statute is to be upheld as an exercise of the commerce power, other factors being equal (the principal other factor being the extent to which the activity has traditionally been regulated by the states). *See id.* at 569 (Kennedy, J., concurring).

43. *See* Merritt, *supra* note 39, at 719 ("Congressional regulation of the sale or 'transfer' of machineguns after *Lopez* is uncontroversial; the sale of any article is commercial activity."). Like Professor Merritt and all the Justices in *Printz* except Justice Thomas, *see supra* note 34, I shall disregard possible Second Amendment objections. Such objections would of course be irrelevant to statutes or treaties addressing other matters.

44. *Cf.* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Adjudication*, 85 CAL. L. REV. 297 (1997) (noting and approving increased use of purpose scrutiny in other areas of constitutional law).

45. Professor Merritt has suggested that the Court's decision to strike down the federal law in *Lopez* was influenced by "[t]he Government's failure to identify an urgent *national* need to combat [the] problem" ostensibly addressed by the statute Congress passed. Merritt, *supra* note 39, at 705. Professor Jackson has proposed that the Court's current approach to federalism issues be replaced by a sort of "necessity" review. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2234-37 (1998).

to do something they could not be compelled to do directly. The Court in *New York*, however, upheld the second incentive even while recognizing that it was designed to "encourage" the states to do what they could not be compelled to do,[46] a purpose reflected in the very term "incentive."

A flat ban on gun sales would be similarly suspect under a "need" test, as Congress's purposes could plainly have been achieved through less intrusive means. But the flat ban on guns was necessary precisely because Congress lacked the power to compel the background checks directly, no matter how great the need. An exercise of conditional preemption clearly cannot be invalid just because Congress's goals could be achieved less intrusively by constitutionally unavailable means. Conditional preemption by its very nature relies on the conditional imposition of a regime that Congress itself regards as a second-best solution in order to induce states to adopt voluntarily what Congress regards as the best solution. Applying a "need" test in this context raises a number of difficult questions.[47] Indeed, the difficulty, if not the impossibility, of applying either a purpose test or need test to an exercise of conditional preemption supports my conclusion that *Lopez* does not embrace such a test. If the Court were to embrace such a test in the future, it would have to rethink the concept of conditional preemption.

If the Commerce Clause does not pose much of a doctrinal limit to Congress's ability to employ conditional preemption, are there other sorts of constraints? Professors Michael Dorf and Charles Sabel,[48] and Professor Roderick Hills,[49] have suggested that economic considerations constrain Congress's

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46. *See* New York v. United States, 505 U.S. 144, 152 (1992).

47. For example, does the court ask whether federal officials could plausibly perform the background checks instead? Such an analysis conflicts with the approach of the *Printz* Court, which regarded such a question as irrelevant. *See supra* note 29. Does a "need" analysis inquire whether the preemption chosen by Congress to induce the states' voluntary agreement was narrowly tailored to achieve that result? Such an inquiry would require the Court to devise a test for determining how much inducement is too much—a daunting task, to say the least.

48. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 425-26 (1998).

49. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 868 (1998).

ability to engage in conditional preemption.[50] Specifically, they note that a threat of preemption is credible only if Congress stands ready to devote federal resources to regulate a given matter itself in the event the states decline to do so. But, while this constraint may be significant in certain contexts, it appears to be negligible in others, as illustrated by my hypothetical rewrite of the Brady Act. The actual Brady Act imposed an obligation on state officials to perform background checks and subjected those officials to penalties for noncompliance. The rewrite encourages the state officials to perform background checks by prohibiting private parties from selling guns unless background checks have been performed by such officials, and it subjects the gun sellers to penalties for noncompliance. It is far from evident that achieving a given level of compliance would cost the federal government more under the latter scheme than under the former. Moreover, Congress could devise alternative enforcement schemes that would appear to be even less costly. For example, Congress could ban the sale of guns in any state in which the legislature has not enacted a law imposing severe state-enforced penalties on state officers who do not conduct background checks.[51] Congress could even rely on private attorneys general to enforce the ban on guns through *qui tam* actions; the portion of the fine retained by the federal government under such a scheme would offset any increased cost, which would in any event be minimal or nonexistent under this scheme. Of course, if the *qui tam* actions were maintained in federal courts, there would be a cost allocable to the federal judiciary. But even this cost could be minimized by giving exclusive jurisdiction to the state courts, a sort of commandeering permitted by *Printz*.[52] In short, Congress could devise inexpensive yet credible second-

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50. *See also* Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 312 (1984).

51. Such a scheme should be easier for the federal government to enforce, as gun shops would be altogether illegal in easily identifiable states. Alternatively, or in addition, Congress could subject gun sellers who sell to people who have not undergone a state-performed background check to damage liability to persons injured by the guns they sell.

52. Under such a scheme, the cost allocable to the federal judiciary would consist only of the resources expended by the Supreme Court in reviewing certiorari petitions and deciding the few, if any, cases involving this statute that the Court chooses to decide.

best schemes that could be quite effective at inducing states to agree to enforce Congress's preferred scheme.[53]

Hills also suggests that conditional preemption can be "politically costly."[54] He does not describe political costs other than the economic ones discussed above, but perhaps he or others would say that there is likely to be substantially greater political opposition to a flat ban on gun sales than to a law requiring a five-day waiting period and a background check. That is surely true, but the hypothetical rewrite of the Brady Act does not flatly ban gun sales; it gives the states the choice of performing background checks or having gun sales banned. Because the rewritten statute does not require anything more objectionable than a background check (if a background check is regarded as the less objectionable option), a rational constituent should be no more disposed to object to this statute than to a statute that only requires background checks (and that is the statute Congress in fact enacted). Admittedly, a conditional ban on gun sales could disproportionately arouse the gun lobby or give it the opportunity to mischaracterize a legislator's vote in television commercials as a vote for a flat ban. On the other hand, it should be possible to write a conditional preemption statute in such a way as to make it clear that Congress is not requiring—and does not prefer—the more objectionable option. The rewritten Brady Act, for example, merely provides that sales of guns shall be subject to a five-day waiting period and a background check performed by state officials. The only differences between the rewrite and the actual Brady Act are that the penalty under the rewrite is imposed on the gun seller instead of the state official, and that state officers have the option not to perform background checks. These differences seem unlikely to generate substantially more opposition.

Apparently recognizing that conditional preemption offers a cheap and easy way around *Printz*, Hills in the end argues that some exercises of conditional preemption would be invalid

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53. Indeed, the "incentive" the Court upheld in *New York* as conditional preemption relied entirely on enforcement by other states. The relevant provision merely permitted states to exclude from their territory waste generated by states that declined to adopt federally specified measures. (Without federal permission, such exclusion would have violated the dormant Commerce Clause.) *See infra* note 108.

54. Hills, *supra* note 49, at 868.

under the doctrine of unconstitutional conditions. This would be the case, in his view, if "(1) the condition that the [state officials] must meet would, if imposed unconditionally, be unconstitutional, and (2) Congress threatened preemption of [state] policy merely to gain leverage to extract compliance with the condition."[55] On the surface, this test appears to condemn all exercises of conditional preemption, but if so, it clashes with *New York*'s upholding of "incentives" avowedly designed to "encourage" states to do what they could not be directly compelled to do. Hills's elaboration of the test, however, suggests that it in fact places only a weak limit on the availability of conditional preemption. Apparently, an exercise of conditional preemption would be invalid only if the condition "served no purpose except as a device by which to punish [the state] for refusing to" do what Congress wants but cannot directly require it to do.[56] My rewrite of the Brady Act would easily pass this test. A flat ban on gun sales would appear to advance whatever aims Congress had in enacting the Brady Act, albeit at a greater social cost. The suggested limit would apparently condemn only conditions wholly unrelated to the aims of the statute. A rule invalidating such pretextual conditions seems unobjectionable, if perhaps inadministrable at the edges, but it places only weak limits on Congress.[57]

Undoubtedly, the availability of conditional preemption is in substantial tension with the functional justification the Court gave in *New York* for the anticommandeering rule.[58] More broadly, the easy and cheap escape from the anticommandeering rule that conditional preemption makes available is in tension with the whole thrust of the Court's recent federalism decisions, as well as with the widespread

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55. *Id.* at 924.

56. *Id.* at 925.

57. The Court has articulated a similar "nexus" requirement in the Spending Clause context, but the requirement as enforced by the Court poses only a very weak limit. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987).

58. As many have noted, if the problem with commandeering is that it blurs the lines of accountability, *see* New York v. United States, 505 U.S. 144, 169 (1992), then it is difficult to explain why exercises of the Spending Clause, conditional preemption, and indeed ordinary preemption are not also unconstitutional. *See, e.g.*, Caminker, *supra* note 37, at 1061-74; Hills, *supra* note 49, at 826-27; Jackson, *supra* note 45, at 2202; Mark V. Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1641-42 (1994).

belief that *New York* and *Printz* were important decisions.[59] This area of the law has seen numerous doctrinal shifts in a short period of time and, rather than accept defeat, the losing side has tended to call for further reversals of course.[60] It would thus not be surprising if the Court decided to cut back or eliminate the conditional preemption doctrine. On the other hand, a future Court could just as easily alleviate the tension by overruling *New York* and *Printz*. Rather than speculate about how this doctrine might evolve, this article considers whether the anticommandeering doctrine as it currently stands should be considered applicable to exercises of the treaty power. This doctrine appears to permit a statute making the performance of background checks by state officials a condition of the sale of guns in a state. And it would permit a treaty requiring state officials to notify aliens they arrest that they have a right to consult with their consuls, but only if a treaty or statute prohibiting the arrest of such aliens altogether would be valid. It is to the latter question that I now turn.

II. CONDITIONAL PREEMPTION AND THE SCOPE OF THE TREATY POWER

As noted, the Vienna Convention effectively gives state officials a choice: they can either provide the required

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59. *But cf.* Jackson, *supra* note 45, at 2226-27 (suggesting that the importance of the Court's recent federalism decisions is as a "cue" or "wake-up call" to Congress that it should pay more attention to federalism). *See also* PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 190-95 (1982) (arguing that *National League of Cities v. Usery* served primarily a "cueing" function); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1484 (1995) (arguing that *Lopez* was a "wake-up call" to Congress).

60. For example, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). The dissenters in *Garcia* predicted that the principle affirmed in *National League of Cities* would "in time again command . . . a majority of [the] Court." *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *see also id.* at 589 (O'Connor, J., dissenting). Similarly, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and the dissenters predicted that *Seminole* would not last long. *Seminole*, 517 U.S. at 1145 (Souter, J., dissenting).

notification or they can refrain from arresting aliens.[61] This treaty would be a valid exercise of conditional preemption only if a treaty or statute prohibiting altogether the arrest of aliens would be valid.[62] The answer to this question under current doctrine appears to be simple: a treaty duly ratified by the President with the advice and consent of the Senate prohibiting the arrest of aliens within our borders would be valid under *Missouri v. Holland*.[63] Justice Holmes in that case suggested that there might not be any substantive limits to the treaty power.[64] This broad position has since been qualified by the Court, and it is now well accepted that the federal government cannot do by treaty what is affirmatively prohibited by the Constitution.[65] It could not, for example, establish religion or restrain the freedom of speech or of the press in violation of the First Amendment. But the Court's holding in *Missouri v. Holland* that the treaty power is not limited by any "invisible radiation" from the Tenth Amendment has survived.[66] The Court in *Holland* did say that the treaty before it addressed a matter of the highest urgency which by its nature could only be adequately addressed through treaty.[67] But surely the Court did not mean to suggest that the treaty makers' judgment about the urgency of the matter or the feasibility of addressing it other than by treaty were proper subjects of judicial review.[68]

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61. State officials face this choice only when they arrest an alien from a nation that is a party to the Vienna Convention. For simplicity's sake, I shall refer in the text to aliens generally.

62. Given the existence of the Vienna Convention, a statute prohibiting altogether the arrest of aliens would appear to be valid as necessary and proper to implement the treaty. As we have seen, the treaty can be complied with if either notice is given or no aliens are detained. In the absence of a power directly to require the former, a statute requiring the latter would appear to be the second-best way to achieve compliance with our international obligations. But this analysis assumes the validity of a treaty that, by its terms, gives the states two options, one of which (the obligation to notify) would arguably be unconstitutional alone. If the anticommandeering principle applies to the treaty power, then this treaty would be valid only if the other option would independently be valid. Determining the validity of the Vienna Convention as conditional preemption thus requires that we examine the validity of a hypothetical treaty that flatly bars the arrest of aliens.

63. 252 U.S. 416 (1920).

64. *See id.* at 432-33.

65. *See* HENKIN, *supra* note 8.

66. *See Holland*, 252 U.S. at 434.

67. *See id.* at 435.

68. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

Other cases suggest that the treaty power extends only to matters that have traditionally been regarded as the proper subjects of negotiation among nations, or that are regarded as appropriate subjects of treaties under international law.[69] Be that as it may, it is clear that the treatment of aliens has long been regarded as an appropriate subject of negotiation between the United States and the countries of which the aliens are nationals. Treaties giving aliens certain rights date back to the beginning of our history and have long been applied to the states.[70] The validity of treaties giving aliens immunities from civil suits or criminal prosecutions has never seriously been questioned.[71]

Recently, scholars have argued that the broad understanding of the treaty power reflected in *Missouri v. Holland* should be reconsidered.[72] In a recent article, Professor Curtis Bradley has argued that the virtually unlimited treaty power the Court recognized in *Holland* produces a loophole permitting the circumvention of the limitations on the commerce power the Court has recently embraced in such cases as *United States v. Lopez*.[73] He accordingly suggests that the treaty power be construed to extend only to those subjects over

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69. *See* Geofroy v. Riggs, 133 U.S. 258, 267 (1890); *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (1987).

70. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

71. The Vienna Convention itself gives foreign consuls some such immunities, Vienna Convention on Consular Relations, *supra* note 9, arts. 41, 43, and other treaties give foreign diplomats and their families certain immunities. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 29, 23 U.S.T. 3227, 500 U.N.T.S. 95. Indeed, such immunities are conferred by statutes and federal common law as well. The Foreign Sovereign Immunities Act ("FSIA") immunizes foreign states from suits in federal or state courts, 28 U.S.C. §§ 1604, 1605 (1994 & Supp. III 1997), and defines "foreign state" in such a way as to encompass foreign individuals in certain circumstances. *See* Chuidian v. Phillippine Nat'l Bank, 912 F.2d 1095, 1098 (9th Cir. 1990). Before the FSIA was enacted, foreign sovereign immunity was regarded as a matter of federal common law. *See generally* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 202-10 (3d ed. 1996). To the extent it is not governed by the FSIA, the immunity of current and former heads of state continues to be governed by federal common law. *See id.* at 284-85. These immunities of course bind executive and well as judicial officers of the states.

72. *Cf.* Healy, *supra* note 11, at 1750-56 (stating that while recent federalism cases could be read to limit treaty power, adoption of federalism-based limits on treaty power would be unwise and unnecessary).

73. *See* Bradley, *supra* note 8, at 425-26.

which Congress otherwise possesses legislative power.[74] My own view is that the risk that the limits imposed by such cases as *Lopez* would be circumvented through use of the treaty power is overstated, given the requirement that treaties be approved by two-thirds of the Senate.[75] Moreover, the limits articulated in *Lopez* concern the extent of the commerce power and thus have little apparent relevance to the scope of a wholly separate head of federal power.[76] Any suggestion that the

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74. *See id.* at 450. Bradley thus urges, in effect, that the treaty power be construed as if the Bricker Amendment had been adopted.

75. *See* U.S. CONST. art. II, § 2. Bradley is legitimately concerned about the opportunity for circumvention that would be available if the limitations reflected in the Tenth Amendment were inapplicable to congressional-executive agreements. But, rather than subject the treaty power to such limitations, I would hold that congressional-executive agreements are subject to those limits, as they are not "treaties" in the constitutional sense. This is not, of course, to say that congressional-executive agreements such as NAFTA are not valid laws. *Compare* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (concluding that they are valid), *with* Tribe, *supra* note 7 (concluding that they are not valid). *See also* David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998) (a rejoinder to Tribe).

A problem not separately addressed by Bradley may be of greater concern: often treaties express broad aspirations in precatory terms. To hold that such broad, precatory provisions may support congressional legislation that would not be within Congress's legislative power in the absence of the treaty seems potentially problematic. But a response better tailored to this concern than Bradley's would simply hold that Congress's power to implement treaties does not encompass the power to enact legislation to implement clearly aspirational or precatory treaty provisions. Whether this limitation is in fact warranted is a subject for another day.

76. Professor Bradley may be constructing his theory around an interpretation of the Tenth Amendment as reserving certain areas of regulation to the states no matter what power Congress is purporting to exercise. But even the Supreme Court opinions most protective of state sovereignty have not adopted such an interpretation of the Tenth Amendment. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833, 852 & n.17 (1976) (stating that the limits articulated in the case do not necessarily apply to exercises of the spending power or the Fourteenth Amendment), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *id.* at 855 n.18 (stating that the limits articulated in the case do not necessarily apply to exercises of the war power).

If the subject-matter limits the Constitution places on the legislative powers enumerated in Article I and elsewhere do not apply to the treaty power, then the very idea of "circumvention" of these limits by the treaty makers is problematic. The treaty makers could not be accused of "circumventing" these limits just because they have concluded a treaty on a matter falling outside the federal legislative power, for these limits by hypothesis would not apply. On the other hand, they would arguably be circumventing these limits if they concluded the treaty solely or primarily to evade the constitutional limits on the federal legislative power. If this is the nature of the circumvention claim, however, I

treaty power authorizes only such treaties as would fall within the commerce power if enacted by Congress would be doctrinally implausible, as it would call into question the validity of treaties which, like the Vienna Convention, impose certain requirements regarding the treatment of aliens. While certain obligations imposed by such treaties might fall within the commerce power, other long-unquestioned provisions common to treaties of Friendship, Commerce and Navigation ("FCN"), and other treaties, might not. For example, the United States is party to treaties that undertake to provide foreign military personnel certain immunities from the criminal jurisdiction of the state and federal governments,[77] and FCN treaties commonly prohibit discrimination against aliens in noncommercial matters.[78]

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think the requirement that treaties be approved by two-thirds of the Senate affords adequate protection.

My argument that the Constitution protects states from exorbitant exercises of the treaty power structurally rather than through subject-matter limits should not be understood as an endorsement of the position of the majority in *Garcia* that the only protection the Constitution offers states from exercises of the federal legislative power is the structural protection afforded by the "national political process." 469 U.S. at 554, 555; *see also* Herbert Wecshler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Constitution extends the federal legislative power to enumerated subjects, and this seems to imply that other subjects are beyond the legislative power. If so, then the Constitution appears to give a state the right to go its own way on those other matters, no matter how large a majority of the other states wants to force it to toe the line. The "national political process" does not protect that right. By contrast, the Constitution does not enumerate the proper (or improper) subjects of treaties. With respect to the treaty power, therefore, the claim that the Constitution contemplates only a structural protection for the states is consistent with the constitutional text.

77. *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII, 4 U.S.T. 1792, 199 U.N.T.S. 67; Agreement Between the North Atlantic Treaty Organization and the Government of the United States of America Concerning the Application of Part IV of the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Signed in Ottawa on September 20, 1951, to the Officials of NATO Civilian Bodies Located on the Territory of the United States of America, Mar. 3, 1981, 33 U.S.T. 1272, 1307 U.N.T.S. 423.

78. For example, the FCN treaty with Japan in force at the turn of the century, as interpreted both by the United States and Japanese governments, prohibited discrimination against Japanese citizens with respect to education. When the United States brought suit against school authorities of San Francisco to enforce this treaty, the question whether the treaty exceeded the scope of the treaty power was fully mooted. The story is told in ROBERT T. DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES §§ 145-59, at

In any event, Bradley suggests that the Constitution be read to authorize treaties that would otherwise fall within *any* of Congress's legislative powers, and those legislative powers include the power to define and punish offenses against the law of nations,[79] to raise and support armies,[80] to pass statutes necessary and proper to effectuate the President's commander-in-chief power,[81] and even the nontextual "foreign affairs" power, not to mention the war power.[82] Treaties that could not be upheld as falling within the commerce power could well be upheld as falling within one or more of those powers; but, if so, it is unclear what is gained by the doctrinal change Professor Bradley advocates. A rule that would uphold treaties under the treaty power only if they also fell within one of Congress's other legislative powers would put pressure on the constitutional provisions delineating Congress's powers in the foreign affairs area, shifting the debate to different ground without materially advancing the analysis.[83] Those troubled by

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142-89 (1908). The suit became moot when the school authorities withdrew the offending resolution. *See id.* § 159, at 189. FCN treaties also commonly prohibit discrimination with respect to criminal prosecutions. Education and criminal law were both regarded by the Court in *Lopez* as areas traditionally reserved to the states.

The FCN treaty concluded with Prussia in 1786 protected Prussian citizens against state legislation denying freedom of conscience or religious worship, "and when dying they were guaranteed the right of decent burial and undisturbed rest for their bodies." *Id.* at 186 n.92 (quoting Mr. Bancroft Davis summarizing the provisions of the treaty). The First Amendment would not be made applicable to the states until after the Civil War, yet this treaty was declared in the Constitution to be the "supreme Law of the Land." It is evidence that the Founders did not regard the treaty power to be limited to matters falling within Congress's legislative power under Article I.

79. *See* U.S. CONST. art. I, § 8, cl.10.

80. *See id.* cl. 12.

81. *See id.* cl. 18.

82. *See id.* cl. 11.

83. For example, perhaps a treaty immunizing foreign military personnel from the criminal jurisdiction of state and federal governments could be justified under the power to raise and support armies, combined with the power to enact laws necessary and proper to implement the President's commander-in-chief power, on the ground that the reciprocal undertaking by foreign states helps protect our military abroad. One might justify under the same provisions a treaty undertaking to protect the human rights of our nationals on the theory that the reciprocal promise by other parties might help forestall international crises such as those in Kosovo, Bosnia, or Somalia that might call for action on the part of the United States military that might endanger the safety of our troops. Alternatively, one might say that prohibiting states from exercising criminal jurisdiction over foreign military is a valid exercise of the power to define and punish offenses against the law of nations. But if the powers of Congress in the

"treaty power exceptionalism," as Professor Bradley is,[84] should be even more troubled by "foreign affairs exceptionalism," as the latter, unlike the former, gives exceptional powers to Congress as well as the treaty makers, and ordinary legislation does not require the concurrence of a supermajority.

The fact is that the power to make treaties is not just the power to make laws on the same subjects by other means; it is the power to make laws on subjects not otherwise falling within Congress's legislative power. One subject that has long been regarded as within the treaty-making power, but in certain contexts might not fall within the legislative power in the absence of a treaty, is the treatment of aliens within the United States. The narrowest and least controversial ground on which to uphold treaties addressing the treatment of aliens would be that this subject has always been regarded as an appropriate one for negotiation among nations. For that very reason, a proposed limitation on the treaty power that would disable the federal government from entering into such treaties is not an eligible interpretation of the Constitution.

Although a treaty addressing the treatment of aliens would clearly fall within the scope of the treaty power as traditionally construed, other sorts of treaties might be vulnerable if the test of the scope of the treaty-making power were tradition. Specifically, treaties limiting the discretion of states-parties with respect to the treatment of their own citizens are an innovation of the post-World War II era, and some such treaties include notification provisions similar to that of the Vienna Convention. The International Covenant on Civil and Political Rights, for example, requires that certain information be given to all persons arrested by the state.[85]

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area of foreign affairs would support the treaties that under Bradley's thesis the treaty power alone would not support, then the suggested analysis imposes no substantive limitation at all.

84. *See* Bradley, *supra* note 8, at 394.

85. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(2), 999 U.N.T.S. 171. It is likely that this provision requires no more than what our Constitution independently requires. If so, the question whether the provision violates the anticommandeering principle is academic. It is nevertheless worth discussing the issue, as human rights treaties could in theory seek to require notifications going beyond constitutional requirements. For similar reasons, I shall disregard for the time being the reservations, understandings, and declarations the United States attached to its ratification of this treaty.

Upholding such a treaty under a conditional preemption theory would require the conclusion that a treaty prohibiting states from arresting any person would be valid. Such a treaty would no doubt be politically and practically problematic, and for that very reason we can be confident that the President and Senate would not agree to it. But, if it were made, would it be unconstitutional? It could perhaps be argued that a treaty may not constitutionally regulate a state's treatment of its own citizens because that has not traditionally been regarded as a proper subject of negotiation with other nations. On the other hand, the treaty power may be said to embrace whatever subjects the international community at any given time regards as a proper subject for negotiation among nations, and today international law clearly addresses a state's treatment of its own citizens. On this issue, I find myself in agreement with Professor Bradley, who agrees with Professor Louis Henkin that the first interpretation would be highly undesirable and is unsupported by the Framers' intent.[86]

At any rate, unless *Missouri v. Holland* is reconsidered, it appears that there are no limits on the treaty power grounded in state sovereignty. The states' sole protection from exorbitant exercises of the treaty power is the structural requirement that treaties receive the consent of two-thirds of the Senate. The federal government thus appears to be even less constrained in its ability to use conditional preemption in treaties than in statutes.[87]

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86. *See* Bradley, *supra* note 8, at 451-52 (citing Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1021 (1968)). Bradley also rejects the suggestion that the treaty power be limited to matters "international" on the ground that today "almost any issue can plausibly be labeled 'international.'" *Id.* Of course, as discussed above, the recognition that in today's world almost everything has international ramifications may equally justify the conclusion that almost anything can be supported by the federal government's commander-in-chief or foreign affairs powers. *See supra* note 83.

87. It is admittedly strange to rely on the constitutionality of a treaty the federal government did not and never would conclude as support for the conclusion that a *different* treaty the government did conclude would be constitutional, particularly when the constitutionality of the hypothetical treaty rests on the existence of structural protections that virtually guarantee that it will never be agreed to. This problem, however, inheres in any doctrine that rests, as the conditional preemption doctrine does, on the argument that a greater power includes a lesser one.

III. COMMANDEERING VS. PREEMPTION

There is another possible problem with the conditional preemption rationale for upholding the consular notification provision: there is some basis for concluding that a treaty barring states from arresting aliens would violate the anticommandeering principle itself. According to some courts and commentators, *Printz* and *New York* invalidate any federal statute that imposes obligations on states without also imposing them on private parties, or regulates states in their governmental roles. If so, then a statute prohibiting the arrest of aliens, unlike a statute imposing a ban on the sale of guns, would be invalid. I conclude that, if *Printz* and *New York* were so construed, then the anticommandeering principle cannot limit the treaty power. But I also conclude that these broad interpretations are implausible even in the purely domestic, nontreaty context.

The precise scope of the anticommandeering principle embraced in *New York* and *Printz* is currently a matter of some disagreement among the federal courts. *New York* involved a provision requiring the state affirmatively to regulate the activities of private parties according to federal standards. *Printz* involved an obligation to perform affirmative acts in administering a federal scheme governing the rights and liabilities of private parties. One might thus conclude that the federal government "commandeers" state officials only when it compels them to perform affirmative acts, such as conducting background checks or notifying aliens of their right to consult with their consuls. On this view, the anticommandeering principle does not reach a federal obligation *not* to do something, such as the obligation not to detain aliens from certain countries.

On the other hand, the Court in *New York* distinguished *Garcia v. San Antonio Metropolitan Transit Authority*,[88] among other cases, on the ground that they involved federal statutes that imposed the same obligations on states as on private parties,[89] and the Court in *Printz* acknowledged that

88. 469 U.S. 528 (1985).

89. *See* New York v. United States, 505 U.S. 144, 160 (1992). The majority opinion in *Garcia* noted that the statute placed the same obligation on public and private employers, 469 U.S. at 554, but it did not make much of that fact. Justice Blackmun's original draft of the *Garcia* decision, however, apparently would have

distinction.[90] This may suggest that Congress has the power to impose obligations on states, even of a prohibitory character, only if it also imposes the obligation on private parties.[91] The United States Court of Appeals for the Fourth Circuit, in *Condon v. Reno*,[92] adopted this interpretation of *Printz* and *New York*, and accordingly struck down a federal statute, the Drivers' Privacy Protection Act ("DPPA"), which prohibits states from revealing in certain circumstances information received on drivers' license applications, on the ground that the statute does not impose the same prohibition on private databases.[93] The United States Court of Appeals for the Eleventh Circuit has struck down the DPPA on similar grounds.[94] Though these holdings extend *Printz* and *New York* beyond what the term "commandeering" seems to denote, they are supported not just by the Court's distinction of *Garcia* and similar cases in *New York* and *Printz*, and by the difficulty of distinguishing affirmative from negative obligations, but also by the Court's suggestion in *New York* that a statute requiring the state to take title to radioactive waste, standing alone, would violate the anticommandeering principle. Such a statute would address only the conduct of states and would not directly require affirmative acts.[95]

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established this as the test of the constitutionality of federal statutes regulating states. *See* Tushnet, *supra* note 58, at 1629.

90. *See* Printz v. United States, 521 U.S. 898, 930-31 (1997).

91. *See* Brief for *Amicus Curiae* Earthrights International Supporting the Appeal of Defendants/Appellants Laskey and Anderson Urging Reversal at 9, National Foreign Trade Council v. Laskey, No. 98-2304 (1st Cir. filed Feb. 5, 1999) ("The Tenth Amendment . . . frowns upon laws that seek to regulate States without applying identical restrictions to private parties.").

92. 155 F.3d 453 (4th Cir. 1998), *petition for cert. filed*, Mar. 15, 1999 (No. 98-1464).

93. *See id.*

94. *See* Pryor v. Reno, No. 98-6262, 1999 WL 187050 (11th Cir. Apr. 6, 1999). The Tenth Circuit, on the other hand, has upheld the DPPA. *See* United States v. Oklahoma, 161 F.3d 1266 (10th Cir. 1998). In these cases, the federal government appears not to have pressed the argument that *Printz* does not apply to prohibitory statutes. *But cf. Pryor*, 1999 WL 187050, at *4 n.5 (referring to, and rejecting as inaccurate, "the United States' argument that the Act does not command the States to do anything because the States may simply opt out of this legislation by deciding to close their DMV records completely"). It stressed instead that the DPPA does not require the states to regulate private parties in a given manner (which *Printz* bars), but rather regulates the states directly (which *Printz* permits). *See, e.g., Condon*, 155 F.3d at 461. It is unclear how our hypothetical statute barring the arrest of all aliens would fare under such a test.

95. *See* Caminker, *supra* note 20, at 235-36.

In *Travis v. Reno*,[96] the Seventh Circuit upheld the DPPA, but there is less difference than meets the eye between its interpretation of *Printz* and *New York* and that of the Fourth and Eleventh Circuits. The Seventh Circuit concluded that the DPPA was constitutional because (1) it "affects states as owners of databases; it does not affect them in their role as governments,"[97] and (2) the burdens imposed on states by the DPPA are not significantly greater than those imposed on private databases by other federal statutes governing similar matters.[98] Thus, a federal statute would presumably violate the Seventh Circuit's interpretation of *Printz* and *New York* if it *either* affected the states in their role as governments *or* imposed on states significantly greater burdens than federal law imposes on private parties engaging in similar conduct.

A statute prohibiting states from arresting aliens would appear to violate the tests articulated by these courts. It would violate the Fourth and Eleventh Circuits' test because it does not also regulate private parties. It may satisfy the second prong of the Seventh Circuit's test, since other rules of law place significant limits on the power of private parties to arrest aliens,[99] but for that very reason it would fail the first prong. Private parties have only limited authority to arrest aliens because arresting people is a function of government. Because a treaty prohibiting the arrest of aliens would affect the states "in their role as governments," the statute would be invalid under the Seventh Circuit's reading of *Printz* and *New York*.

If *Printz* and *New York* condemn all laws placing obligations on states that are not also imposed on private parties, or affecting the states in their role as governments, subjecting the treaty power to this limitation would be highly problematic. Unlike the Constitution, federal statutes often address the conduct of private parties, and when they do impose obligations on states they often impose on them the same obligations they impose on private parties. Thus, while the Fourth and Seventh Circuits' interpretations of *Printz* may

96. 163 F.3d 1000 (7th Cir. 1998).

97. *Id.* at 1004. The Eleventh Circuit, too, stressed that the DPPA regulated "an exercise of sovereignty." *Pryor*, 1999 WL 187050, at *6.

98. *See id.* at 1005-06.

99. The second prong may not be satisfied because the limits on the power of private parties to arrest aliens have their source in state law. Even if this prong were satisfied, however, the first would not be.

be problematic with respect to statutes, at least those interpretations would reach only the atypical statute. Treaties, however, resemble the Constitution in this respect more than they resemble statutes. As a general matter, treaties address the rights and obligations of governments vis-à-vis each other, and they typically apply to state action. The ratification debates on which the Court relied in *New York* to show that the Framers contemplated a regime in which the federal government would act directly on individuals are particularly instructive on this question. As Justice O'Connor explained, the Framers regarded the regime set up by the Articles of Confederation to be ineffective because the Articles gave the federal government the power to act only upon the states as political bodies; the Constitution, on the other hand, gave the federal government the power to act directly upon individuals.[100] What is important for present purposes is the Framers' description of the regime they rejected, the one permitting the government to act only on states, as a "treaty" regime.[101] The Framers thus recognized that treaties, unlike statutes, generally do not impose duties directly on private individuals. Even when a treaty's ultimate object is the protection or regulation of individuals, it typically accomplishes that goal by placing obligations, whether of an affirmative or negative character, on the states-parties. When the obligation is of a negative character, moreover, it presumptively applies to governmental actors in the states-parties at all levels.[102] Thus, an anticommandeering rule that bars the imposition of obligations on states that are not also imposed on private individuals would invalidate the typical rather than the odd treaty. The same would be true of a rule barring treaties that affect states "in their role as governments." Accordingly, neither rule could plausibly apply to the treaty power.

Supreme Court decisions upholding treaties of this nature without so much as hinting at a Tenth Amendment problem confirm that, if the anticommandeering principle is indeed that broad, it does not apply to the treaty power. For example, in

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100. *See* New York v. United States, 505 U.S. 144, 163-65 (1992).

101. *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1101 (1992).

102. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 257 (7th rev. ed. 1996).

Asakura v. Seattle,[103] the Court gave effect to a provision of an FCN treaty with Japan providing that "[t]he citizens or subjects of each of the High Contracting Parties shall have liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects."[104] Relying on this treaty, the Court held that a Seattle ordinance making noncitizens ineligible for pawnbroker licenses could not validly be applied to Japanese citizens.[105] The Court effectively interpreted the treaty to require Seattle to issue licenses to Japanese citizens as long as it issued licenses to United States citizens, and upon the same terms. (The treaty-based prohibition thus required the state to perform affirmative acts—evaluate the license applications of Japanese citizens—that they would not have had to perform in the absence of the treaty.)[106] This is just one of many treaties given effect by the Supreme Court that affected the states in their role as governments and placed obligations on state actors without also placing them on private actors. Interpreting the anticommandeering principle of *New York* and *Printz* to invalidate such obligations would thus require the rejection of numerous treaty precedents. Since the Court in *Printz* regarded the absence of contrary precedents as a reason for extending the holding of *New York* to statutes that commandeer executive officials,[107] it seems safe to say that, if the anticommandeering principle would invalidate federal laws affecting states in their role as governments or placing obligations on states but not private parties, then the anticommandeering principle does not apply to exercises of the treaty power.

Indeed, the doctrinal case for the broad interpretations of *Printz* and *New York* just discussed seems weak even outside the treaty context. The Supreme Court has long recognized, albeit largely in what is arguably dicta, that Congress has the power to enact laws addressing solely the governmental

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103. 265 U.S. 332 (1923).

104. *Id.* at 340 (quoting Treaty on Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504).

105. *See id.* at 341-42.

106. Today, this nondiscrimination obligation is required by the Constitution, but at the time the Equal Protection Clause had not been interpreted to apply to aliens. The plaintiff in *Asakura* raised a Fourteenth Amendment claim, *see id.* at 340, but the Court chose to resolve the case on the basis of the treaty.

107. *See* Printz v. United States, 521 U.S. 898, 907-09 (1997).

activities of states. In dormant Commerce Clause cases, for example, the Court has long made clear that Congress has the power to enact legislation allowing state regulation that would otherwise run afoul of the Court's dormant Commerce Clause jurisprudence,[108] or to strike down state legislation that it regards as prejudicial to the national interest in free interstate commerce, even if the statute does not violate the Commerce Clause in its self-executing operation.[109] In *Barclays Bank PLC v. Franchise Tax Board*,[110] the Court upheld California's "worldwide combined reporting" method of determining the amount of tax owed by certain corporate groups against a challenge based on the dormant Foreign Commerce Clause, relying in part on the fact that Congress had long been aware of California's approach and had declined to enact a law prohibiting it. The Court's express recognition that Congress has the power to prohibit states from using this method of taxation rebuts the claim that Congress lacks the power to regulate states in their role as governments or to impose negative obligations on the states that do not also apply to private parties. Private parties, after all, do not engage in taxation. Similarly, it is well accepted that Congress has the power simply to bar state regulation in a particular field of commerce without supplying an alternative federal regulatory scheme. Such a statute does nothing more than prohibit state regulation, in apparent violation of the broad interpretations of *Printz* and *New York*.[111] Even in the statutory context, therefore, *Printz* and *New York* cannot plausibly be construed to invalidate all federal laws that affect states in their

108. The second incentive upheld in *New York* was upheld as a conditional exercise of Congress's power to approve state action that otherwise would have been barred by the dormant Commerce Clause. *See* New York v. United States, 505 U.S. 144, 173-74 (1992).

109. Indeed, Justice Scalia, the author of the majority opinion in *Printz*, would, in the absence of *stare decisis* concerns, replace entirely the Court's practice of striking down state statutes on dormant Commerce Clause grounds with a congressional power to invalidate state statutes that, in its view, contravene the national interest in a free market. *See, e.g.*, Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (Scalia, J., concurring & dissenting).

110. 512 U.S. 298 (1994).

111. *See* Tushnet, *supra* note 58, at 1641-42.

governmental roles or impose obligations on the states that they do not also impose on private individuals.[112]

IV. *PRINTZ* AND THE TREATY POWER

If *Printz* and *New York* do not invalidate all federal statutes imposing obligations on states without also imposing them on private individuals, or affecting states in their role as governments, then what is the scope of the anticommandeering principle? Without answering that question, it is impossible to reach firm conclusions about *Printz*'s applicability to the treaty power.

There are a number of possible answers. First, *Printz* and *New York* may invalidate only federal statutes that impose on state legislatures or executive officials the obligation to act affirmatively to administer or enforce a federal regulatory scheme. On this view, federal statutes that merely prohibit conduct by the states would not violate the anticommandeering principle, even if the prohibition did not apply to private parties. As we have seen, it is notoriously difficult to draw the line between affirmative and negative obligations. Should the treaty obligation at issue in *Asakura*, for instance, be regarded as merely the negative obligation not to discriminate against Japanese citizens, or should it be regarded as the affirmative obligation to give Japanese citizens the same rights as United States citizens?[113] On the other hand, a distinction between

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112. *See also* Matthew Schaefer, *Twenty-First-Century Trade Negotiations, the US Constitution, and the Elimination of US State-Level Protectionism*, 2 J. INT'L ECON. L. 1, 20-29 (1999) (describing provisions of congressional-executive agreements that would be called into question by the broad interpretation of *Printz* and *New York* under discussion here, and citing additional nontreaty case law that calls into question that broad interpretation).

113. The United States defended the constitutionality of a similar nondiscrimination obligation against a challenge based on the Tenth Amendment on the ground that the treaty was merely prohibitory:

> It was not contended that the state was obligated to supply education, but that if a state did choose to supply education as a governmental function, it could not discriminate, and that while the state was at liberty to maintain a school system or not, yet if it did provide such a school system, the schools of which alien children generally were permitted to attend, it could not exclude the alien children of any particular nation enjoying treaty rights. In other words, the provision of the treaty placed no obligation upon the state, was in no sense compulsory, but was negative and prohibitory.

affirmative and negative obligations is supported by the Court's description of "commandeering" as the "administ[ration of] a federal regulatory program"[114]—indeed, by the very term "commandeering." Recognition of the federal government's power to preempt state law appears to require that at least some negative obligations be exempted from the anticommandeering principle, as state officials are undoubtedly subject to the obligation not to enforce state laws that conflict with federal laws regulating private conduct, or to interfere with federal officers enforcing such laws.[115] If *New York* and *Printz* contemplate such a distinction, however, an obligation could not be counted as affirmative merely because a state would have to take affirmative preparatory steps to ensure that its officers comply with a legal prohibition.[116]

Alternatively, *New York* and *Printz* might be construed to prohibit federal statutes that impose even negative obligations on states, but only if the statutes do not impose the same prohibition on the federal government.[117] This would modify

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DEVLIN, *supra* note 78, § 150, at 162-64.

114. New York v. United States, 505 U.S. 144, 188 (1992); *see also* Travis v. Reno, 163 F.3d 1000, 1004 (7th Cir. 1998) ("[S]tates cannot be compelled to become regulators of private conduct.").

115. The majority in *Printz* recognized the latter obligation. *See* Printz v. United States, 521 U.S. 898, 913 (1997).

116. Even if a nondiscrimination obligation were regarded as affirmative, such a treaty provision could perhaps be upheld as an exercise of conditional preemption: the state is given a choice between treating aliens equally or withdrawing from the field. The treaty in *Asakura*, for example, might be understood to give Seattle the choice between granting licenses to Japanese citizens and withdrawing from the regulation of the pawnbroker business. It is noteworthy that this analysis would validate nondiscrimination provisions only if *Missouri v. Holland* survived in all its breadth. The federal government no doubt has the power to require the states to withdraw from the regulation of pawnbroker businesses under the Commerce Clause, but treaties prohibit discrimination in noncommercial areas traditionally regulated by the states, such as education, *see supra* note 78, and such treaties would no doubt be valid even if the Equal Protection Clause did not independently prohibit discrimination in those areas. The conditional preemption doctrine would validate a treaty barring discrimination in education, however, only if we accepted that a treaty barring the states from regulating education would be valid. The United States has advanced precisely that argument. *See supra* note 113.

117. *Cf.* Jackson, *supra* note 45, at 2208 n.126 (noting that "Solicitor General Bork's argument in support of the FLSA in *National League of Cities* . . . suggested that Congress was constrained by a requirement for such equivalency"); *see also* Tushnet, *supra* note 58, at 1649 (suggesting this argument as a basis for upholding a federal statute struck down by the Ninth Circuit on the basis of *New York*).

only slightly the Court's reason for distinguishing *Garcia* and similar cases. Rather than distinguish these cases as involving statutes that impose on states the same obligations they impose on private parties, the Court could distinguish them on the ground that they do not single out the states for regulation. A statute that regulates functions performed only by governments, such as taxation, does not single out states for regulation if the statute imposes the same obligation on the federal government.[118]

Either of the foregoing narrow interpretations of *Printz* would meet the objections identified above to applying the anticommandeering rule to the treaty power. The main problem with applying *Printz* to the treaty power is that negative obligations imposed by treaties typically (1) apply only to governmental actors and (2) apply to governmental actors at all levels. An interpretation of the anticommandeering principle that disabled the federal government from placing negative obligations on states unless it imposed the same obligations on private individuals would accordingly severely limit the treaty power. Limiting *Printz* to affirmative obligations would largely eliminate this problem, so long as "affirmative" were defined narrowly. Treaties do sometimes impose affirmative obligations on states-parties of a sort analogous to that involved in the *Printz* case, but exempting the states from such obligations is problematic only when the required affirmative acts are triggered by, or otherwise connected to, activities that states are already performing. Again, this problem would disappear if the federal government retained the power to impose negative obligations on the states. The federal government would then have the power to give the states a choice between (1) not performing the triggering act and (2) performing the triggering act and complying with the triggered obligation. Nor would the treaty power be significantly obstructed by a rule tying the federal government's power to impose negative obligations on the states to its willingness to assume the obligations itself, for, like the nondiscrimination provision involved in *Asakura* and

118. Perhaps some combination of the above would be acceptable: states cannot be compelled affirmatively to enforce a federal regulatory scheme, and they can be subjected to negative obligations only if the same obligations are imposed on similarly situated private parties or on the federal government.

the consular notification provision involved in *Breard*, most treaties that impose negative or conditional obligations impose the same obligations on state and federal governments.[119]

When a treaty imposes an obligation to perform affirmative acts and the obligation is not triggered by or otherwise connected to governmental activities the states are currently carrying out, an interpretation of *Printz* as barring the federal government from requiring the states to perform those acts appears to pose no special difficulties. To the extent the treaty contemplates such affirmative acts of executive officials, there will usually be no question that the relevant acts are to be performed by federal officials. As a matter of international law, there would be no obstacle to assigning such obligations to state officials. Disabling the federal government from doing so as a matter of domestic constitutional law might perhaps be undesirable, but not more so in the treaty context than in the purely domestic context.[120]

With respect to treaties that require affirmative acts of a legislative nature, the narrow interpretation of *New York* and *Printz* has considerable appeal. Treaties that require affirmative acts of legislation have a long history. They are known as non-self-executing treaties. One of the principal problems with the Articles of Confederation was that states were violating federal treaties and the federal government lacked the power to compel compliance or remedy violations.[121] This problem was caused in part by the courts' adherence to the British rule, under which treaties did not have direct effect as domestic law, but always had to be incorporated into domestic law through legislation. While state courts applying

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119. Such a limitation would, however, call into question provisions of nontreaty international agreements that have been given domestic effect through legislation. *See* Schaefer, *supra* note 112, at 23-29.

120. Justice Breyer's dissenting opinion in *Printz* noted some benefits that might be gained from such commandeering. *See Printz*, 521 U.S. at 976-78 (Breyer, J., dissenting). For example, it may be more efficient to require state officials to do certain things than to establish a whole new federal bureaucracy for the purpose. *See id.* at 977. This would appear to be true, however, only if what we want the state officers to do is related to something they are already doing. If so, then the federal government's ability to give the states a choice between doing the new thing or being barred from doing the old thing should eliminate the problem.

121. *See generally* Vázquez, *supra* note 101; Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Non-Refoulement Obligation*, 7 GEO. IMMIGR. L.J. 39 (1993).

the British rule were refusing to give effect to treaties directly, state legislatures were failing to pass the required legislation and the federal government lacked the power to do so. The Founders corrected this problem by making treaties the "supreme Law of the Land" and thus enforceable by the courts without the need for intervening acts of legislation.[122] Despite this history, United States courts have long recognized a category of treaty that is not directly enforceable by judges or other domestic-law-applying officials without implementing legislation. The circumstances in which a treaty is properly held to be non-self-executing need not be examined here.[123] For present purposes what is important is that the power to implement non-self-executing treaties has always been thought to reside in the federal government. To apply the anticommandeering principle to the treaty power would be to hold that the federal government not only has the *power* to implement non-self-executing treaties, but also, as a constitutional matter, the sole and exclusive *duty* to do so—a duty that may not be delegated to the states.[124]

Perhaps ironically, applying *Printz* and *New York* to the treaty power would call into question the constitutionality of the policy reflected in the so-called "federalism" understandings the United States has recently attached to the

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122. *See generally* Vázquez, *supra* note 101, at 1101-14.

123. On this question, see generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

124. In which branches of the federal government this duty resides is of course a different question. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (upholding Congress's power to delegate to the President in the area of foreign affairs even if a similar delegation would be unconstitutional in the purely domestic area).

If a treaty is not self-executing, the federal government has a duty to enact legislation if the treaty requires domestic-law-applying officials to do or not to do certain things and existing law does not impose such a requirement on such officials. Curtis Bradley has suggested to me that, while there may be a duty under international law to enact legislation, it does not follow that there is a duty to do so under domestic law. I admit that a federal duty to enact legislation is one that cannot be judicially enforced, as Congress cannot be made a defendant before a court. *See also Printz*, 521 U.S. at 975 (Souter, J., dissenting) ("[T]he essence of legislative power, within the limits of legislative jurisdiction, is a discretion not subject to command."). I am also sympathetic to the claim that a judicially unenforceable duty is not a legal duty at all. *See* Vázquez, *supra* note 101, at 1089-91. Nevertheless, the Constitution designates "all" treaties of the United States as the "supreme Law of the Land," and thus appears to rule out the claim that a treaty that requires implementing legislation does not impose a domestic-law duty to enact such legislation.

human rights treaties it has ratified. The understanding attached to the International Covenant on Civil and Political Rights is typical:

> [T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[125]

The intended purpose of this understanding is a matter of some uncertainty. Among the other reservations, understandings, and declarations ("RUDs") attached to these treaties is one declaring the treaties to be non-self-executing. Still other RUDs purport to limit the substantive obligations undertaken by the United States pursuant to these treaties so that, in the end, the treaties require no more than what our domestic Constitution independently requires. As commentators have pointed out, however, notwithstanding the reservations, discrepancies remain between these treaties and our domestic laws.[126] To the extent discrepancies exist, the non-self-executing declaration (assuming it is binding and effective) means that the treaty does not itself preempt inconsistent laws, but instead requires implementing legislation. The federalism understanding, in turn, appears to provide that, in certain circumstances, the responsibility for passing the required legislation will be shouldered by the states rather than the federal government. The understanding does not appear to be designed merely to notify other parties that certain matters are beyond the federal government's power under our Constitution. If *Missouri v. Holland* is still good law, the federal government has the power to implement these treaties to the extent they do not contravene the affirmative

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125. 138 CONG REC. S4781, S4784 (1992) (setting out the understandings which apply to the obligations of the United States under the International Covenant on Civil and Political Rights).

126. *See* Neuman, *supra* note 7, at 50-51.

prohibitions of the Constitution. The authors of the understanding appear to recognize this by stating that the treaties shall be implemented by the United States only insofar as it "exercises" jurisdiction over the relevant matters. Through this understanding, the federal government seems to be saying that, even though it possesses legislative power to implement the treaty, it does not intend to exercise that power unless it has already legislated over the subject matter. This understanding, of course, does not diminish in the slightest the United States's obligation under international law to pass the required legislation,[127] and under international law it is a matter of indifference whether the required legislation is passed by the federal government or by the fifty states separately. Thus, the federalism understanding, alongside the non-self-executing declaration, appears to commandeer state legislatures to pass the laws the treaty requires. Such a requirement is something even dissenters in *Printz* regarded as unconstitutional.[128]

Professor Gerald Neuman has noted the tension between the anticommandeering principle and the federalism understandings, but concludes that "this observation may illustrate the inapplicability of *New York v. United States* to exercises of the treaty power, and the weakness of the evidence for the anticommandeering principle in general."[129] I do not agree. The evidence for the anticommandeering principle may in fact be weak,[130] particularly as applied to commandeering of executive officials,[131] but the practice of attaching federalism understandings to human rights treaties does not strengthen the case against the principle. First, this practice is too recent to have any value as evidence of the Framers' intent, or otherwise to receive deference because of its pedigree. Second, the accountability concerns that led the Court in *New York* and

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127. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995).

128. *See Printz*, 521 U.S. at 970-76 (Souter, J., dissenting).

129. Neuman, *supra* note 7, at 52 (footnote omitted).

130. *See* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1781-82 (1997).

131. In addition to the articles by Professor Caminker already cited, *see supra* notes 20, 37, see, for example, Jackson, *supra* note 45; Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Martin Flaherty, *Are We to Be a Nation?: Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U.COLO. L. REV. 1277 (1999). *But see* Hills, *supra* note 49, at 831-55.

Printz to prohibit the federal government from commandeering state legislatures seem equally relevant in the treaty context. Treaty adherence offers certain benefits under international law. Indeed, the federal government maintains that its purpose in adhering to human rights treaties is not to produce any changes domestically, so much as to attain international standing to complain of other nations' violations.[132] If the federalism understanding imposes on the states the duty to pass the laws the treaty contemplates, it permits the federal government to reap the international benefits while shunting to the states the domestic political costs.[133] If the federal government through treaty makes an international undertaking on the part of the Untied States, it seems only right that any legislative action required by the treaty—and any political heat that results—be taken by the federal government.

Perhaps the federalism understanding can be saved from a challenge based on the *New York* and *Printz* cases on the ground that, unlike the obligation imposed on state executive officials by the Brady Act or the obligation imposed on state legislatures by the Low-Level Radioactive Waste Amendments Act, the states' obligation to pass legislation to implement these human rights treaties is not backed by any sanction for noncompliance. If this argument were accepted, though, it would be because the absence of a sanction renders the domestic law "duty" to pass legislation effectively precatory. This may in fact be the intent behind the federalism understanding, which would explain why the understanding is widely regarded as benefiting rather than burdening the states.[134] But if the purpose of this understanding is to make

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132. *See* David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1184 (1993). Such a purpose is neither unusual nor objectionable. It is generally the case that nations undertake international obligations through treaty only because of the benefits they stand to gain from the reciprocal undertakings of the other states-parties. What would be objectionable would be the failure to take seriously the obligations undertaken in exchange for those taken on by one's treaty partners.

133. This dynamic was evident in another aspect of the *Breard* episode. *See* Vázquez, Breard *and the Federal Power*, *supra* note 4, at 690.

134. Alternatively, the federalism understanding, though imposing a mandatory obligation on the states to pass legislation, might be regarded as preferable to the states than outright federal preemption because at least it leaves to the states some discretion as to the particular form the required legislation will

compliance with these treaties ultimately a matter of the states' option, then the resulting regime is in deep tension with our constitutional scheme. The Founders made treaties the law of the land because they valued treaty compliance and they understood that if compliance were left to the individual states, as it was under the Articles of Confederation, then compliance would be haphazard at best. If the treaties containing the federalism understandings do not violate the commandeering prohibition because they do not command, but merely request, action on the part of the states, then for that very reason the understandings are highly problematic. As a matter of international law, the treaties impose obligations; they do not just make requests.

In any event, it is far from clear that the absence of a sanction would save the understanding. The Court has not elaborated the distinction between laws that commandeer and laws that merely request cooperation. Although the presence of a sanction clearly places a statute in the former category,[135] it does not follow that the absence of one places a statute in the latter. To hold that it does would reflect a rather unflattering opinion of the characters of state executive and legislative officers, an opinion that seems uncharacteristic of the Justices in the majority in recent federalism decisions. If the Court instead regards as noncommandeering only statutes that expressly state that the contemplated conduct is optional, then the federalism understandings would appear to be invalid.[136]

It may seem ironic that a doctrine designed to protect the states' sovereignty results in the invalidation of a provision apparently designed for their benefit, but this sort of irony

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take. This, however, would not distinguish the federal obligation imposed by these treaties from that imposed by the Low-Level Radioactive Waste Amendments Act, which likewise left the states with much discretion.

135. *See supra* note 37 and accompanying text.

136. The absence of a sanction would certainly reduce the likelihood that a state would ever seek a judicial declaration that it is not required to enact the legislation. If it did obtain such a declaration, moreover, the end result would be the same as the result the understanding seeks to produce, as neither the states nor any individual would be able to maintain an action in the courts to require the federal government to enact the required legislation. *See supra* note 124. For this reason, the understanding's incompatibility with *New York*'s anticommandeering principle may be relevant only to a conscientious president or senator—one who takes seriously constitutional limitations on the treaty power without regard to their possible enforcement by the courts. This is not the same, however, as saying that the conflict is irrelevant (at least one hopes).

pervades the anticommandeering doctrine. As Justice Breyer noted in his dissenting opinion in *Printz*, the federal government's inability to commandeer may paradoxically result in the creation of an unwieldy federal bureaucracy more threatening to the states.[137] Indeed, the conditional preemption doctrine itself reflects the irony that the federal government retains powers far more threatening to states than that of commandeering their officials. It is noteworthy in this connection that the Founders gave the federal government the power to commandeer the state courts to enforce federal law because those concerned with protecting state sovereignty viewed this option as less threatening to the states than the creation of a battery of federal trial courts to enforce federal laws throughout the nation.[138] On the other hand, those who objected to commandeering of state officials were animated by a profound distrust of state officials' willingness and ability to enforce federal law faithfully.[139] This history may call into question the correctness of the holdings in *New York* and *Printz*,[140] but it also suggests that, as long as those decisions stand, we should not be surprised that it operates to invalidate some provisions regarded as desirable by defenders of state interests.

CONCLUSION

Whether the anticommandeering principle articulated in *New York* and *Printz* applies to exercises of the treaty power

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137. *See* Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting).

138. The principal disagreement at the Convention concerning the federal courts was between the nationalists, who wanted to create lower federal courts to enforce federal law, and the defenders of states' rights, who wanted to rely on the state courts to enforce federal laws, subject to Supreme Court review—in essence a species of commandeering. Under the Madisonian Compromise, Congress was given the power, but not the duty, to create lower federal courts, and state judges were instructed in the Supremacy Clause to enforce federal laws. *See generally* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7-9 (4th ed. 1996). Thus, the current system, which relies on federal commandeering of state judges, reflects the victory on this point of the defenders of states' interests over the nationalists.

139. *See* Hills, *supra* note 49, at 818.

140. *But cf. id.* at 855-916 (defending anticommandeering principle on functional grounds while acknowledging that the historical support for the principle reflected nationalist sentiment).

depends on the scope of that principle. If those decisions invalidate federal laws that affect states "in their role as governments" or that impose obligations on states without imposing them on private parties, their holdings cannot be applicable to treaties. Such a rule would invalidate the typical treaty, including some that have been upheld by the Supreme Court. On the other hand, a narrower interpretation of the anticommandeering principle—one that, for example, invalidates laws placing affirmative but not negative obligations, or laws that impose obligations on the states' governmental activities without placing similar obligations on the federal government—could unproblematically be applied to exercises of the treaty power, as long as the Court continued to recognize a broad power of conditional preemption. Treaties that impose affirmative obligations on states in connection with functions or activities they are already undertaking could then be upheld as giving the states a choice between complying with the obligation and withdrawing from the activity. As long as *Missouri v. Holland* remains good law, the federal government's power to impose that choice on the states will be virtually plenary. Whether the broad or narrow understanding of the anticommandeering principle were adopted, the Vienna Convention's consular notification provision would be valid, as would any treaty placing obligations on states in connection with functions they undertake as governments.[141]

141. If the broad understanding were adopted, the Vienna Convention would be valid because *Printz* would not be applicable to the treaty power. If the narrow interpretation were adopted, the Vienna Convention would be valid as conditional preemption.