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Gubernatorial Foreign Policy

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JULIAN G. KU

Gubernatorial Foreign Policy

ABSTRACT. In a variety of circumstances, state governors exercise independent decision-making power over matters affecting the foreign policy of the United States. This Essay describes and defends this emerging system of gubernatorial foreign policy on both legal and functional grounds. Recent Supreme Court decisions retreating from federal exclusivity in foreign affairs and prohibiting the commandeering of state executive officials leave a small doctrinal space for governors to act independently on matters affecting foreign policy. This small space has been further expanded by the federal government's practice of imposing limitations on the preemptive effect of treaties and international agreements. A system of gubernatorial foreign policy also represents the most practical and feasible way to accommodate the internationalizing pressure of globalization with a continuing federal system of "dual sovereignties." Under this system, the states will continue to improve their capacity to deal with matters affecting foreign affairs, and the federal government will retain the right to preempt, but not to commandeer, state governors in the service of federal foreign policy goals.

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INTRODUCTION

In May 2004, the office of Governor Brad Henry of Oklahoma became the unlikely focal point of relations between Mexico and the United States. Osbaldo Torres, a Mexican national convicted of multiple murders by Oklahoma courts, was scheduled to be executed on May 18. Not only was the Mexican government urgently lobbying the governor's office on Torres's behalf, but the Governor was also considering a judgment issued by the International Court of Justice (ICJ) purporting to require him to suspend Torres's execution and to order a new hearing to consider the effect of treaty violations on Torres's conviction and sentence.¹ At the same time, attorneys for Torres were urgently seeking an order from Oklahoma's highest court of criminal appeals to stay the execution based on the ICJ's order.²

On the morning of May 13, the Oklahoma court suspended the execution and ordered a new hearing pursuant to the ICJ judgment.³ A few hours later, Governor Henry announced at a press conference that he had commuted Torres's sentence to life imprisonment, thereby removing most of the legal basis for Torres's appeal under the ICJ judgment.⁴

As the Governor, the state's highest criminal court, the Mexican government, and the ICJ struggled to resolve Torres's fate, one entity was curiously absent: the U.S. federal government. According to news reports, the State Department had contacted Governor Henry's office but had merely urged him to consider the ICJ's judgment.⁵ The federal government did not intervene in the litigation in the Oklahoma state courts. The Governor was not ordered by the President to commute Torres's sentence. Rather, the Governor exercised his own discretion in making that decision.⁶

1. *Avena and Other Mexican Nationals (Mex. v. U.S.)* (Mar. 31, 2004) [hereinafter *Avena Judgment*], available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (follow "Judgment" hyperlink).

2. For a narrative of the facts surrounding the Torres decision, see Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 581-82 (2004).

3. *Torres v. State*, 43 I.L.M. 1227 (2004) (Okla. Crim. App. May 13, 2004) (granting a stay of execution and remanding the case for an evidentiary hearing).

4. See Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at <http://www.governor.state.ok.us> (search for "Osbaldo Torres"); see also John Greiner, *Henry Commutes Death Sentence*, DAILY OKLAHOMAN, May 14, 2004, at A1.

5. See Murphy, *supra* note 2, at 582.

6. See Press Release, Office of Governor Brad Henry, *supra* note 4, at 1.

The President's passivity is surprising because it is an axiom of U.S. foreign relations law that the President is the leading authority, perhaps even the "sole organ,"⁷ for the conduct of U.S. foreign policy. Moreover, it is nearly as axiomatic that state governments are not granted an independent role in conducting foreign policy.⁸ Yet in this case, a potentially important diplomatic issue was left entirely to the discretion of the Governor of Oklahoma and the Oklahoma state courts. Indeed, although the State Department issued statements in previous ICJ cases involving similar issues, none of the statements "ordered" or "commanded" the governors in those cases; each governor made an independent decision about whether and how to comply with the ICJ's judgments.⁹

To be sure, in a subsequent case involving the effect of the same ICJ judgment on a Texas execution, the President intervened by releasing a memorandum purporting to order the Texas courts to follow the ICJ's judgment.¹⁰ The constitutionality of this order will be tested in the near future, but even if upheld, it applies only to state courts, and not to governors.¹¹ For a variety of reasons, both legal and political, state governors will retain some measure of independent discretion to exercise their powers in ways that might affect and indeed determine aspects of U.S. foreign policy.

Governors exercise this limited but important foreign policy power in a variety of contexts. In addition to the power to respond to requests by foreign governments and international institutions, governors also negotiate and execute certain kinds of international agreements in pursuit of regional or international cooperation. Governors and other state executive officials administer insurance regulations and state purchasing regulations in pursuit of certain foreign policy goals. In these admittedly limited but hardly unimportant areas, a gubernatorial foreign policy is beginning to emerge.

My goal in this Essay is to redirect the existing academic conversation on state governments and foreign affairs. While scholars have considered the legal

7. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936).

8. *See, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937) ("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies.").

9. *See* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 532–38 (1999); Julian G. Ku, *The State of New York Does Exist: How States Control Compliance with International Law*, 82 N.C. L. REV. 457, 512–14 (2004) (describing the State Department's careful non-binding communications to governors in the wake of the ICJ's previous decisions).

10. *Medellin v. Dretke*, 544 U.S. 660, 663 (2005) (per curiam) (quoting Memorandum from George W. Bush to the Attorney General (Feb. 28, 2005)).

11. *Id.*

and policy consequences of state activities in foreign affairs,¹² they have not considered the unique role of governors in the state foreign policy process. Nor have scholars considered the usefulness of a governor-led system of state foreign policy as an accommodation between the forces of globalization and the domestic federal system.

My discussion proceeds in three parts. Part I introduces and defines a system of gubernatorial foreign policy. Part II argues that notwithstanding the traditional understanding of exclusive federal control over foreign affairs, existing constitutional doctrine still permits states to exercise limited independence in matters affecting foreign affairs. I conclude in Part III that this system of gubernatorial foreign policy represents the most practical and feasible accommodation of the forces of globalization and a system of dual sovereignties envisioned by the U.S. constitutional structure.

I. A SYSTEM OF GUBERNATORIAL FOREIGN POLICY

In this Part, I introduce and define a system of gubernatorial foreign policy. I then examine three examples of this system in action.

A. Defining a Gubernatorial Foreign Policy

Executive officials of a particular state often take actions that implicate the foreign relations of the United States as a whole. Such actions become a “gubernatorial foreign policy” when a governor or other state executive official takes that action independent of federal government supervision or control.¹³ The level of gubernatorial independence from the federal government, however, varies depending on the situation.

12. See, e.g., Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999) (arguing that state foreign affairs activities are unconstitutional); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Affairs Federalism*, 75 NOTRE DAME L. REV. 341 (1999) (describing the original understanding of the role of states in foreign affairs).

13. For my purposes, the term “gubernatorial” encompasses not only actions taken by a state’s chief executive, or governor, but also actions taken by independent state executive officials such as state attorneys general or state insurance commissioners. As Professor Marshall points out in his essay in this Symposium, William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006), many attorneys general are themselves independently elected. City officials might also qualify as state executive officials on the theory that they act as agents for the state.

In some cases, governors act with the full acquiescence of the federal government to deal with a matter implicating foreign affairs. In these instances, governors act at the height of their foreign policy powers because the federal government has expressly endorsed their activities. In other cases, gubernatorial activities are taken without either express approval or opposition by the federal government. Because the federal government's views are often uncertain on foreign policy matters facing governors, many of the gubernatorial foreign policy activities I describe belong to this second category. Finally, certain gubernatorial activities are taken with the express disapproval of the federal government. In these circumstances, the governors' foreign policy powers are highly restricted. As I will argue in Part II, however, there are a few circumstances in which a governor's decision on how to proceed is constitutionally protected from federal control.

Not all gubernatorial foreign policy activities have the same legal character. Like exercises of the federal executive's foreign policy power, exercises of a state executive's foreign policy power take place within a complex and uncertain web of legal authorizations, prohibitions, and limitations. Some of these activities might be said to encroach upon federal powers, while others might be constitutionally shielded from federal control. But all represent an important and insufficiently studied component of the foreign policy system of the United States.

B. Examples of Gubernatorial Foreign Policy

In this Section, I review three examples of gubernatorial foreign policy in action. First, governors engage in foreign policy when they take primary responsibility for responding to demands by foreign governments and international institutions. Second, governors engage in foreign policy when they negotiate and sign international and regional agreements on behalf of their states. Finally, governors and other members of a state's executive branch take foreign policy actions when they impose sanctions or other economic limitations on doing business with particular foreign countries. Each type of gubernatorial foreign policy reflects some level of independence from federal government control.

1. *Responding to Demands by Foreign Governments and International Institutions*

States have always played an important role in responding to demands by foreign governments and international institutions.¹⁴ The most dramatic examples of this role can be found in conflicts between the state administration of capital punishment and the United States' international obligations. These conflicts highlight the central position that governors hold when dealing with demands by foreign governments and international organizations.

The administration of capital punishment by the states has drawn intense criticism from foreign governments as well as from international institutions.¹⁵ Aside from general moral disapproval, foreign critics have also alleged that the death penalty violates certain U.S. obligations under international law. As discussed below, these international obligations provide foreign governments and international institutions with a basis for demanding a change in U.S. death penalty practices.

Although the challenged death penalty practices implicate the obligations of the entire United States, the federal government has generally referred both foreign governments and international institutions to a particular state's governor. For example, between 1997 and 2003, Mexico filed diplomatic notes in at least twenty capital cases involving its nationals on death row in the United States.¹⁶ These notes protested the failure of the United States to comply with its obligations under the Vienna Convention on Consular Relations when arresting the Mexican nationals.¹⁷

14. See Ku, *supra* note 9, at 488-89 (discussing Texas's interpretation of international law).

15. See Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 139-50 (2002) (discussing European views of U.S. capital punishment practices).

16. See Memorial of Mexico, Avena and Other Mexican Nationals (Mex. v. U.S.), ¶ 140 (June 20, 2003) [hereinafter Avena Memorial], available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (follow "Written Pleadings" hyperlink).

17. *Id.* ¶ 154. The Vienna Convention obligates signatories to inform the consulates of foreign states whenever the nationals of those states are taken into custody and to notify those nationals of their right to consular assistance. Vienna Convention on Consular Relations art. 36, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The Convention's Optional Protocol provides that all disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, opened for signature Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261 [hereinafter Optional Protocol to the Vienna Convention on Consular Relations].

The federal government's official response to these notes is not publicly available, but according to Mexico, the responses offered nothing more than diplomatic apologies for the failure to comply with treaty obligations when arresting the Mexican nationals.¹⁸ In some cases, the federal government also forwarded the diplomatic notes directly to the governors of the states where the violations had occurred.¹⁹ The governors who received these notes, however, generally rejected the Mexican protests and defended their right to arrest and eventually execute the Mexican nationals in question. In one case, the Governor of Texas received a personal communication from the President of Mexico, and the Secretary of State of Texas received a personal visit from Mexico's diplomatic representatives.²⁰

In addition to foreign governments, international institutions have also requested or even demanded that the United States suspend death sentences imposed on both U.S. and foreign nationals. For instance, the Inter-American Commission on Human Rights (IACHR), the human rights arm of the Organization of American States (OAS),²¹ has issued a number of requests seeking the suspension of executions alleged to violate U.S. obligations under international human rights law.²² A number of these formal requests have been sent directly to state governors, however, rather than to the federal government. For instance, in 1993 the IACHR sent a request directly to the Governor of Texas requesting that the Governor stay the execution of U.S.

18. Avena Memorial, *supra* note 16, ¶¶ 140-155.

19. See, e.g., *id.* ¶ 151 (asserting that the federal government forwarded a diplomatic note from Mexico to Texas authorities).

20. *Id.* ¶ 154.

21. The Organization of American States is the world's oldest regional organization. It counts as members thirty-five states in the Western Hemisphere. See Cong. Research Serv., Organization of American States: A Primer (May 11, 2005), available at <http://www.fas.org/sgp/crs/row/RS22095.pdf>. The Inter-American Commission on Human Rights is empowered under the OAS Charter to issue reports and investigate complaints of violations of international human rights obligations by OAS members. See Charter of the Organization of American States art. 106, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, available at <http://www.oas.org/juridico/english/charter.html> ("[The IACHR's] principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.").

22. See, e.g., Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1320 (1996) (noting that after Texas authorities refused the IACHR's request of a delay of execution, Carlos Santana was executed on March 23, 1993); Press Release, Inter-Am. Comm'n on Human Rights, No. 17/00 (Nov. 13, 2000), available at <http://www.cidh.org/Comunicados/English/2000/Press17-00.htm> (noting that the United States twice failed to respond to the IACHR's request to stay the execution of Miguel Flores pending its review of Flores's petition regarding the United States' violation of his consular rights).

citizen Gary Graham pending a full IACHR investigation of Graham's claim that his rights had been violated. The Governor of Texas, Ann Richards, responded directly to the IACHR note and indicated that under Texas law she could no longer extend clemency. When the IACHR sent another request, this time directed to the federal government, the federal government did little more than forward correspondence from Texas executive officials concerning the Graham case.²³

Even though the IACHR did not claim that the United States was violating its obligations under international law, its communications still could have given rise to a foreign policy question for the United States. Relations with the IACHR may affect the U.S. government's relations with the OAS and the other member states of the OAS. Despite the salient foreign policy question, the federal government appears to have left the ultimate decision of how to respond to the IACHR's requests to the discretion of the Governor of Texas.

The existence of a gubernatorial foreign policy in this context is even more apparent in a trilogy of cases brought against the United States in the International Court of Justice, challenging state executions of foreign nationals as violations of the Vienna Convention on Consular Relations.²⁴ While the international and domestic legal issues raised by these cases have received plenty of scholarly attention,²⁵ far less attention has been paid to the central role that state governors played in relations between the United States and the ICJ.

Paraguay brought the first ICJ case in a last-minute attempt to stop the execution of one of its nationals, Angel Breard, by the Commonwealth of Virginia.²⁶ At Paraguay's request, the ICJ issued a provisional measures order

23. See Press Release, Inter-Am. Comm'n on Human Rights, No. 9/00 (June 28, 2000), available at <http://www.cidh.org/Comunicados/English/2000/Press9-00.htm>. This back-and-forth correspondence continued until 2000, when the IACHR's final, last-minute request to the federal government to stop the execution was again forwarded by the federal government to the Governor of Texas.

24. *Avena Judgment*, *supra* note 1; *LaGrand Case* (F.R.G. v. U.S.) (June 27, 2001), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (follow "Judgment" hyperlink); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9) (provisional measures order).

25. See, e.g., Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT'L L. 666 (1998).

26. See *Vienna Convention on Consular Relations*, 1998 I.C.J. 248.

requiring the United States to suspend Breard's execution so that the ICJ could consider the full case.²⁷

While the legal status of the ICJ's order is both important and interesting,²⁸ it is the interplay between the ICJ, the U.S. State Department, and the Governor of Virginia that best illustrates the system of a gubernatorial foreign policy. The ICJ's provisional measures order was sent to the State Department, and the State Department's only action was to forward the order to the Governor of Virginia, along with a letter from the Secretary of State.²⁹ The Secretary's letter, however, did not purport to require the Governor of Virginia to comply with the ICJ's provisional measures order. Rather, the letter simply "requested" that the Governor stay the execution pending the ICJ's final judgment.³⁰ Because the U.S. courts did not treat the order as enforceable, the final decision of whether to suspend the execution per the ICJ's provisional order amounted to a foreign policy decision by the Governor of Virginia. The Governor, James Gilmore, decided to execute Breard rather than defer to the wishes of the ICJ and the government of Paraguay.³¹

A year later, Governor Jane Dee Hull of Arizona faced a similar foreign policy decision when the ICJ issued a nearly identical provisional measures order in favor of two German nationals facing execution. Perhaps learning from its previous experience, the ICJ's provisional measures order was directed both to the Governor of Arizona and to the U.S. federal government.³² Upon receiving the ICJ's provisional measures order, the U.S. government simply forwarded the ICJ order to the Governor without requesting any particular action, thus leaving the final decision in the Governor's hands. Like her

27. *Id.* at 258. The order was the subject of substantial litigation in U.S. federal courts, and the U.S. Supreme Court ultimately ruled that the provisional order could not be enforced in a federal habeas action. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam).

28. See Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 41-57 (2006) (discussing the domestic legal status of the ICJ judgment as well as the legal status of other international tribunal judgments).

29. See Brief for the United States as Amicus Curiae Supporting Respondents at 51 app. F, *Breard*, 523 U.S. 371 (No. 97-8214).

30. *Id.*

31. See Bradley, *supra* note 9, at 538.

32. Again, the U.S. courts refused to act. See *Federal Republic of Germany v. United States*, 526 U.S. 111, 111-12 (1999) (denying a motion for leave to file a bill of complaint and Germany's motion for preliminary injunction seeking to give effect to the ICJ provisional measures order).

Virginia counterpart, the Governor of Arizona decided to proceed with the execution.³³

Both the Virginia and Arizona cases provide unusually powerful examples of the system of gubernatorial foreign policy in action. The ICJ's provisional measures orders represented both a legal obligation and a foreign policy challenge. When U.S. courts refused to enforce the orders, responding to the ICJ's orders became a question of foreign policy. This foreign policy question did not involve only U.S. relations with countries like Paraguay and Germany, but also U.S. relations with the ICJ itself, which serves as the primary judicial arm of the United Nations system. Each member of the United Nations, for instance, has an obligation to carry out ICJ judgments in cases to which it is a party.³⁴ Yet despite these various foreign policy implications, the ultimate decision of how to respond to the ICJ orders was left to the Governors of Virginia and Arizona without any direct intervention by the federal government.

The central role of state governors is confirmed by the complicated U.S. response to the most recent ICJ Vienna Convention decision in *Avena*.³⁵ In that case, brought by Mexico, the ICJ ordered the provision of judicial remedies to fifty-one Mexican nationals facing death sentences in the United States.³⁶ Although the federal government has intervened in the cases of these individuals, even that federal intervention was calculated to allow state executives to make the initial foreign policy decision.

The very first case testing the effect of the ICJ's judgment in *Avena* occurred in Oklahoma. As discussed earlier, even though the Oklahoma court eventually decided to give effect to the ICJ's order, Governor Henry had already decided to respond to the twin pressures of Mexico and the ICJ by granting clemency to Torres, the condemned Mexican national.³⁷ Facing almost identical facts, however, the Governor of Texas announced that he would not accede to the ICJ's judgment ordering him to stop the execution of

33. Memorial of the Federal Republic of Germany ¶¶ 4.169-4.171, *LaGrand Case* (F.R.G. v. U.S.) (Sept. 16, 1999), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (follow "Written Pleadings" hyperlink). When Germany persisted with the case after the execution, Arizona went so far as to dispatch its Attorney General (later Governor) to The Hague to defend Arizona's actions before the ICJ. Verbatim Record ¶¶ 2.1-2.58, *LaGrand Case* (F.R.G. v. U.S.) (Nov. 14, 2000) available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (follow "Oral Pleadings" hyperlink).

34. U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

35. *Avena Judgment*, *supra* note 1.

36. *Id.* ¶¶ 138-141.

37. See *supra* text accompanying notes 1-6.

another Mexican national, Jose Medellin.³⁸ Texas's refusal to act prompted federal intervention by the U.S. Supreme Court, which granted certiorari to consider the legal effect of the ICJ's judgment.³⁹ The federal government intervened once again when President Bush issued a memorandum purporting to require Texas state courts to comply with the ICJ's judgment with respect to Mexican nationals facing execution in Texas.⁴⁰

This might suggest an end to the use of gubernatorial foreign policy to respond to ICJ judgments. However, the careful phrasing of the memorandum reveals that the federal government remains reluctant to compel state compliance with federal foreign policy goals.⁴¹ The President's memorandum is directed not at the Governor of Texas but at the state courts. Moreover, it directs those courts to apply principles of "comity" in order to implement the ICJ's judgment rather than simply requiring compliance with the ICJ's judgment as a matter of legal obligation. Indeed, the legal effect of even the President's memorandum is being challenged in Texas courts.⁴² All of this carefully circumscribed language suggests that the federal government will continue to leave room for a gubernatorial foreign policy in future cases involving international tribunal judgments.

2. *International Agreements*

The role of governors in responding to demands by foreign governments and international institutions is probably the most dramatic example of a gubernatorial foreign policy. But governors can also take a more direct and

38. See *Texas To Ignore Court Order To Stay Executions*, L.A. TIMES, Feb. 7, 2003, at A33 [hereinafter *Texas To Ignore Court Order*] (quoting the Texas Governor's spokesman as saying that "there is no authority for the federal government or this World Court to prohibit Texas from exercising the laws passed by our legislature").

39. *Medellin v. Dretke*, 544 U.S. 660 (2005) (per curiam).

40. *Id.* at 663 (quoting in full the Memorandum from George W. Bush to the Attorney General (Feb. 28, 2005)).

41. See *id.* ("I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals* . . . by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.").

42. See *Ex parte Medellin*, No. AP-75207, 2005 WL 1532996 (Tex. Crim. App. June 22, 2005). The legal effect of the President's memorandum was raised during the briefing of the case. Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae Supporting Respondent, *Ex parte Medellin*, No. AP-75207, 2005 WL 3142646.

assertive role in foreign policy by negotiating and entering into international agreements.⁴³ Although these agreements generally are made only with foreign regional governments, they are far from trivial. These agreements seek to regulate a variety of international matters such as fuel tax allocation, cross-border motor vehicle regulation, natural resources management, and even greenhouse gas emissions. Governors negotiate and sign such agreements either pursuant to their independent state constitutional authority or pursuant to a specific statutory authorization.

a. Bilateral Agreements

The most common and unremarkable form of state international agreement is a bicultural exchange agreement with a foreign government.⁴⁴ As a report released by the National Governors Association observed, states use bilateral cultural exchange agreements to bolster their economic relationships with certain foreign countries. To take just one example, at least twenty-five states have signed bilateral trade, cultural, and educational agreements with Israel.⁴⁵ Such agreements are generally made during a governor's visit to a particular foreign country. For instance, Governor Gray Davis of California signed an agreement for cooperation in the development of biotechnology during his 1999 visit to Israel.⁴⁶ Many of these agreements are phrased in non-binding terms, but as a National Governors Association study of these agreements suggests, they are increasingly common and important

43. See Raymond Spencer Rodgers, Notes and Comments, *The Capacity of States of the Union To Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1024-28 (1967) (describing several agreements between states and Canada).

44. A general review of these activities, including "sister-city" agreements, is discussed in Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989).

45. See NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, HOW STATES ARE USING ARTS AND CULTURE TO STRENGTHEN THEIR GLOBAL TRADE DEVELOPMENT 12 (2003), available at <http://www.nga.org/Files/pdf/040103GLOBALTRADEDEV.pdf> [hereinafter NGA STUDY]. The states include Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Vermont.

46. See, e.g., Memorandum of Understanding Between the Israel Biotechnology Organization and the California Commission on Bioscience, Oct. 29, 1999, <http://www.jewishvirtuallibrary.org/jsourc/US-Israel/cabio.html> (establishing a "formal relationship between the Israel Biotechnology Organization and the California Governor's Commission on Bioscience in order to foster technology, business development and educational opportunities, through business interaction in the public and private sectors").

mechanisms for governors seeking to attract trade, investment, and tourism to their states.⁴⁷

More significantly, governors of northern border states have sought deep levels of cooperation with Canadian provincial governments. A number of states, for instance, have entered into bilateral reciprocal agreements with the Province of Quebec for the treatment of traffic sanctions, the inspection of commercial vehicles, and buses.⁴⁸ Traffic agreements require each state or province to recognize traffic offenses committed by their residents in the other party's jurisdiction for purposes of driver's license suspensions.⁴⁹ Reciprocal inspection agreements allow one party's inspection to satisfy inspection requirements in the other party's jurisdiction.⁵⁰ States have also made similar reciprocal agreements in the area of child-support regulation.⁵¹

Though these reciprocal agreements seem trivial, they represent a potentially important gubernatorial power. These agreements appear to be negotiated exclusively by state governors and their subordinates, with little legislative involvement and no federal supervision; they are typically recognized by statute or incorporated by administrative action. While some state legislatures have specifically granted their executives the authority to

47. See NGA STUDY, *supra* note 45, at 1.

48. Regulation Respecting a Reciprocal Agreement Between the Gouvernement du Québec and the Government of the State of Maine Concerning Drivers' Licenses and Traffic Offenses, R.Q. c. C-24.2, r.o.1.2.2 (Can.), available at <http://www.canlii.org/qc/laws/regu/c24.2r.o.1.2.2/20060310/whole.html> (last visited Aug. 7, 2006); Regulation Respecting the Reciprocal Agreement Between the State of New York and Québec Concerning Drivers' Licenses and Traffic Offenses, R.Q. c. C-24.2, r.o.1.2 (Can.), available at <http://www.canlii.org/qc/laws/regu/c-24.2r.o.1.2/20050809/whole.html> (last visited Aug. 7, 2006); Regulation Respecting Reciprocal Commercial Vehicle Registration Agreements Between the Gouvernement du Québec and Certain American States, R.Q. c. C-24.2, r.o.1.5 (Can.), available at <http://www.canlii.org/qc/laws/regu/c-24.2r.o.1.5/20051019/whole.html> (listing agreements between Quebec and forty-one different states) (last visited Aug. 7, 2006); Regulation Respecting an Agreement Between the Gouvernement du Québec and the Government of the State of New York Respecting the Mechanical Inspection of Buses, R.Q. c. C-24.2, r.o.1.2.1 (Can.), available at <http://www.canlii.org/qc/laws/regu/c-24.2r.o.1.2.1/20051019/whole.html> (last visited Aug. 7, 2006).

49. See, e.g., Regulation Respecting the Reciprocal Agreement Between the State of New York and Québec Concerning Drivers' Licenses and Traffic Offenses, *supra* note 48, art. 3.3.

50. See, e.g., Regulation Respecting an Agreement Between the Gouvernement du Québec and the Government of the State of New York Respecting the Mechanical Inspection of Buses, *supra* note 48, art. 2.

51. See, e.g., Gloria Folger Dehart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89 (1994).

enter into such agreements,⁵² other state executives appear to be acting under their own constitutional authority. In any case, these agreements have become more and more common, as have “summits” between U.S. governors and their Canadian counterparts.⁵³

b. Multilateral Agreements

Governors also take the lead in the negotiation and implementation of broad multilateral agreements involving several states and foreign provinces. Perhaps the most successful example of a state multilateral agreement is the Great Lakes Charter, an agreement among seven U.S. states and two Canadian provinces to cooperatively manage the waters of the Great Lakes.⁵⁴

The original charter, signed in 1985, committed the parties to develop mechanisms for cooperating in the management of the Great Lakes resources.⁵⁵ A subsequent 2001 agreement committed the parties to prepare “a Basin-wide binding agreement(s), such as an interstate compact and such other agreements, protocols or other arrangements between the States and Provinces.”⁵⁶ The states and provinces finalized this commitment in December 2005 when they agreed to a prohibition on new or increased diversions of water from the Great Lakes, subject to certain limitations.⁵⁷

52. For an example of a state statute authorizing such agreements, see MONT. CODE ANN. § 10-3-1309(2) (2005), which states, “The public service commission may enter into reciprocal agreements with adjacent states and bordering Canadian provinces that Montana’s inspectors may inspect trains while they are stopped in those states or provinces before they cross the Montana border.” For another example, see WASH. REV. CODE ANN. § 46.23.020 (West 2001), which authorizes the Washington Department of Licensing to execute a reciprocal agreement with the Canadian Province of British Columbia.

53. See, e.g., Press Release, N.Y. State Governor’s Office, Governor and Québec Premier Hold Third Economic Summit (Oct. 5, 2005), available at http://www.state.ny.us/governor/press/05/oct5_05.htm.

54. Council of Great Lakes Governors, The Great Lakes Charter: Principles for the Management of Great Lakes Water Resources, Feb. 11, 1985, available at <http://www.glc.org/wateruse/wrmdss/finalreport/pdf/GreatLakesCharter.pdf> (establishing an agreement among the states and provinces bordering the Great Lakes).

55. *Id.*

56. Council of Great Lakes Governors, The Great Lakes Charter Annex: A Supplementary Agreement to the Great Lakes Charter, June 18, 2001, at 2, available at <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf>.

57. Council of Great Lakes Governors, Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement art. 200, Dec. 13, 2005, available at http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf; see also Council of Great Lakes Governors, Frequently Asked

This latest agreement is also accompanied by a “Compact” that includes all the parties to the 2001 Annex Agreements except for the Canadian provinces.⁵⁸ While the precise definition of a “compact” remains uncertain,⁵⁹ compacts may include agreements between different U.S. states as well as agreements between U.S. states and foreign states (although some agreements with foreign governments may not rise to the level of a compact). Both kinds of compacts require congressional approval.⁶⁰

Even compacts requiring congressional approval, however, represent a form of gubernatorial foreign policy. Agreements such as the Great Lakes Charter were negotiated by governors directly with other governors and with foreign provincial leaders. The federal executive played no official role in the negotiations.⁶¹ It did not, for instance, sign any of the agreements. Congress’s role is only to approve or disapprove the compact negotiated by the governors.

This last example illustrates how state executives can shape foreign policy in cooperation with the federal government. State governors in this case play the role otherwise held by the federal executive in the negotiation of a typical international agreement. Indeed, because the distinction between a compact requiring congressional approval and an agreement that can be made by the states alone is hardly self-evident, state governors may have the authority to make agreements with foreign governments that are never reviewed by the federal government. At least one state court has recognized that some agreements with foreign governments do not rise to the level of a compact

Questions: Annex 2001 Implementing Agreements (Jan. 2006), http://www.cglg.org/projects/water/docs/12-13-05/Annex_Implementing_Agreements_Frequently_Asked_Questions_1-23-06.pdf.

58. Council of Great Lakes Governors, Great Lakes – St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, *available at* http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_water_resources_compact.pdf.

59. See Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 499–510 (2003) (arguing that the judicial definition of “foreign compact” remains flexible). *But see* McHenry County v. Brady, 163 N.W. 540 (N.D. 1917).

60. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”).

61. The absence of the federal executive is surprising considering that both the Supreme Court and the executive take the view that states cannot negotiate with any foreign governments. See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 574 (1840) (Taney, C.J.) (describing the Framers’ intention that “there would be no occasion for negotiation or intercourse between the state authorities and a foreign government”); 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 25 (1943) (quoting a State Department letter rejecting proposed Florida-Cuba compact negotiations); see also Swaine, *supra* note 59, at 506 n.402 (describing a State Department letter warning that “individual states have no authority to negotiate or conclude international agreements”).

requiring federal approval,⁶² and the U.S. Supreme Court has held that preliminary negotiations to an interstate compact are not always prohibited.⁶³

Governors have also negotiated and entered into international agreements that may actually differ from the foreign policies pursued by the federal government. A number of U.S. governors, for instance, have joined with a number of Canadian provinces to set greenhouse gas reduction goals.⁶⁴ This agreement committed parties to reduce greenhouse gas emissions to 1990 levels by 2010, and to ten percent below 1990 levels by 2020.⁶⁵ These goals were similar to the reduction goals set in the Kyoto Protocol to the United Nations Framework Convention for Climate Change.⁶⁶ Of course, the United States famously has refused to ratify the Kyoto Protocol and to commit itself to the Protocol's aggressive targets for the reduction of greenhouse gas emissions.⁶⁷

These and other state international agreements represent a softer, less dramatic example of gubernatorial foreign policy. Governors negotiate, sign, and implement agreements with foreign governments or at least subnational entities of foreign governments. All of these agreements implicate overall U.S. foreign relations by establishing cross-border cooperation, by building U.S. ties to countries such as Israel, or by adopting a position on the necessity of international cooperation to secure a reduction of greenhouse gas emissions. All of these agreements place governors at the center of a foreign policy process, from which the federal government may often be excluded.

62. See *Brady*, 163 N.W. 540 (upholding an agreement between North Dakota and a Canadian town as not violating the Compact Clause).

63. See *Virginia v. Tennessee*, 148 U.S. 503 (1893) (holding that boundary negotiations between Virginia and Tennessee did not violate the Compact Clause).

64. See Conference of New England Governors & E. Canadian Premiers, Climate Change Action Plan, Aug. 28, 2001, http://www.scics.gc.ca/pdf/850084011_e.pdf [hereinafter Climate Change Action Plan]; see also Ken Colburn & Amy Royden, *New England States and Eastern Canadian Provinces Team Up To Tackle Climate Change*, CLIMATE CHANGE & SUSTAINABLE DEV. NEWSL., June 2003, at 7.

65. Climate Change Action Plan, *supra* note 64, at 7.

66. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol], available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (requiring member states to reduce emissions to five percent below 1990 levels by 2008-2012).

67. See Letter from President George W. Bush to Senators Charles Hagel, Jesse Helms, Larry Craig, & Pat Roberts (Mar. 13, 2001) (explaining his opposition and the Senate's opposition to joining the Kyoto Protocol), available at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

3. *Executive Actions Pursuant to Statutory Authorization*

The final example of gubernatorial foreign policy illustrates how governors act in cooperation with their state legislatures. It also illustrates how non-gubernatorial executive officials may be authorized to take actions that implicate foreign policy.

State legislatures have enacted a number of statutes that directly impact foreign affairs. The most controversial statutes require businesses that apply for state contracts to certify that they avoid business transactions with certain foreign countries.⁶⁸ Less aggressively, some statutes require businesses applying for state contracts to certify that their business in certain foreign countries complies with non-discriminatory principles.⁶⁹ State governments have also prohibited state executive officials from investing state pension funds in certain foreign countries.⁷⁰

In a different vein, a number of states have enacted statutes imposing special disclosure requirements on foreign insurance companies as part of state regulation of the insurance industry.⁷¹ These and other statutes can be fairly classified within my definition of gubernatorial foreign policy for two reasons. First, the Supreme Court has generally relied on the existence of an express federal statute or policy to invalidate such statutes. It has thus far avoided presumptions based on dormant federal control over foreign policy. Second, although governors and other executive officials act pursuant to state statutes, these statutes often grant governors or state executive officials significant discretion.

For instance, the well-known state efforts to regulate or suspend the licenses of insurance companies that issued, but did not honor, policies to Holocaust victims leave substantial discretion to state executive officials. Washington State allows its insurance regulators to lift such a suspension if the regulating company "is participating in the international commission process in good faith and is working through the international commission to resolve

68. See, e.g., An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Mass. Acts 239 (codified at MASS. GEN. LAWS ANN. ch. 7, §§ 22G-M (West 2002)), *invalidated by* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

69. See, e.g., MASS. GEN. LAWS ANN. ch. 7, § 22C (West 2002) (requiring businesses operating in Northern Ireland to certify non-discriminatory practices).

70. See, e.g., CONN. GEN. STAT. ANN. § 3-13h (West 2005) (restricting the use of state investment funds in Northern Ireland).

71. See, e.g., CAL. INS. CODE §§ 13800-13807 (West 2005); CAL. CIV. PROC. CODE § 354.5 (West Cum. Supp. 2003).

all outstanding claims with offers of fair settlements in a reasonable time frame.”⁷²

In sum, state interventions in foreign policy through legislative enactments typically allocate substantial discretion to state executive officials. Such officials exercise foreign policy powers by waiving statutory requirements or even terminating such requirements based upon their discretionary judgment.

II. THE LEGAL BASIS OF A GUBERNATORIAL FOREIGN POLICY

The system of gubernatorial foreign policy I have described appears at odds with the usual conception of federal government domination over foreign affairs. In this Part, I examine the legal basis for the system of gubernatorial foreign policy. I conclude that even the most extreme form of gubernatorial foreign policy—in which a governor acts in conflict with the policy of the federal government—is consistent with existing understandings of the balance between federal and state powers under the Constitution.

The federal government’s political branches have accepted and even buttressed these constitutional understandings by clearing out a constitutional space for a gubernatorial foreign policy. In a number of circumstances, the federal government has even declared that it will rely on state governments to carry out many of its international obligations. Without the power to commandeer the states, however, this means that the implementation of these international obligations is within the discretion of state governors.

A. A Constitutional Space for a Gubernatorial Foreign Policy

The constitutional framework supporting the operation of a gubernatorial foreign policy has two doctrinal components. First, while the Supreme Court has found that the federal government preempted a number of state activities in recent years, it has refrained from endorsing a theory of federal exclusivity over foreign affairs. This means that governors are generally free to engage in foreign policy activities absent express preemption by Congress or the President.⁷³ Second, the Court has continued to impose constitutional

72. WASH. REV. CODE ANN. § 48.104.090 (West 2005).

73. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (invalidating a California statute on the basis that it impermissibly interfered with the federal government’s conduct of foreign relations, because it required insurance companies doing business in California to disclose all information relating to policies sold in Europe by the company or anyone “related” to it between 1920 and 1945); *Crosby*, 530 U.S. at 372-73 (holding that a federal

prohibitions on the commandeering of state governors and other state executive officials, thus limiting the ability of the federal government to commandeer governors to fulfill a particular foreign affairs goal.

1. *The Retreat from Federal Exclusivity*

The theory of federal exclusivity holds that state governments cannot encroach on matters implicating foreign affairs, whether or not the federal government has actually approved a treaty, statute, executive agreement, or declaration with respect to the particular foreign policy issue.⁷⁴ This view enjoys broad support among commentators,⁷⁵ and a number of the Court's decisions have also embraced this approach.⁷⁶ For instance, on one occasion, the Supreme Court went so far as to declare that, for the purposes of foreign affairs, the "state[s] . . . do[] not exist."⁷⁷

The most powerful judicial articulation of the theory of federal exclusivity is found in *Zschernig v. Miller*.⁷⁸ In *Zschernig*, the Supreme Court invalidated an Oregon statute limiting the rights of foreigners to inherit real property if the inheriting foreign national's home country did not give U.S. citizens similar rights.⁷⁹ The Court's decision depended on a theory of exclusivity because the Court did not find that the state statute had been expressly preempted by any treaty, statute, or presidential order. Instead, the Court held that state laws "must give way if they impair the effective exercise of the Nation's foreign policy."⁸⁰

statute preempted a Massachusetts statute barring state entities from buying goods or services from companies that did business with the nation of Burma).

74. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 163-65 (2d ed. 1996) (describing the view that states are excluded from foreign affairs even without action by federal political branches).

75. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1297 (1996) ("[T]he Constitution appears to preclude the states from exercising direct authority over foreign relations . . ."); Denning & McCall, *supra* note 12 (arguing that state foreign policy activities are unconstitutional); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997) (arguing that state and local sanctions against Burma may be unconstitutional).

76. For a summary of the Supreme Court case law in this vein, see Ramsey, *supra* note 12, at 350-65.

77. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

78. 389 U.S. 429 (1968).

79. *Id.* at 440.

80. *Id.*

Since the *Zschernig* decision, the Court has not reaffirmed the federal exclusivity approach despite having had several opportunities to do so.⁸¹ The Court's most recent decision in *American Insurance Ass'n v. Garamendi* reflects this reluctance. The lower court in that case had invoked *Zschernig* to invalidate a California statute targeting foreign insurance companies for failing to pay World War II-related policies, on the ground that the statute interfered with the federal foreign affairs power;⁸² the Supreme Court, however, took a different approach. In his opinion for the Court, Justice Souter relied on executive agreements between the United States and German governments as evidence that the federal government had preempted California's statute. Although these agreements did not explicitly preempt California law, the Court found them to be evidence of an "unmistakabl[e]" policy to negotiate a resolution to the insurance coverage dispute.⁸³

The Court's opinion thus avoided adopting *Zschernig*'s exclusivity view, at least in its broadest formulation. Instead, the Court suggested that its approach followed Justice Harlan's concurrence in *Zschernig*, which would require preemption of state law if "state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government."⁸⁴ The test, Justice Souter held, depended on weighing the "strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."⁸⁵ He also suggested that the strength of the state interest in a particular policy could reduce the likelihood that the Court would find that policy to be in conflict with federal law.⁸⁶

81. Most notably, the Court avoided invoking a broad *Zschernig*-style approach to preemption in *Barclays Bank v. Franchise Tax Board of California*, 512 U.S. 298 (1994), when it upheld a state tax that appeared to conflict with a broader federal international tax policy.

82. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 397 (2003) (describing the district court's preliminary injunction holding that the California statute is an unconstitutional violation of federal foreign affairs power).

83. *Id.* at 421.

84. *Id.* at 420 (emphasis added).

85. *Id.*

86. *Id.* Although Justice Souter had no difficulty finding that there had been a necessary conflict between the state and federal laws in *Zschernig*, he did suggest that at some point the strength of the state interest in vindicating the claims of Holocaust survivors might displace the federal standard. But because the federal government has the same interest, he held, the "humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.* at 426-27.

Garamendi has been criticized for giving the federal executive branch too much discretion in its power to preempt state law.⁸⁷ Even so, Garamendi's approach still leaves room for a system of gubernatorial foreign policy. If the Court had revived Zschernig's approach, almost all of the activities I described in Part I would be subject to immediate preemption by federal courts whether or not the federal executive or legislative branches had acted. But the Supreme Court's reluctance to reaffirm Zschernig's theory of broad federal exclusivity suggests that there is doctrinal room for a gubernatorial foreign policy absent a clearly conflicting treaty, statute, executive agreement, or presidential declaration. Even in such a case, the Court would, per Justice Souter, weigh the strength of the state's interest against the federal claim of preemption.

2. *Commandeering*

While a system of gubernatorial foreign policy can survive under the Supreme Court's approach in Garamendi, the Court still recognizes the federal government's power to preempt (through treaty, statute, or executive act) almost all forms of state activities affecting foreign affairs. This express preemptive power was broadly endorsed by both the Crosby and Garamendi decisions and could effectively wipe out almost all forms of gubernatorial foreign policy. But the federal government's preemptive power is not unconstrained. Rather, it is limited by the constitutional prohibitions on the commandeering of states and state executive officials.

a. *New York v. United States and Printz v. United States*

In addition to its decisions limiting the federal government's exercise of power pursuant to the Commerce Clause,⁸⁸ the Supreme Court has imposed limitations on the federal government's ability to "commandeer" state governments to carry out federal policies.⁸⁹ The Court derived these "anti-commandeering" principles from the Tenth Amendment's recognition of the states' residual sovereignty.⁹⁰

87. See *id.* at 430 (Ginsburg, J., dissenting); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 898-925 (2004).

88. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

89. See, *e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

90. *Printz*, 521 U.S. at 919.

The modern Court's application of the anti-commandeering doctrine began with *New York v. United States*,⁹¹ which invalidated a federal regulatory scheme requiring states to dispose of low-level radioactive waste. The federal law was invalidated for impermissibly intruding on state sovereignty by commandeering the state governments to "enact and enforce a federal regulatory program."⁹² Five years later, the Court extended these anti-commandeering protections to state executive officials. In *Printz v. United States*,⁹³ the federal government argued that the gun background check program was distinguishable from *New York* because the program merely required state executive officials to provide "non-policymaking help in enforcing that law."⁹⁴ But Justice Scalia's opinion for the Court held that such a distinction was immaterial. "Congress cannot circumvent that prohibition [on commandeering] by conscripting the States' officers directly."⁹⁵

Unlike the Court's other federalism decisions, *New York* and *Printz* do not place constitutional limitations on the subject matter of federal regulations. Rather, the decisions limit how the federal government may pursue its regulatory objectives. Thus, even if the federal government has an unquestioned constitutional authority to regulate, the anti-commandeering decisions nevertheless prevent the federal government from requiring state executive officials to carry out its regulatory plan.

According to the Court, the prohibition on anti-commandeering reflects the Constitution's commitment to a dual system of sovereignties, including both the federal and state governments. Justice O'Connor's opinion for the Court in *New York* stated this principle broadly:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.⁹⁶

91. 505 U.S. 144.

92. *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

93. 521 U.S. 898.

94. *Id.* at 927.

95. *Id.* at 935.

96. *New York*, 505 U.S. at 188 (citation omitted).

b. *Commandeering and Foreign Affairs*

Neither New York nor *Printz* discussed whether the constitutional prohibition on commandeering also applies to the federal government's power to conduct foreign affairs. Nor has the Court addressed this question in later decisions discussing or applying the anti-commandeering doctrine.⁹⁷ Scholars, however, have highlighted the potential significance of the anti-commandeering principle, particularly as it was applied in *Printz*, to the federal government's efforts to exercise its foreign affairs powers against the states through the treaty power.

Professor Vázquez, for instance, argued that the primary legal justification for the anti-commandeering principle—namely, the Tenth Amendment's recognition of state sovereignty—does not apply to exercises of the federal treaty power.⁹⁸ He cited Justice Holmes's famous holding in *Missouri v. Holland*⁹⁹ that the treaty power is not limited by any "invisible radiation" of the Tenth Amendment.¹⁰⁰ Unlike the federal government's exercise of domestic constitutional powers, the federal treaty power does not infringe on any aspect of state sovereignty recognized by the Tenth Amendment because there are no limitations on the subjects that can be regulated by treaties.¹⁰¹

While compelling, this critique of anti-commandeering in the foreign affairs context fails to grapple with the important distinction between the power to make a treaty and the power to implement a treaty's obligations. The Constitution plainly allocates to the federal government the exclusive power to make treaties by negotiating, signing, ratifying, and acceding to treaties with foreign governments.¹⁰² This power to make treaties is not reserved to the states by the Tenth Amendment. But it does not follow that the Constitution

97. See, e.g., *Reno v. Condon*, 528 U.S. 141 (2000). In fact, no court has addressed the foreign affairs implications of *Printz* and *New York*. The First Circuit briefly considered the issue, but found that the litigant had waived the argument. See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999).

98. See Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1354 (1999).

99. 252 U.S. 416 (1920).

100. *Id.* at 434.

101. Vázquez therefore argued that the *Printz* limitation should be read very narrowly. Vázquez, *supra* note 98, at 1350–58. Professor Flaherty added a review of historical materials that generally agreed with this analysis. See Martin S. Flaherty, *Are We To Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1296 (1999).

102. See U.S. CONST. art. I, § 10, cl. 1 (denying states the power to make treaties); *id.* art. II, § 2, cl. 2 (granting to the President the power to make treaties).

also allocates to the federal government the exclusive power to implement a treaty's obligations as a matter of domestic law.¹⁰³

Within the U.S. system, treaties hold the status of supreme federal law¹⁰⁴ and it is generally accepted that treaties are equivalent to federal statutes.¹⁰⁵ But it is also generally accepted that many treaties are "non-self-executing" in the sense that they do not have domestic legal effect unless and until they are separately implemented.¹⁰⁶ And even some "self-executing" treaties cannot be enforced by courts because they do not create private causes of action.¹⁰⁷

A common mechanism for implementing a treaty's obligations, as Chief Justice Marshall noted, is a new federal statute specifically designed to implement the treaty.¹⁰⁸ But this is not the only mechanism. Some treaties may be implemented by presidential action,¹⁰⁹ while others may be implemented by state governments.¹¹⁰ The variety of domestic legal mechanisms for implementing treaties suggests that the constitutional power to implement a treaty is not necessarily coterminous with the constitutional power to make a treaty. The fact that the President or Congress has some power to implement treaties, for instance, does not mean that either institution's implementing actions are free of constitutional constraints imposed by either federalism or

103. The treaty power is only one of the foreign affairs powers that might be invoked against the states. A similar distinction might limit the federal government's power to invoke customary international law against the states. While Congress and the President hold the power to recognize rules of customary international law as binding on the U.S. government, their power to implement these rules against the states is still constrained by the Constitution's anti-commandeering prohibitions. For a discussion of other limitations on the effect of customary international law on the states, see Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 217-19.

104. U.S. CONST. art. VI, cl. 2 ("Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

105. See Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 339-45 (2005) (describing general judicial acceptance of, but noting scholarly disagreements about, the doctrine equating treaties with federal statutes).

106. See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (declaring treaties the law of the land but noting that in some cases, the "legislature must execute the [treaty], before it can become a rule for the Court").

107. See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722-23 (1995) (describing different types of non-self-execution, including the lack of a private right of action).

108. See *Foster*, 27 U.S. (2 Pet.) at 314.

109. See, e.g., Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) (implementing U.S. obligations under various international human rights treaties).

110. See Ku, *supra* note 9, at 499-510 (describing state implementation of treaties involving private international law).

separation of powers. Indeed, as Professor Rosenkranz has forcefully argued, Congress may not be able to rely upon its delegated authority under the Necessary and Proper Clause when implementing a treaty by legislation.¹¹¹ Rather, Congress may need to rely upon its other delegated powers to enact legislation implementing a treaty.

For this reason, when the federal government implements (as opposed to makes) a treaty, it is almost certainly limited by the same Tenth Amendment principles that limit its activities in the domestic sphere. Many of the same concerns animating the anti-commandeering prohibition in the domestic context can be invoked in the treaty-implementation context as well. For instance, in the Optional Protocol to the Vienna Convention on Consular Relations, the federal government obligated itself to notify consulates whenever a foreign national was arrested in the United States.¹¹² As in *Printz*, state officials are absorbing all of the costs of and responsibility for implementing this federal obligation. Without having any input in the development of the policy, states are “put in the position of taking the blame for [a federal obligation’s] burdensomeness and for its defects.”¹¹³

This burden on the states is not an unavoidable consequence of federal control over the treaty power because there are other non-commandeering methods for the federal government to fulfill its treaty obligations. It could implement its obligations by, for instance, creating a private right of action in federal courts for foreign nationals to challenge violations of their consular rights.¹¹⁴ It could even pass legislation imposing conditions on federal spending that would require state and local officials to comply with treaty obligations.¹¹⁵ These alternative methods could thus accomplish the federal (and international) regulatory objective without commandeering state and local officials.

111. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868, 1880-1912 (2005) (arguing that Congress’s legislative power under Article I to implement treaties is limited to matters it otherwise would have domestic authority to regulate).

112. See Optional Protocol to the Vienna Convention on Consular Relations, *supra* note 17.

113. *Printz v. United States*, 521 U.S. 898, 930 (1997).

114. For instance, the Court has stated that a treaty can serve as the basis for a private lawsuit invalidating a state law. *Asakura v. City of Seattle*, 265 U.S. 332, 341-42 (1924).

115. As far as I know, this method has never been tried in the context of treaty implementation. On the other hand, the Supreme Court is likely to uphold any conditional spending legislation against Tenth Amendment challenges. See *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987) (rejecting an “independent constitutional bar” to the use of the spending power to compel state action).

B. Expanding the Constitutional Space

Even assuming that the federal foreign affairs power is not exclusive and that the federal government lacks the power to commandeer state officials, the federal government continues to avail itself of a number of mechanisms to compel adherence to national foreign policies. Surprisingly, the federal government has emphatically chosen not to wield its most expansive and unchallenged power: preemption by treaty or statute. The choice to avoid preemption by limiting the domestic effect of a treaty, combined with the judicial prohibition on commandeering, carves out further space for state governors to exercise independent discretion in certain matters affecting foreign affairs.

1. Responding to Foreign Demands

States often become involved in foreign policy when a foreign government requests or demands that the United States alter some aspect of its domestic regulation or practice.¹¹⁶ The federal government has adopted a number of strategies to respond to the often justifiable protests from foreign governments.¹¹⁷ There is one strategy, however, that the federal government appears never to have adopted in response to foreign government demands. It has never ordered or “commandeered” state officials to comply with the demands of a foreign government or to carry out U.S. international law obligations.¹¹⁸ Instead, it has permitted the state governments to make the ultimate decision over how and even whether to comply with foreign demands. Indeed, the federal government has consistently relied on the state governments to carry out its international obligations to international tribunals.¹¹⁹ When defending its actions before the ICJ, the federal government emphasized the sovereign status of the states: “The separate states are not subsidiary bodies subordinate to the power of the Federal Government and subject to its direction. Rather, they remain sovereign and are the masters of

116. See Ku, *supra* note 9, at 495-99.

117. *Id.*

118. See *id.*

119. See discussion *supra* Subsection I.B.1.

their affairs within the areas of responsibility reserved to them by the United States Constitution.”¹²⁰

This record of historical and modern practice does more than simply support the proposition that the “commandeering” prohibition applies to state officials in foreign policy contexts. Even if the federal government has such a commandeering power, it has emphatically chosen not to exercise it. Thus, even if it is not constitutionally constrained from interfering with the states, the federal government has often left the decision of how to respond to foreign governments’ demands to the independent judgment of state officials.

2. Treaty Limitations

Though the federal government has refrained from attempting to commandeer or otherwise interfere with state governors in response to demands from foreign governments, it does have the acknowledged power to preempt state activities through treaty, statute, executive agreement, or executive declaration.¹²¹ Assuming that *Missouri v. Holland* remains good law,¹²² the federal government still has broad powers to eliminate state activities that interfere in foreign affairs. Surprisingly, the federal government has chosen not to exercise this power against the states. To the contrary, it has imposed severe limitations on its own ability to preempt state activity through treaties. These limitations carve out even more space for discretionary gubernatorial actions affecting foreign policy.

The most dramatic examples of the federal government’s self-imposed limitations are found in reservations, understandings, and declarations

120. Counter-Memorial of the United States of America ¶ 121, *LaGrand Case* (F.R.G. v. U.S.) (Mar. 27, 2000), available at <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm> (follow “Written Pleadings” hyperlink).

121. The first three methods have long been recognized. See HENKIN, *supra* note 74, at 157-58 (explaining that “there is no reason why a treaty, an executive agreement, a judicial doctrine or any federal regulation” should not preempt state law). The fourth method was recognized by the Supreme Court in *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003).

122. This may be a large assumption considering the strength of two recent academic attacks on the decision. See Bradley, *supra* note 9, at 553 (calling for the partial overruling of *Missouri v. Holland*’s claim that no federalism limitations exist on the scope of the treaty power); Rosenkranz, *supra* note 111 (calling for the overruling of *Missouri v. Holland*’s holding that legislation implementing treaties is not subject to Tenth Amendment federalism limitations).

attached to the ratification of international agreements.¹²³ These “RUDs” are usually conditions imposed by the Senate before giving advice and consent to treaties. In the trade context, the limitations are contained in legislation approving and implementing trade agreements. Although these limitations take different forms, all have the same legal consequence: They prevent international agreements from preempting, commandeering, or otherwise restricting the ability of state officials to act in matters affecting foreign affairs.

For instance, a number of state laws and activities have been challenged as violations of U.S. obligations under international trade agreements.¹²⁴ But states are largely free to ignore such findings, which do not have any direct effect in the U.S. domestic system. In approving the agreements, Congress specifically prevented such agreements from having any preemptive effect except in a lawsuit brought by the U.S. government itself.¹²⁵

Even though the federal government has never brought a lawsuit to enforce trade agreements against the states, the trade agreements do preserve the federal government’s authority to preempt inconsistent state law by lawsuit. No such provision is found in the conditions attached to U.S. ratification of leading international human rights treaties, however. For instance, in ratifying the International Convention on Civil and Political Rights, the United States attached a federalism “understanding[]” stating that the treaty would be implemented by the federal government within its existing jurisdiction, “and otherwise by the state and local governments”¹²⁶

The understanding reflects the President’s and Senate’s belief that the treaty does not alter the existing division of authority between the federal and state governments. The explicit recognition that the states would be responsible for implementing the treaty with respect to those matters within their existing jurisdiction further indicates that the treaty does not provide the

123. See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (providing a general overview of the system of reservations, understandings, and declarations).

124. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (reviewing the compatibility of certain state gambling regulations and trade treaty obligations); Final Award of the Tribunal, *Methanex Corp. v. United States*, 44 I.L.M. 1345 (Aug. 3, 2005) (considering and then rejecting the argument that a California gasoline regulation violated NAFTA obligations), available at <http://www.state.gov/documents/organization/51052.pdf>. Although the United States essentially prevailed in both cases, the cases do illustrate the exposure of state law to international trade obligations.

125. See 19 U.S.C. § 3312(b)(2) (2000); *id.* § 3512(b)(2)(A).

126. S. EXEC. REP. NO. 102-23, at 23, 24 (1992), reprinted in 31 I.L.M. 645, 659.

constitutional authority for federal legislation preempting matters currently controlled by the states.

This suggestion has been strengthened in the most recent treaties approved by the U.S. Senate. Upon ratifying the recent Convention against Transnational Crime¹²⁷ in the fall of 2005, the U.S. Senate attached a reservation declaring that the U.S. government is not bound by the treaty to the extent it required the federal government to “address conduct which would fall within” a sphere of local activity governed exclusively by state law.¹²⁸ In essence, the reservation removes any implication that the treaty could authorize federal preemptive authority over state activities, even if those activities affected the subject matter of the treaty. Similar reservations have been proposed for at least two other treaties under consideration by the Senate.¹²⁹

By imposing federalism limitations upon the domestic effect of these international agreements, the federal government has deliberately deprived itself of a key tool to compel state compliance with its foreign policies. Treaties, executive agreements, and implementing statutes are the primary mechanisms by which the federal government preempts inconsistent state law. Accepting the imposition of the above federalism limitations, however, means that such treaties, international agreements, and statutes cannot be used to compel state adherence to national foreign policy goals.

Because the federal government has effectively handcuffed itself from preempting state activity in many areas involving foreign policy, the state governments are the only governmental institutions in the United States authorized to fulfill those U.S. treaty obligations. As I have suggested, this often means that governors will be left with the sole power to decide whether and how to respond to foreign demands under the treaties.

127. S. TREATY DOC. NO. 108-16 (2005).

128. *Id.* § 2(a)(1).

129. See, e.g., LETTER OF SUBMITTAL, UNITED NATIONS CONVENTION AGAINST CORRUPTION, S. TREATY DOC. NO. 109-6 (2005), *available at* 2003 WL 24205811 (“The Government of the United States of America reserves the right to assume obligations under this Convention in a manner consistent with its fundamental principles of federalism . . . [and] therefore reserves to the obligations set forth in the Convention to the extent they (1) address conduct that would fall within this narrow category of highly localized activity or (2) involve preventive measures not covered by federal law governing state and local officials.”); LETTER OF SUBMITTAL, CONVENTION ON CYBERCRIME, S. TREATY DOC. NO. 108-11 (2001), *available at* 2001 WL 34368783 (“The Government of The United States of America, pursuant to Articles 41 and 42, reserves the right to assume obligations under Chapter II of the Convention in a manner consistent with its fundamental principles of federalism.”).

III. THE ADVANTAGES OF GUBERNATORIAL FOREIGN POLICY

The emergence of a system of gubernatorial foreign policy will be controversial. In the broader debate over foreign affairs federalism, scholars have pointed out the practical difficulties of permitting states to develop independent and potentially inconsistent foreign policies. They have argued that the U.S. constitutional system is premised on the maintenance of “one voice” with respect to matters affecting foreign affairs. Notwithstanding the force of the “one voice” argument, this Part offers a pragmatic functional defense of allowing a system of gubernatorial foreign policy to arise.

A. Building a Gubernatorial Foreign Policy Capacity

The very term “gubernatorial foreign policy” may seem paradoxical because governors do not seem to have the capacity to handle the intricacies of foreign policy. Although four out of the last five U.S. Presidents served as governors prior to taking office,¹³⁰ none of them claimed to have gained extensive experience in foreign affairs during their terms as governor. But it is worth noting that modern state executives are developing the capacity and experience to participate directly in the flow and ebb of foreign relations.

For instance, a number of states have established overseas offices to represent their particularized interests in countries of special importance. Alabama, for instance, has established a field office in Heidelberg, Germany to promote the state’s image in Europe and to strengthen ties with German automakers that have invested in the state.¹³¹ Virginia has established similar offices in China, Hong Kong, Singapore, Korea, and Japan to facilitate and encourage trade with East Asia.¹³²

Some state offices overseas have a long history. Since 1971, the State of Texas has operated a “Mexico Office” in Mexico City with the “goal of

130. Since 1976, the United States has elected four governors to the federal presidency: Jimmy Carter (Georgia), Ronald Reagan (California), Bill Clinton (Arkansas), and George W. Bush (Texas). The only non-governor elected was Reagan’s Vice President, George H.W. Bush, in 1988. Prior to 1976, no former governor had been elected since Franklin Roosevelt, of New York, in 1944. Overall, however, it is striking that nineteen of the forty-three U.S. Presidents served as governors prior to taking office as the chief foreign policy organ of the United States. For a compilation of presidential statistics, see Christopher DeMuth, *Governors (and Generals) Rule*, AM. ENTERPRISE, Jan./Feb. 2004, at 26, 29.

131. See NGA CTR. FOR BEST PRACTICES, ENHANCING COMPETITIVENESS: A REVIEW OF RECENT STATE ECONOMIC DEVELOPMENT INITIATIVES 10 (2005), available at <http://www.nga.org/Files/pdf/0501COMPETITIVENESS.pdf>.

132. *Id.* at 33-34.

strengthening trade, investment and tourism ties between Texas and Mexico markets with specific emphasis on benefiting small and medium sized Texas businesses.”¹³³

However, not all of these offices are focused merely on international marketing and business issues. At least two states have established domestic offices for the management of international relations generally. Maryland, for instance, has created a “Subcabinet for International Affairs” to “coordinate open communication and collaboration among state agencies regarding international affairs for the State of Maryland.”¹³⁴ The State of Washington has also established an “Office of International Relations and Protocol.”¹³⁵

To be sure, such scattered developments hardly constitute a bureaucracy comparable to the foreign policy capacity of the federal government. But the yardstick for measuring the gubernatorial foreign policy capacity is not whether governors will have more expertise than the federal government’s foreign policy bureaucracy. Plainly, governors will not. Rather, the question is whether governors will have a greater capacity to take foreign policy actions than would a state or federal court. In the traditional view, state governors are excluded from foreign affairs activities, but federal and state courts are then responsible for implementing U.S. obligations under a treaty, statute, or executive agreement. When making this comparison, at least, there are some reasons to believe that governors have a superior foreign policy capacity than federal and state courts.

For instance, when considering whether and how to implement the ICJ’s judgment in *Avena*, Governor Henry and Oklahoma’s highest criminal court simultaneously considered the proper way to respond. The Oklahoma court properly considered the effect of the consular rights treaty, the treaty obligations to the ICJ, and the effect on Torres’s case. But sitting as a court, it could not consider the possible effects of noncompliance on Oklahoma’s and the United States’ relationship with Mexico and the ICJ. Overall, the Oklahoma court, like all courts, had a limited ability to gather information

133. State of Texas Mexico Office Website, <http://www.tded.state.tx.us/mexico/> (last visited Mar. 17, 2006).

134. Exec. Order No. 01.01.2005.24, Robert Ehrlich, Governor of Maryland, Governor’s Subcabinet for International Affairs (May 11, 2005), *available at* <http://www.governor.maryland.gov/executiveorders/2005/0524eo.html>.

135. WASH. REV. CODE § 43.290.010 (1998). The office serves “as the state’s official liaison and protocol office with foreign governments.” *Id.* Moreover, the director of the office is appointed by and “shall serve at the pleasure of the governor.” *Id.*

beyond that particular case and to consider broader political relationships and trends.¹³⁶

By contrast, the governor's office had greater access to information concerning the broader political context of the ICJ decision. It had the ability to directly and privately communicate with representatives from the Mexican and federal governments. This secrecy, combined with an ability to act with dispatch, affords governors numerous advantages in resolving this and other foreign policy issues that come within their limited purview.

B. Accommodating Globalization While Preserving Federalism

One might agree that governors have some limited foreign policy expertise but still believe that a centralized, exclusive federal foreign policy system that speaks with "one voice" would work more effectively.¹³⁷ The rise of globalization has only heightened the argument for one voice. States, for instance, have traditionally held independent authority to regulate such matters as gambling, local health and safety, and criminal punishment. The forces of globalization have exposed all of these areas to the prospect of international regulation.¹³⁸

But it does not follow that internationalization requires nationalization. For instance, globalization has placed U.S. criminal punishment policies under international scrutiny. Both international courts and foreign governments have sought to modify the administration of the death penalty in the United States. The authority to change or modify those policies, however, lies primarily (and perhaps exclusively) with state governments. The simplest and most direct response to foreign government requests is action by the state governors in question. There is no functional necessity to bring the federal government into, for example, a dispute over Texas's process for hearing appeals of death

136. For a critique of courts in the administration of structural injunctions, see PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 150-84 (1983).

137. See, e.g., *United States v. Belmont*, 301 U.S. 324, 331 (1937) (invoking the one voice argument to hold that an executive agreement preempts inconsistent state law); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (defending the Supreme Court's decision in *Missouri v. Holland* on historical grounds); *id.* at 1310 (characterizing as strikingly irresponsible the possibility that states could have independent control to implement treaty obligations).

138. For instance, state policies in all of these areas have been challenged as inconsistent with international norms. See, e.g., *Avena Judgment*, *supra* note 1 (finding a treaty violation due to the United States' failure to provide a judicial hearing to challenge the effect of a consular rights violation on a capital punishment sentence).

sentences. The Governor of Texas can and does deal directly with foreign governments and is perfectly capable of changing or adjusting his or her policies in response to the foreign concerns.¹³⁹ Foreign governments are also perfectly capable of directly expressing their concerns to state governors.

Supporters of “one voice” might respond that the foreign policy consequences of Texas’s actions might affect all Americans, and not just Texans. This is a legitimate concern. But globalization has not only expanded the subjects of international concern; it has raised the profile of sub-national entities on the international stage. As Professor Spiro has argued, states have begun to achieve a substantial international presence in their own right.¹⁴⁰ The globalization of communications, trade, and travel has made it more likely that foreign nations can recognize the difference between a policy of the State of Texas and a policy of the State of New York.¹⁴¹

But even if gubernatorial actions abroad are not understood as the actions of a particular state, there still might be a justification for permitting a system of gubernatorial foreign policy. The need for one voice must be balanced against the United States’ continuing commitment to a system of federalism. As globalization subjects more and more state policies to international scrutiny, the traditional theory of one voice would lead to the eventual nationalization of all of these areas of state policy.

One voice might be the most effective way to fulfill international goals, but it also threatens the dual system of sovereignties that the Supreme Court has gone to great pains to preserve. Moreover, as a political matter, the threat (real or imagined) of international control over state policies operates as another disincentive to U.S. participation in many international agreements.¹⁴² In the long run, allowing the existence of a gubernatorial foreign policy operates as a

139. Whether the Governor wants to change the policy is a different question from whether he can do so. See *Texas To Ignore Court Order*, *supra* note 38.

140. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1259-70 (1999) (describing the rise of states as “demi-sovereigns”). Whether or not they are “demi-sovereigns,” the trend Professor Spiro described seems quite real.

141. To provide just one example of foreign retaliation against a particular state rather than the whole United States, the United Kingdom adopted legislation retaliating against corporations from political subdivisions that employed a tax method that harmed U.K. corporations. See *id.* at 1266 n.166 (noting that retaliatory legislation by the United Kingdom would have targeted only states rather than the entire foreign entity).

142. For instance, opponents of a number of human rights treaties have used the threat to states’ rights as basis for opposition. See, e.g., Richard G. Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 428-34 (2003) (arguing that implementation of the treaty by Congress would exceed federal power over states).

pragmatic constitutional compromise between the internationalizing demands of globalization and the continuing conception of the United States as a federal system. The federal government continues to retain its authority to enter into international commitments, even commitments relating to matters that were previously controlled by the state governments. But the federal government leaves implementation of those obligations, along with the power to respond to greater international scrutiny of state policies, to the state governments, and to their chief executives in particular.

CONCLUSION

The main goal of this Essay is to give academic recognition to the potentially significant role of governors in the conduct of U.S. foreign policy. Governors are increasingly responsible for dealing with demands from foreign governments and international institutions. They negotiate and participate in certain limited forms of international agreement. They also execute state policies intended to impose sanctions on foreign countries. All of this represents an emerging system of gubernatorial foreign policy characterized by governors exercising independent decision-making power over matters affecting the foreign policy of the entire United States.

The system of gubernatorial foreign policy I have described does not conflict with traditional understandings of federal control over foreign affairs. Recent Supreme Court decisions have retreated from claims of federal exclusivity over foreign affairs and have shielded state officials from commandeering by the federal government. This doctrinal framework has left a small space for gubernatorial foreign policy, which the federal government has expanded through its practice of relying on states to carry out foreign policy obligations and by imposing limitations on the preemptive effects of treaties and international agreements.

In my view, a system of gubernatorial foreign policy is the most practical and feasible way to accommodate the internationalizing pressure of globalization with the traditional conception of federalism still extant in U.S. constitutional jurisprudence. The states will continue to improve their capacity to deal with matters concerning foreign affairs that affect their traditional areas of jurisdiction. The federal government will retain the right to preempt, but not commandeer, state governments in the service of their foreign policy goals. As states continue to expand and exert their improved foreign affairs capacity, even this federal right to preempt may become less necessary so that, in the future, the federal government will rely more and more on state governors to carry out foreign affairs responsibilities. In this way, globalization and

federalism can both survive and prosper well into the Constitution's third century.