

LEFT OUT OF THE GAME: FAST-TRACK, NON-TARIFF BARRIERS, AND THE EROSION OF FEDERALISM

*William J. Kovatch, Jr.**

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On January 27, 1998, an embattled President Clinton stood before the nation promoting a litany of government initiatives in his State of the Union Address. Buried in his list of promises was a reference to a renewed pursuit of foreign trade agreements. President Clinton attempted to allay the fears of those who believe the expansion of free trade will only result in lower environmental and labor standards for the United States. Rather, the

* Mr. William J. Kovatch, Jr. received his B.A. in 1992 from the University of Miami; M.A. in 1994 from American University; Juris Doctorate Degree in 1998 from Temple University; and is a 1999 LL.M. candidate at Temple University. The author would like to thank Professors Jack Coe, Jeffrey Dunoff, Henry Richardson, III, and Deborah Zalesne for their inspiration and encouragement. The author would like to give special thanks to his fiancée, Lamphanh Sorathsasomboune, for her patience and support.

President asserted that the United States cannot promote higher standards if it retreats from foreign trade.¹

The President directed this portion of his speech to fellow Democrats, who played a large role in the defeat of Fast-Track in 1997.² Many Democrats feared how support of Fast-Track would impact their re-election campaigns slated for 1998. Specifically, the AFL-CIO, a traditional supporter of the Democratic Party, invested heavily in a public campaign to defeat Fast-Track, claiming the expansion of free trade would only cost the United States jobs.³

The Clinton Administration desired Fast-Track, in part, to assist in building a hemispheric free trade zone to include all of the Americas by the year 2005.⁴ The President promoted this agenda in a 1997 trip to South America.⁵ The use of Fast-Track to create a free trade zone of the Americas, however, confronts some tensions within the United States' federal structure.

The Constitution creates a federal system based upon the coexistence of the central government and the state governments.⁶ The state governments retain certain powers. However, the trend of trade liberalization and the power of states have come into conflict. Trade liberalization includes the reduction of "non-tariff barriers." These non-tariff barriers are regulations that have the effect of limiting access to a particular market of imported goods. However, regulations may stem from legitimate concerns of a state for its population. Yet, as the states do participate in trade agreement negotiations, they may find themselves bound by an instrument calling for changes in their regulatory scheme without participation. By giving the President the authority to act as the

1. President's State of the Union Address, *reprinted in This Is Not a Time to Rest. It Is a Time to Build*, WASH. POST, Jan. 28, 1998, at A24.

2. Fast-Track involves a grant of authority to the President in international trade matters. Under Fast-Track procedures, the President would have the authority to enter into trade negotiations, conclude a trade agreement, and submit the implementing legislation to Congress. Congress would then be prohibited from amending the implementing legislation, and could only approve or disapprove the measure. Fast-Track aims to streamline the process of concluding trade agreements, resulting in greater efficiency and certainty for trading partners of the United States.

3. Terry M. Neal, *Ad Watch: Trade Policy*, WASH. POST, Oct. 17, 1997, at A22.

4. Carla Anne Robbins & Matt Moffett, *Clinton Hopes to Boost Pact on Latin Trip*, WALL ST. J., Oct. 9, 1997, at A15.

5. Anthony Faiola, *Brazilians Wary of U.S. Trade Pact: Businesses Fear Dropped Barriers Could Damage Recovering Economy*, WASH. POST, Oct. 16, 1997, at A24.

6. When dealing with an issue such as international trade that affects both foreign nations and the fifty states of the United States, there exists a danger of confusion with respect to terms. The word "state" has a different meaning within the context of international law, and United States domestic law. To avoid this confusion, where possible, the term "state" in this paper refers to one of the fifty political subdivisions within the United States. For the sake of simplicity, the term "nation" will be used to denote a state in the context of international law.

voice of the nation in trade agreements involving non-tariff barriers, Fast-Track has the effect of eroding federalism.

This paper examines how Fast-Track affects the United States constitutional system. Part I explains the background to Fast-Track and NAFTA. Part II outlines the power of Congress to regulate Foreign Commerce with respect to state sovereignty. Part III argues that states have a legitimate concern under the Constitution in regulating for the benefit of their citizens. As Fast-Track does not involve formal consultation with the states prior to the conclusion of the trade agreements, it does threaten to erode the principle of federalism. Part III suggests an alternative to preserve federalism by including consultations with state governors during the negotiation process.

I. FAST-TRACK, FREE TRADE, AND NON-TARIFF BARRIERS

A. Background

Congress delegated power to the President to conclude international trade agreements as a method of avoiding the influence of special interests. Congress became aware of this danger after protectionist interests in 1934 pursued policies helping to push the world into the Great Depression.⁷ Congress responded through the Reciprocal Trade Agreements Act of 1934⁸ which delegated in the President the authority to negotiate and implement international trade agreements.⁹ Congress periodically extended this authority until 1967 when it lapsed.¹⁰

President Ford and Congress negotiated a renewal of presidential authority over international trade through the Fast-Track provisions of the Trade Act of 1974 (hereinafter "1974 Act").¹¹ Under Fast-Track, the President must first make a determination that barriers to trade "unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy."¹² Then, the President may enter into a trade agreement to remove those barriers.¹³ The President must notify Congress of his intentions ninety days before entering into a trade agreement.¹⁴ The President then submits the implementing bill through the majority leaders in

7. Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 697 (1996).

8. Pub. L. No. 73-316, 48 Stat. 943 (1934) (codified as 19 U.S.C. §§ 1351-1354).

9. 19 U.S.C. § 1351(a)(1)(A)(1934).

10. Edmund W. Sims, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471, 475 (1990).

11. Pub. L. No. 93-618, 88 Stat. 1978 (codified as 19 U.S.C. §§ 2112, 2191 (1974)).

12. 19 U.S.C. § 2112(b)(1).

13. *Id.*

14. *Id.* at § 2112(e)(1).

both the House of Representatives and the Senate.¹⁵ Congress may not amend the implementing bill.¹⁶ Congressional committees then have forty-five days to consider the bill. If the bill is still in committee after forty-five days, it is automatically discharged.¹⁷ A vote on the final passage of the bill is to be held no later than fifteen days after its discharge.¹⁸ This gives Congress a total of sixty days to consider the bill. Debate in both the House¹⁹ and the Senate²⁰ is limited to twenty hours. Fast-Track under the 1974 Act lapsed in 1980. Congress renewed Fast-Track authority with the Trade and Tariff Act of 1984,²¹ and the Omnibus Trade and Competitiveness Act of 1988.²² Fast-Track authority lapsed in 1993.

B. *Changes in Trade Agreements: NAFTA and the WTO*

The end of the Cold War led to dramatic changes in the world economy. The economies of the world have become more interdependent.²³ There has been a general rise in the understanding that international issues affect domestic interests.²⁴ The process of globalization has caused "a worldwide convergence of economic and political values."²⁵ As the North American Free Trade Agreement (hereinafter "NAFTA")²⁶ and the World Trade Organization (hereinafter "WTO")²⁷ demonstrate, the nations of the world have agreed that the lifting of barriers is the best way to promote international trade. However, these new trade agreements have provoked a debate on the limitations of Fast-Track in considering the domestic impact of international trade issues.

1. Fast-Track and Adequate Debate

Through agreements such as NAFTA and the WTO, the scope of international trade agreements have expanded to include issues previously

15. 19 U.S.C. § 2191(c)(1).

16. *Id.* at § 2191(d).

17. *Id.* at § 2191(e)(1).

18. *Id.*

19. *Id.* at § 2191(f)(2).

20. 19 U.S.C. § 2192(g)(2).

21. Pub. L. No. 98-573, 98 Stat. 2948 (1984).

22. Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 2903 (1988)).

23. Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 430, 439 (1997).

24. *Id.* at 429, 433.

25. *Id.* at 429.

26. North American Free Trade Agreement, Dec. 17, 1992, Can-Mex.-U.S., 32 I.L.M. 289 (1993) [hereinafter "NAFTA"].

27. Agreement Establishing the World Trade Organization, April 15, 1994, 33 I.L.M. 13 (1994).

considered to be within the exclusive jurisdiction of the national government. These new trade agreements give international entities a greater ability to review domestic laws to determine if they create non-tariff barriers that are incompatible with the principles of the agreements. This creates the potential for the alteration of a nation's domestic laws and a limitation on that nation's sovereignty. As Fast-Track limits debate, there is a question as to whether there is an adequate opportunity to assess fully the impact of these agreements on domestic law.²⁸

Fast-Track may not adequately protect the interests of states with respect to the harmonization of domestic laws. In December of 1992, the United States, Canada, and Mexico concluded NAFTA. NAFTA differed from previous trade agreements involving the United States as it provided for greater economic integration between the United States, Canada and Mexico.²⁹ Through NAFTA, "the United States [surrendered] its role, at least to Canada and Mexico, as a separate trading entity and [became] a part of a regional entity."³⁰

By developing a system that strives for greater harmonization, NAFTA created a tension between trade liberalization and the sovereignty of subsidiary governments. Article 105 of NAFTA states: "The Parties shall ensure that all necessary measures are taken to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, *by state and provincial governments*."³¹ Thus, the drafters of NAFTA consciously bound their governments to strive for integration even of their subsidiary governments.

For the United States, this aspect of NAFTA led to objections from state governments. The "impetus for globalization" has limited the states' ability to regulate in areas such as environmental protection, labor

28. See Dana Rohrabacher, *Pennies for Thoughts: How GATT Fast Track Harms American Patent Applicants*, 11 ST. JOHN'S J. LEGAL COMMENT. 491, 494 (1996). Representative Rohrabacher raised the concern of adequate debate when she testified before the Subcommittee on Courts and Intellectual Property on the effect the WTO had on United States patent law. Before the creation of the WTO, United States patent law guaranteed seventeen years of protection to the patent owner after the date the patent was issued. *Id.* Under the WTO, however, Representative Rohrabacher claimed patent protection was changed to twenty years from the date of application. *Id.* at 495. Because protection under United States law would now start at the time of application, inventors applying for patents representing significant technological breakthroughs would receive less protection under these changes as such patents typically take a number of years to issue. *Id.* at 495-96. Representative Rohrabacher claimed that as this passed under Fast-Track procedures, Congress did not give the change "neither full debate nor full scrutiny." *Id.* at 494. As Fast-Track prohibited Congress from adequately addressing this issue due to the limitation of debate, this significant change in the law was not addressed thoroughly.

29. C. O'Neal Taylor, *Fast Track, Trade Policy and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 6 (1994).

30. *Id.* at 7. (alteration in original).

31. NAFTA, *supra* note 26, art. 105 (emphasis added).

protection, health and safety standards, and competition rules.³² No constitutional duty exists for federal authorities to consult with the states when negotiating trade agreements.³³ Yet, by the terms of NAFTA, states must regulate according to its guidelines.³⁴ In response to this situation, state authorities complained that NAFTA weakened the enforcement of state regulations.³⁵ State laws would now become subject to challenge as non-conforming to NAFTA provisions on non-tariff barriers.³⁶ NAFTA brought into conflict the goal of integrating the North American economies in order to facilitate trade and the sovereignty of state governments.

2. NAFTA Labor and Environmental Issues

NAFTA's failure to address labor and environmental issues in the text of the primary agreement set the stage for a bitter political battle in the United States.³⁷ By including Mexico in the agreement, the opponents of NAFTA feared the agreement would lead to the erosion of labor and environmental standards in the United States. Mexican labor is cheaper than that of the United States and Canada. This gives Mexico a comparative advantage in labor costs.³⁸ Thus, by adding Mexico to the free trade agreement, opponents argued jobs would migrate from the United States to Mexico. Opponents also argued NAFTA would also create pressure on the United States to lower its labor standards.³⁹

With respect to environmental protection, Mexico is a developing nation. Mexican environmental regulations are less stringent than those of the United States and Canada. The Mexican government is also less effective in enforcing those regulations. As companies can take advantage of this situation, this gives Mexico a comparative advantage with respect to environmental standards. Companies wishing to decrease their costs in connection to protecting the environment could move to Mexico.⁴⁰ Further, opponents to NAFTA were concerned that United States environmental standards could come under attack as non-tariff barriers.⁴¹

32. A.J. Tangeman, Comment, *NAFTA and the Changing Role of State Government in a Global Economy: Will the NAFTA Federal-State Consultation Process Preserve State Sovereignty?*, 20 SEATTLE U. L. REV. 243, 244 (1996).

33. *Id.* at 245-46.

34. *Id.* at 251.

35. Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 425 (1995).

36. *Id.*

37. Taylor, *supra* note 29, at 8.

38. *Id.* at 82-83.

39. *Id.* at 80.

40. *Id.* at 99-100.

41. *Id.* at 101.

NAFTA was seen by opponents as setting a dangerous precedent for future trade agreements. By ceding authority over non-tariff barriers to other trading partners, the United States endangered the concerns of labor and environmental interests. To this end, President Clinton proposed addressing labor and environmental issues in side agreements to NAFTA.⁴² This, however, did not alleviate the concerns of NAFTA opponents. The result was a fierce political battle over the passage of the implementation legislation.

C. *The 1997 Proposals*

President Clinton submitted to Congress a proposal to renew the President's authority to negotiate trade agreements utilizing Fast-Track.⁴³ This proposal was known as the Export Expansion and Reciprocal Trade Agreements Act of 1997 (hereinafter "1997 Clinton Proposal").⁴⁴ The proposal came at a time when the President desired to begin negotiations to include Chile in NAFTA.⁴⁵

In response to the President's request for Fast-Track authority, Representative Bill Archer, Chairman of the House Ways and Means Committee, introduced H.R. 2621, a bill entitled the "Reciprocal Trade Agreement Authorities Act" (hereinafter "H.R. 2621").⁴⁶ H.R. 2621 left intact the procedure for Fast-Track as set forth in the 1974 Act.⁴⁷ H.R. 2621 also provided for consultations between the Executive and Congress.⁴⁸

H.R. 2621 also sought to ensure that foreign nations would not use labor, environmental, health and safety standards as arbitrary or unjustified barriers to trade.⁴⁹ H.R. 2621 further aimed to prevent a nation from taking advantage of lowering their labor and environmental standards. To accomplish this task, H.R. 2621 charged the President with ensuring that a nation does not waive or derogate from its existing standards in order to gain a competitive advantage in trade.⁵⁰

42. Taylor, *supra* note 29, at 8.

43. Letter from President William J. Clinton to the Congress of the United States (Sept. 16, 1997).

44. Export Expansion and Reciprocal Trade Agreements Act of 1997 (visited Sept. 18, 1997) <<http://www.whitehouse.gov/Initiatives/FastTrack/bill.html>>.

45. Bob Davis & Greg Hitt, *Clinton Asks for Trade-Pact Authority, Avoiding Labor, Environmental Issues*, WALL ST. J., Sept. 17, 1997, at A2.

46. H.R. 2621, 105th Cong., 1st Sess. (1997) [hereinafter H.R. 2621].

47. *Id.* § 103(b)(3).

48. *Id.* § 104.

49. *Id.* § 102(b)(7)(A).

50. *Id.* § 102(b)(7)(B).

II. FAST-TRACK AS A THREAT TO FEDERALISM

A. *The Role of Federalism in the United States Constitutional System*

The Founding Fathers built the United States' government upon the principle of federalism. Instead of creating single central government and dissolving the existing state governments, the Federal Government was superimposed upon the several states. James Madison specifically rejected the notion that the Constitution would spell the downfall of the state governments. Rather, Madison envisioned the states as "essential parts of the federal government," playing a larger role in the lives of the people than the Federal Government.⁵¹ To that end, Madison argued, "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."⁵²

Federalism continues to serve a vital function in the United States. By retaining the states, the federal system promotes diversity, pluralism, and experimentation in public policy.⁵³ In addition, federalism serves a prophylactic function. The continued existence and vitality of the states protects the people "from arbitrary majoritarianism and overcentralization"⁵⁴ The structure of the Constitution sought to avoid the accumulation of power in a single entity.⁵⁵ By dispersing power, not only among the three branches of the Federal Government, but also among the Federal Government and the governments of the states, the Constitution serves to secure the people from such an excessive accumulation.

Federalism ensures a "greater degree of citizen participation."⁵⁶ Through a republican form of government, the people choose representatives to serve their interests. When a single legislature governs a population the size of the United States, the voice of a single citizen is necessarily diluted. But when a republican government governs smaller geographical units with smaller populations, the citizens have a greater voice in the formation of public policy. In a state legislature, the ratio of citizens to representatives is smaller than in the Congress which governs the entire nation. The smaller the ratio, the greater influence a single voter has. Federalism, therefore, ensures greater liberty, and gives the voter greater control over their own governance. Federalism is a value that should be secured, and protected.

51. THE FEDERALIST No. 45 (James Madison).

52. *Id.*

53. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 105 (1969).

54. *Id.*

55. THE FEDERALIST No. 47 (James Madison).

56. ADVISORY COMMISSION, *supra* note 53, at 105.

B. Congressional Power over Commerce and State Sovereignty

Congress has the power “[t]o regulate Commerce with foreign nations.”⁵⁷ Chief Justice John Marshall stated “[T]he power of Congress does not stop at the judicial lines of the several States. It would be a very useless power, if it could not pass those lines.”⁵⁸ The Tenth Amendment, however, declares that all “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁹ The question is whether this reservation of power to the states can act as a limit on the power of Congress to regulate foreign commerce.

1. The Commerce Clause and State Sovereignty

The Supreme Court addressed the issue of the relationship between the Commerce Clause and state sovereignty in *National League of Cities v. Usery*.⁶⁰ Congress exercised its commerce power by amending the Fair Labor Standards Act [hereinafter “FLSA”]⁶¹ to extend its coverage to state employees.⁶² The Court proclaimed: “This Court has never doubted that there are limits upon the power of Congress to override sovereignty, even when exercising its otherwise plenary power to tax or to regulate commerce which are conferred by Article I of the Constitution.”⁶³ Congress used its Commerce power to regulate “States in their capacities as sovereign governments,” interfering with states acting “in areas of traditional governmental functions.”⁶⁴ The act was, thus, unconstitutional.

The Court revisited *Usery* in *Garcia v. San Antonio Metropolitan Transportation Authority*.⁶⁵ The Court faced the issue of whether state sovereignty immunized states from the minimum wage and overtime provisions of the FLSA.⁶⁶ The Court asserted that lower federal courts

57. U.S. CONST. art. I, § 8, cl. 3.

58. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 195 (1824). *Gibbons*, however, involved the conflict between a New York act that granted a monopoly over the navigation of waterways within its jurisdiction with a license granted by Congress. *Id.* at 2-3. As the case involved interstate commerce, Marshall’s discussion of international commerce is dicta. However, Marshall was using the discussion to explain the extent of Congressional power over commerce, and to illustrate how that power penetrates state boundaries.

59. U.S. CONST. amend. X (ratified 1791).

60. 426 U.S. 833 (1976).

61. 29 U.S.C. § 203(d)(1994).

62. *Usery*, 426 U.S. at 836-37.

63. *Id.* at 842.

64. *Id.* at 851-52. Chief Justice Rehnquist listed a few traditional governmental functions. They are: fire prevention, police protection, sanitation, public safety, and parks and recreation.

65. 469 U.S. 528 (1984).

66. *Id.* at 533.

struggled with the *Usery* standard of “identifying a traditional function for the purpose of state immunity under the Commerce Clause.”⁶⁷ The Court rejected the *Usery* standard as “unworkable” and “inconsistent with established principles of federalism”⁶⁸ Accordingly, the Court upheld the constitutional validity of the FLSA as it applied to the states.⁶⁹

In support of his opinion, Justice Blackmun contended that the rights of states received protection from the structure of the federal government.⁷⁰ The Constitution accommodated state sovereignty through representation in the House of Representatives, and equal representation in the Senate.⁷¹ This protected the states from an overreaching Congress.⁷²

Justice O'Connor dissented stating, “The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded.”⁷³ O'Connor proclaimed, “The true ‘essence’ of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme.”⁷⁴ In O'Connor's view, the courts must remain diligent in protecting the principle of federalism.⁷⁵ Reminding the Court of Chief Justice Marshall's formula from *McCulloch v. Maryland*,⁷⁶ Justice O'Connor declared, “It is not enough that the ‘end be legitimate’; the means to that end must not contravene the spirit of the Constitution.”⁷⁷ Therefore, just because the task may be difficult, courts should not abdicate its duty to protect state sovereignty.⁷⁸

Writing for the majority, Justice O'Connor defended state sovereignty in *Gregory v. Ashcroft*.⁷⁹ In that case, state judges challenged a provision of the Missouri Constitution requiring judges to retire at age seventy as a violation of the ADEA.⁸⁰ Justice O'Connor asserted that “a healthy balance of power between the States and the Federal Government will

67. *Id.* at 530.

68. *Id.* at 531.

69. *Id.* at 546.

70. *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 528, 550 (1984).

71. *Id.* at 551.

72. *Id.*

73. *Id.* at 580 (O'Connor, J., dissenting).

74. *Id.* at 581 (O'Connor, J., dissenting) (*citing* *Younger v. Harris*, 401 U.S. 37 (1971)).

75. *Garcia* at 581 (1984) (O'Connor, J., dissenting).

76. 17 U.S. (3 Wheat) 316 (1819).

77. *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting).

78. *Id.* at 588-89 (O'Connor, J., dissenting).

79. 501 U.S. 452 (1991).

80. *Id.* at 456.

reduce the risk of tyranny and abuse from either front.”⁸¹ The states, therefore, “retain substantial powers under our constitutional scheme, powers with which Congress does not readily interfere.”⁸² The citizens of a sovereign state have a right to set the qualifications for judges within their state.⁸³ Thus, as ambiguity existed as to whether judges were employees under the act, O’Connor construed the act to avoid the intrusion upon the rights of the states, thereby upholding the Missouri constitutional age requirement.⁸⁴

The limits of the use of commerce power by Congress to proscribe rules to the states when involved in environmental matters became an issue in *New York v. United States*.⁸⁵ A provision of an act of Congress required the states to regulate radioactive waste in a manner consistent with the direction of Congress, or to “take title to and possession of low level radioactive waste generated within their borders and become liable for all damages waste generators suffer as a result of the States’ failure to do so promptly.”⁸⁶ The Court concluded: “that while Congress has substantial power under the Constitution to *encourage* the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer on Congress the ability to *compel* the States to do so.”⁸⁷

Therefore, Congress cannot use its commerce power to direct the states to adopt a particular scheme of regulation.⁸⁸ The choice given to the states, to regulate according to the Congressional desire or take title to the waste, was “tantamount to coercion,” and therefore an unconstitutional invasion of state sovereignty.⁸⁹

Under the Commerce Clause, Congress has the power to regulate the state’s relationship to its employees as if it were a private employer. However, Congress may not intrude upon the states’ sovereign prerogatives. Congress may not use its commerce power to interfere with the means by which a state chooses its public officials. Nor may Congress use its commerce power to direct the states to adopt regulations that Congress prescribed.

81. *Id.* at 458.

82. *Id.* at 461.

83. *Id.* at 473.

84. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

85. 505 U.S. 144 (1992).

86. *Id.* at 174-75.

87. *Id.* at 149 (emphasis added).

88. *Id.* at 161.

89. *Id.* at 175.

2. Foreign Affairs and State Sovereignty

The cases mentioned above, however, dealt with Congressional power over interstate commerce. As Fast-Track would extend to the President the ability to negotiate international trade agreements, the power of Congress to regulate when faced with state sovereignty may take on a new dimension.

Justice Holmes found the power of the Federal Government over international affairs to confront different considerations when conflicting with state action in *Missouri v. Holland*.⁹⁰ *Holland* involved a treaty between the United States and Great Britain concerning the killing of migratory birds that passed between Canada and the United States.⁹¹ Justice Holmes first noted while “[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution”⁹² no such qualification existed with respect to the supremacy of treaties. Holmes found it questionable whether the provisions of the treaty were contrary to the Constitution.⁹³ “The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”⁹⁴ Holmes concluded that “[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”⁹⁵ Therefore, when the nation faced an issue that could only be addressed in conjunction with a foreign nation, the Federal Government may intrude upon the states’ power and proscribe a rule through a treaty.⁹⁶

State action may nonetheless be upheld even when that action may have an effect on international relations. In *Clark v. Allen*⁹⁷ a resident of the State of California died in 1942 bequeathing her property to relatives in Germany.⁹⁸ The California Probate Code at that time required a foreign nation grant reciprocal rights to United States citizens before aliens residing in that nation could take property by succession or through a will.⁹⁹ The Court conceded that this statute had some incidental effect in foreign nations.¹⁰⁰ However, when there is no overriding federal interest, and the state did not actively pursue foreign policy, a statute having incidental

90. 252 U.S. 416 (1920).

91. *Id.* at 431.

92. *Id.*

93. *Id.* at 433-34.

94. *Id.*

95. *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

96. *Id.* at 435.

97. 331 U.S. 503 (1947).

98. *Id.* at 505.

99. *Id.* at 506, n.1.

100. *Id.* at 517.

effects on foreign relations is not automatically invalid.¹⁰¹ Therefore, the California statute was valid.

Different consequences follow when a state actively pursues a foreign policy agenda. In *Zschering v. Miller*¹⁰² a resident of Oregon died intestate leaving heirs in the Communist nation of East Germany. An Oregon statute required a foreign nation to guarantee the right of its citizens to receive property by succession “without confiscation” before the property could be transferred.¹⁰³ The Court determined that the statute was an intrusion in the field of foreign affairs, entrusted by the Constitution to the President and Congress.¹⁰⁴ The Court noted that the statute aimed to exclude Marxist nations from taking title to the property of the deceased.¹⁰⁵ In order to determine when “confiscation” occurs, the State of Oregon would have to make inquiries into foreign law, and judge the credibility of diplomatic statements.¹⁰⁶ The Court noted that decisions under this law were made according to foreign policy attitudes present during the Cold War.¹⁰⁷ The Court stated that the lack of a treaty on the subject matter was itself not dispositive. Rather, “even in the absence of a treaty, a State’s policy may disturb foreign relations.”¹⁰⁸ As such, the Oregon statute was found unconstitutional.

The Supreme Court addressed the issue of the extent of the foreign commerce power of Congress in *Japan Line, Ltd. v. County of Los Angeles*.¹⁰⁹ In this case, Japanese shipping companies owned ships designed to carry cargo containers. These containers would travel through the State of California. Under California law, property located in the state on March 1 of any year was subject to an ad valorem tax.¹¹⁰ The Japanese company paid the tax, but sued for a refund.¹¹¹

The issue before the Court was whether the California tax unconstitutionally intruded upon the power of Congress to regulate foreign commerce. The Court noted that “[w]hen construing Congress’ power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required” than under the interstate commerce power.¹¹²

101. *Id.* at 517. One such overriding federal interest could be if a treaty is in force on the subject.

102. 389 U.S. 429 (1968).

103. *Id.* at 431.

104. *Id.* at 432.

105. *Id.* at 434.

106. *Id.*

107. *Zschering v. Miller*, 389 U.S. 429, 437 (1968).

108. *Id.* at 441.

109. 441 U.S. 434 (1979).

110. *Id.* at 437.

111. *Id.*

112. *Id.* at 446.

Specifically, in foreign commerce, there is a greater need for national uniformity: “[A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern.”¹¹³ The California tax created an asymmetry in international taxation that created a disadvantage for Japan.¹¹⁴ Therefore, as the tax defeated uniformity, it stood as an unconstitutional invasion of the foreign commerce power of Congress.¹¹⁵

That a tax scheme may differ from state to state, however, is not enough to invalidate the tax as an invasion of the foreign commerce power. In *Container Corp. of America v. Franchise Tax Board*¹¹⁶ a California franchise tax employed the “unitary business” principle in determining the tax base.¹¹⁷ California applied this principle to a Delaware corporation doing business in California as well as in foreign nations. The Court asserted that merely because a tax has “resonations” in foreign affairs, it is not necessarily unconstitutional.¹¹⁸ Here, the tax did not create an asymmetry in international taxation.¹¹⁹ Taken with the fact that it was imposed on a United States corporation, the Court held that the foreign policy of the United States was not seriously threatened by the tax.¹²⁰

The *Holland* holding dealt specifically with the power of *treaties* to displace state regulation. Under the authority granted by Fast-Track, the President would not negotiate a treaty for the purposes of Article VI of the Constitution, but an executive agreement authorized by a delegation of power by Congress. Congress would need to pass implementing legislation for the agreement to have the force of law. In that regard, it would not deserve the enshrinement as the supreme law of the land as a treaty.

Both the *Clark* and *Container Corp. of America* decisions show that more is necessary for a state law to be unconstitutional than the fact that the law touches upon foreign relations incidentally. Under these precedents, a state law will be found unconstitutional when a state *intends* to affect foreign policy, even when that law falls within the traditional state jurisdiction. Thus, despite the fact that probate law is an area of regulation

113. *Id.* at 448.

114. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434,453 (1979).

115. *Id.* at 453-54.

116. 463 U.S. 159 (1983).

117. *Id.* at 162-63. Under the unitary business formula, the state first defines the scope of the business entity’s activities in the taxing jurisdiction. Then, the state apportions income between the taxing jurisdiction and the elsewhere by looking at the character of the activities performed within and without the jurisdiction. *Id.* at 165.

118. *Id.* at 193 (*citing Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 448 (1980)).

119. *Id.* at 195.

120. *Id.* at 196.

reserved to the states, when the Oregon law in *Zschering* required state judges to make foreign policy considerations it intruded upon the foreign policy powers of the Federal Government. The aim of the Oregon statute was to further Cold War objectives by denying the validity of testamentary gifts made to citizens of Communist nations. In contrast stands the decision in *Clark*. The California statute applied equally to all foreign nations. The only requirement was that of reciprocity. The California statute did not attempt to pursue an international affairs agenda of favoring nations adhering to an ideology consistent with that of the United States.

A state regulation that has the effect of barring the importation of foreign goods should not be found invalid unless it reflects an attempt on the part of a state to interfere in foreign policy matters. Often, when a state regulates in the areas of health, safety, environmental and labor standards, it is acting to protect the interests of its citizens. So long as the regulations are not applied in a discriminatory fashion there is little danger that the aim of the state is to affect foreign policy. When the regulation does not aim to affect foreign policy it does not represent an unconstitutional encroachment upon the power of the Federal Government.

The decision of the Court in *Japan Line* appears to be consistent with the need for establishing a uniform system of taxation with respect to foreign commerce. Thus, the Foreign Commerce Clause would forbid a state from imposing its own tariffs. Extending the reach of the foreign commerce power of Congress to all non-tariff barriers, however, would appear contrary to the design of the Founding Fathers. The historical experience of the American Colonies supports the notion that in delegating the power to regulate foreign commerce to Congress, the Founding Fathers were concerned primarily with taxation as a means of regulation.¹²¹ Thus, in the experience of the Founding Fathers, the imposition of duties acted as the main vehicle of regulation of international trade.

The concept of non-tariff barriers only recently emerged in multilateral trade agreements. The Tokyo Round of GATT negotiations, which lasted from 1973 to 1979, was the first time multilateral trade

121. Prior to independence, Great Britain imposed upon the American Colonies the system of mercantilism. Britain imposed high duties on imports in order to force the American Colonies to purchase goods from other British possessions, and not from competing foreign colonies in the West Indies. ANDREW C. MCLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 12 (1935).

Alexander Hamilton asserted that a unity of national regulation over international trade was necessary in order to give the United States an advantage over foreign powers. *THE FEDERALIST*, No. 11 (Hamilton). By uniting against foreign nations such as Great Britain, Hamilton theorized that the United States could force Britain to open markets in the West Indies, and protect American rights concerning fisheries, and navigation of the Great Lakes and Mississippi River. *Id.* Therefore, the grant of power over foreign commerce was meant to provide the United States with a united front when acting in international trade issues.

negotiations focused on the issue of non-tariff barriers.¹²² Previously, the primary concern of trade negotiations was the level of tariffs. It appears unlikely that the Founding Fathers conceived of the regulation of non-tariff barriers when drafting the Constitution.

III. INJECTING THE STATES INTO FAST-TRACK

A. States Have a Legitimate Role to Play in International Trade

The United States embarked on a new era of international trade relations demanding greater federal and state cooperation. Since the end of the Cold War, the world has become increasingly economically interdependent.¹²³ Issues of foreign relations have direct effects on the lives of United States citizens.¹²⁴ For example, lower wage levels in nations such as Mexico create incentives for companies to locate manufacturing facilities in those nations. As a result, manufacturing jobs have been migrating out of the United States.

Greater participation of the state governments in international trade does not represent an intrusion upon the power of the Federal Government. Rather, it is an adaptation "to a changing world in which the line between national and state or local concerns is much less clear than when the Republic was founded."¹²⁵ By acting in international trade, states merely "promote legitimate concerns and interests and express the views of their citizens in international and foreign policy issues of relevance and importance to them."¹²⁶ Foreign trade and investment translates into more local jobs. The role of the state in some respects has become to act as the protector and creator of jobs within their boundaries. Much of the state action in international trade has been to further these roles.¹²⁷

Additional concerns have been raised by the creation of a free trade zone through NAFTA. Free trade zones aim to eliminate barriers to trade among its members. This means not only the elimination of customs and duties, but also the elimination of non-tariff barriers. Non-tariff barriers

122. D.M. McRae & J.C. Thomas, *The GATT and Multilateral Treaty-Making: The Tokyo Round*, 77 AM. J. INT'L L. 51, 68 (1983).

123. Seita, *supra* note 23, at 439.

124. *Id.* at 433.

125. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 828 (1989).

126. *Id.*

127. For example, the Commonwealth of Pennsylvania, and the City of Philadelphia recently pursued the Norwegian shipbuilding firm of Kvaener SA to invest in the Philadelphia Navy Yard. The Navy Yard was closed by the United States Government in 1995. Since then, the Commonwealth and City governments have actively sought an investor to utilize the shipyard in order to create more jobs in the Philadelphia area. J. Alex Tarquino, *Developments: Philadelphia's Ship May Be Coming In*, WALL ST. J., Nov. 26, 1997, at B10.

include more than just the imposition of quotas on imports. The term is ill defined, and subject to an expansive meaning.¹²⁸ In 1974, when Congress approved Fast-Track, the Senate stated that the term: "cover[s] a variety of devices which distort trade, including quotas, variable levies, border taxes, discriminatory procurement and internal taxation practices, rules of origin requirements, subsidies and other direct and indirect means used to discourage imports or artificially stimulate or restrict exports."¹²⁹ The Senate definition demonstrates the ambiguity, and expansive nature of the term. Specifically, an indirect measure used to discourage imports may refer to any regulation that has the effect of restricting trade. Such an expansive definition of "non-tariff barriers" has been used by the European Union.¹³⁰ Regulations in matters such as health, safety, and labor issues can be viewed as non-tariff barriers if they have the effect of acting as an impediment to market entry of products from other nations.¹³¹ If congressional power over foreign commerce is read to pre-empt state regulation over all non-tariff barriers, there is a real danger of encroaching upon the state sovereignty.

128. Non-tariff barriers have been defined as obstructions to international trade other than customs duties or taxes on importation. 2 R. STURM, CUSTOMS LAWS & ADMINISTRATION § 61.2 (1985).

129. S. REP. NO. 1298, at 74 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7224 (reporting on a bill granting President authority to enter into trade agreements regarding non-tariff barriers).

130. Any national rule directly or indirectly, actually or potentially capable of hindering trade is forbidden by the EU as a non-tariff barrier. Case 120/78, Reme-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1978] E.C.R. 649.

131. NAFTA does allow the member nations to retain the right to promulgate standards related to safety, protection of life and health, protection of the environment, and the protection of consumers. These regulations must conform to the principle of non-discrimination. In addition, unnecessary obstacles to trade cannot be established. The regulations must have a demonstrated purpose of achieving a legitimate object, and the regulation cannot exclude goods of a member nation that meets that legitimate object. NAFTA, *supra* note 26, art. 904.

A similar provision is found in the European Union. Nations that are part of the EU may maintain their own standards. However, any national rule that is directly or indirectly, actually or potentially capable of hindering trade is forbidden as a non-tariff barrier. If the EU has not itself developed a rule on a certain issue, the member nations may adopt their rules that are reasonable and proportional. A proportional measure cannot be broader than necessary. Case 120/78, Reme-Zentral AG v. Bundesmonopolverwaltung für Branntwein, [1978] E.C.R. 649.

Indeed, Germany's beer purity laws came under attack for violating the rule of proportionality. While Germany defended its law as a measure necessary to protect the health of German citizens, the European Court of Justice found that the regulation was not necessary to protect public health. Of key importance was the fact that other European nations allowed the very additives and preservatives forbidden by German law. In addition, Germany allowed the same preservatives when used in other beverages. Case 178/84, Re Purity Requirements for Beer: Commission v. Germany, 1979 E.C.R. 649.

In order to create greater integration of markets, harmonization is necessary not only among the national governments, but the subgovernments as well. Within a national government that employs a federal scheme, power is diffused among the national and subgovernments. In the United States, the fifty states and the District of Columbia may regulate certain subject matters. Specifically, under the police power, the states have the power to regulate the health, safety, welfare, and morals of its citizens.¹³² Such standards may preclude the admission of imported products to the state's market when those products fail to meet those standards. The negotiators of NAFTA specifically aimed to address this problem, by binding the national governments to ensure that their subgovernments adhere to the agreement.¹³³ If states must adhere to the requirements of a trade agreement such as NAFTA, regulations may need to come into conformity with the agreement. By aiming to reduce non-tariff barriers, these agreements may encroach upon state sovereignty. State governments do not play a formal role in trade negotiations. As a result, states may be bound to change their laws and regulations by an agreement which they had no part in creating. By precluding states from participating in the negotiation of international trade agreements, issues which increasingly have local consequences are being made by a more remote decision-making bodies.¹³⁴ Involving states in international trade only serves to further the democratic process.

It has been argued that the structure of the federal government protects the rights of states.¹³⁵ However, constitutional changes have eliminated any body of the Federal Government that represents the interests of states as states. Each state is entitled to two Senators.¹³⁶ However, due to the Seventeenth Amendment Senators are popularly elected, not appointed by the state governments.¹³⁷ While Senators do represent the population of the state from which they are elected, they do not necessarily represent the interests of the state governments.

Under Fast-Track, no provision exists to protect the legitimate interests of the states to promulgate regulations. Yet, should the United States follow the precedent set in NAFTA, states will be bound by trade agreements to comply with their terms. This effectively robs the states of

132. *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 577 (1847); *Commonwealth v. Alger*, 61 Mass. 53 (1851).

133. NAFTA, *supra* note 26, art. 105.

134. "As national governments become larger, more remote and more indifferent, it is only through state and local governments, more accessible and responsive to their views, that ordinary citizens can make their voices heard." Bilder, *supra* note 125, at 828-29.

135. *Garcia v. San Antonio Metro. Transp. Auth.*, 469 U.S. 550 (1984).

136. U.S. CONST. art. I, § 3, cl. 1.

137. Originally, under Article I, § 3 of the Constitution, the state legislatures chose the Senators. The rules changed in 1913 with the passage of the 17th Amendment.

their sovereignty in favor of the central government. Through the mechanism of trade agreements, the President and Congress may direct the states to adopt a course of regulation of subjects rightfully within the states' police power. Trade agreements, therefore, would allow the federal government to violate the standard of *New York v. United States*.¹³⁸

B. *A Proposal*

A solution to this problem would be to create a role for the states in Fast-Track. When the President enters into negotiations over a trade agreement that will affect non-tariff barriers, the President could consult the governors of the states. The President need not consult each governor individually, just as under Fast-Track the President need only consult the members of the House Ways and Means Committee and the Senate Finance Committee.¹³⁹ In a similar fashion, the governors of the fifty states could organize themselves in a committee to deal with trade issues affecting states' interests. Such a requirement would ensure a voice for the states in the process of negotiating trade agreement that could affect states' interests.¹⁴⁰

The participation of the governors should be limited to those areas where states have a legitimate interest. Those are non-tariff barriers. Specifically, the governors should only offer their opinions on those non-tariff barriers that would change state regulations. These would be in health, safety, environmental, and labor issues. The governors should not be able to affect those parts of the trade negotiations dealing with issues fully within federal jurisdiction, such as tariff levels, the elimination of quotas, and rules of origin. Such constraints would ensure that the governors only participate in areas of legitimate state concern, and not unduly hinder the negotiation process.

Congressional consultations are reinforced by the fact that Congress must still approve of the trade agreement before it can become law. Thus, Congress has the security of voting on the trade agreement. The governors do not have such insurance. This can be remedied by requiring any provision of a trade agreement that involves changes in existing health, safety, environmental and labor regulations to receive approval from a majority of the committee of governors. Without such approval, any such provision cannot become law.

To set up such a mechanism within Fast-Track need not create an inefficient hindrance to the President. First, as Chief Justice Burger

138. 505 U.S. 144, 175 (1992).

139. H.R. 2621, *supra* note 46, § 104(a)(1)(B).

140. This proposal would be consistent with current United States policy as 19 U.S.C. § 2114c(2)(A)(i)(1998) provides an informal method whereby the President consults with state governments where "he deems appropriate," during the course of trade negotiations.

asserted, efficiency is not a primary goal of a democracy.¹⁴¹ Indeed, if efficiency translated into the accumulation of power in the hands of the President at the expense of the states, this could lead to a tyrannical government. The President would be able to rule without taking into concern the interests of the state governments.

Second, efficiency would actually be promoted by adding a prophylactic mechanism to protect state sovereignty¹⁴² before the conclusion of the trade agreement. Currently, states would be forced to wait until after the agreement is concluded to challenge the agreement.¹⁴³ Otherwise, without a final agreement, there would be no tangible injury

141. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 944 (1982).

142. *See supra*, notes 51-56 and accompanying text for an argument that federalism is an independent value from the rights and interests of the people who live within the states that is worthy of protection. *See also, supra* notes 74-79 and accompanying text for a summary of Justice O'Connor's defense of federalism.

143. In *Public Citizens v. United States Trade Representative*, 970 F.2d 916, 917 (D.C.Cir. 1992), the Court of Appeals for the D.C. Circuit faced a challenge to NAFTA negotiations. The plaintiffs sought an order for the Trade Representative to prepare an environmental statement for NAFTA during the negotiation process. The court found that for there to be a cause of action, there needed to be a final act of an administrative agency. *Id.* at 919. In this case, as the negotiations were still in progress, there was no guarantee that the negotiations would produce a final agreement. Without a final agreement, there can be no final act of an administrative agency. *Id.*

After NAFTA had been concluded, but before it had passed Congress, the plaintiffs renewed their suit. The Court of Appeals reasoned that since the President had the authority to renegotiate NAFTA, or decide not to submit it to Congress, it was not the Trade Representative's action that the plaintiffs were challenging. *Public Citizens v. United States Trade Representative*, 5 F.3d 549, 553 (D.C.Cir. 1993), *cert. denied*, 114 S.Ct. 685 (1994). As presidential actions were not final administrative agency acts, they were not reviewable under the APA. *Id.* The court concluded by stating that "NAFTA's fate now rests in the hands of the political branches. The judiciary has no role to play." *Id.* This statement is a power indication of the deference the courts gave to the Executive branch. It implied that the courts would not interfere in the process of implementing the trade agreement, even if it involved the accelerated process involved in Fast Track.

One more attempt to compel the issuance of an environmental impact statement came to the District Court in *Public Citizens v. Kantor*, 864 F.Supp. 208 (D.D.C. 1994). In this case, the Uruguay Round of GATT had to be completed, and an agreement sent to Congress under Fast-Track procedures. *Id.* at 211. This time, the court asserted that the decision of the Court of Appeals in the second action brought by the plaintiffs "unequivocally foreclosed judicial review." *Id.* The court could not revisit the issue on a writ of mandamus. *Id.* at 213.

These cases demonstrate a reluctance on the part of the courts to review the process of negotiation of trade agreements. Instead of deciding the case on the merits of the cause of action, the courts dismissed the cases under a doctrine of deference. The courts decided to dismiss the cases finding either the controversy to lack the requisite ripeness, or the plaintiff to lack standing. This suggests a tendency of the courts to avoid the issue of the constitutionality of the President's authority under Fast-Track.

that the states could contest.¹⁴⁴ The states would be forced to challenge trade agreements only after becoming law. At that point, there would be greater pressure on the courts to uphold the validity of the agreement.

The better alternative would be to address the issue of state sovereignty before the agreement is concluded. The removal of non-tariff barriers that affect state regulations could then be addressed during the negotiation process, and receive an approval before the agreement becomes final. Then, an agreement such as NAFTA could not be said to dictate to the states how to regulate without including the states in the process. This would have the function of protecting not only the value of creating greater certainty with regard to trade agreements that affect the states, but also of upholding federalism.

IV. CONCLUSION

The history of presidential trade authority has shown a tendency of Congress to delegate power to the President to decrease influence of special interests. Beginning in 1934, Congress sought to avoid the influence of protectionist forces. The effect of Fast-Track today is to blunt the influence of labor and environmental interests. It is for this reason that labor and environmental interests have aimed to defeat Fast-Track.

However, in centralizing authority over international trade agreements, Congress may be acting to circumvent safeguards deliberately placed in the constitutional structure. Specifically, federalism acts to ensure excessive power does not become accumulated in one set of hands. The aim is to avoid tyranny.

No safeguards exist in Fast-Track for federalism. As trade agreements address non-tariff barriers, the Federal Government must recognize that trade agreements affect states' interests. By the very terms of NAFTA, the Federal Government is bound to seek state compliance. Yet, the states have no role in the formation of the trade agreements. Instead, they are forced to accept the agreement and any changes in state laws, without a voice in its creation. This problem can be solved easily by requiring the President to consult representatives of state governments during the negotiations, just as the President consults members of Congress. Such a requirement would not act as a hurdle to the formation of a trade agreement, and encourages greater efficiency by avoiding attacks on the agreement after it has been concluded. Requiring consultations with representatives of state governments during trade negotiations would ensure continued vitality of federalism.

144. *Public Citizens*, 970 F.2d at 919.