Made in the USA Foundation v. United States: NAFTA, the Treaty Clause, and Constitutional Obsolescence

Rachel S. Brass

I. INTRODUCTION

After years of negotiation and domestic political conflict, the United States, Mexico and Canada adopted the North American Free Trade Agreement (NAFTA) in 1994.[1] Four years later, the Made in the USA Foundation and the United Steel Workers of America filed suit in the Northern District of Alabama,[2] charging the United States with passing NAFTA in violation of the Treaty Clause of the United States Constitution.[3] The plaintiffs argued that Congress, in passing NAFTA, did not abide by the procedures outlined in Article 2, section 2, clause 2 of the U.S. Constitution (the Treaty Clause)[4] and that the Treaty Clause[5] outlines a specific procedure for adopting treaties. Because Congress passed NAFTA using a simple majority of both houses rather than a supermajority of one house, NAFTA was argued to be unconstitutional.[6] In a lengthy, largely well-reasoned opinion, Judge Probst found NAFTA constitutional.[7]

The opinion in *Made in the USA Foundation v. United States* raises three critical issues: (1) whether the Supreme Court has the power to negate treaties that violate the Constitu-

1. *See North American Free Trade Agreement, Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S. C. §§3301-3473 (1993)).*

2. *See* Made in the USA Found. v. United States, 56 F. Supp.2d 1226 (N.D. Ala. 1999). *See also* George Becker, *NAFTA is Unfair – and Unconstitutional: First, this 'Trade Agreement' is Really a Treaty and Needed Senate Approval. Second, NAFTA Betrays America*, PITTSBURGH POST GAZETTE, August 5, 1998, at A7 (reviewing arguments of the plaintiffs by Becker, international president of the United Steelworkers of America); David Rubenstein, *Steelworkers Try to Dismantle NAFTA in Federal Court Battle*, CORP. LEGAL TIMES, April, 1999, at 1.

3. *See* U.S. CONST. art II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur. . .").

4. *See* Made in the USA Found., 56 F. Supp.2d at 1229.

5. *See* U.S. CONST. art II, § 2, cl. 2.

6. *See* Made in the USA Found., 56 F. Supp.2d at 1278.

7. *See id.* at 1323.

tion; (2) whether NAFTA constitutes a "treaty" either as envisioned by the framers or as defined under contemporary international law; and (3) whether the Treaty Clause provides the sole means of adopting treaties. The Supreme Court has never reviewed the latter two issues.[8] While the *Made in the USA* decision may be politically necessary,[9] it serves to undermine the text of the Constitution, and makes the Treaty Clause obsolete. Because Congress did not comply with the requirements of the Treaty Clause in adopting NAFTA, the agreement is unconstitutional and Probst's decision should be overturned.

This Comment seeks to revitalize the Treaty Clause and protect the integrity of the Constitution through a judicial overturning of NAFTA. Part I outlines the adoption of the Treaty Clause and the traditional analysis that courts apply to cases involving treaties and international agreements. It also reviews the history of fast-track negotiating authority and the passage of NAFTA. Part II recounts the holding and reasoning in *Made in the USA Foundation*. Part III questions the validity of the court's reasoning that Congress held the authority to negotiate NAFTA using fast-track negotiating authority. This Comment concludes that the district court erred in finding NAFTA constitutional.

8. *See id.* at 1229 ("remarkably, in the over two hundred years of this nation, the Supreme Court of the United States has not specifically and definitively decided the principles applicable to" what constitutes and treaty and whether the Treaty Clause offers an exclusive means of forming binding international agreements). *See also* ELBERT M. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 114-15 (1960) (noting that wide use of international agreements "apparently convinced attorneys appearing before the Supreme Court that it would be useless to argue that an international agreements is invalid because it is not a 'treaty'").

9. As the United States argues in the principal case, a decision finding NAFTA unconstitutional could potentially damage both trade relations and our international bargaining power. *See* Made in the USA Found., 56 F. Supp.2d at 1249-51. However, as this Comment explains, a decision for the plaintiffs would not limit the Government's ability to enter into international and trade agreements. *See infra*, note 163 and accompanying text (explaining the feasibility of a balance between constitutionally mandated procedures and efficient congressional-executive agreements). *See also* Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1092 (1990) (arguing that the controversy over executive agreements is a matter of constitutional norms and domestic relations not international norms and foreign relations).

II. THE TREATY CLAUSE AND INTERNATIONAL TRADE AGREEMENTS

A. THE TREATY CLAUSE

THE HISTORY OF THE TREATY CLAUSE

While drafting the Constitution, the framers discussed with great passion and detail[10] the Treaty Clause, which states that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur."[11] According to the framers, discussions involved three key concerns.

First, to ensure that the fledgling nation formed no international agreements that might oppress certain regions of the country, all treaties required approval by the Senate.[12] This

---

10. *See* James Madison, *Helvidus, No. I, in* LETTERS AND OTHER WRITINGS OF JAMES MADISON, VOL. I. 1769-1793 611, 615 (By Order of Congress, 1865) (stating that the clause was essentially important because treaties "sometimes have the effect of changing not only the external laws of the society but operate also on the internal code"); *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 175 (1996) (recognizing treaties as a matter of special concern to framers). *See generally* RALSTON HAYDEN, THE SENATE AND TREATIES: 1789-1817 at 1 (1920).

Note that treaties warrant mention distinct from mere laws in article. II, §2 and in the supremacy clause. *See* U.S. CONST. art II, § 2, cl. 2; U.S. CONST. art. VI, § 2.

11. *See* U.S. CONST. art II, § 2, cl. 2.

12. *See* U.S. CONST. art I, § 3, subd. 1. *See also* THE FEDERALIST NO. 64 (John Jay) (indicating that the framers selected the senators based on their integrity, lengthier terms, greater detailed knowledge and dedication to national interests).

At the Constitutional Convention, participants made an attempt to give the House of Representatives a role in the approval of treaties, but the delegates voted down the proposal ten to one. *See* Joel D. Joseph, *Why NAFTA Violates the Constitution*, THE SAN DIEGO UNION-TRIB., July 16, 1998, at B11. Instead, the Constitution limited the role of the House to deliberating "on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as in their judgment, may be most conducive to the public good." *See* 4 ANNALS OF CONGRESS 769 (1786) [1795-1795]. In other words, the framers limited the House to engaging in what is necessary and proper to implement a treaty. *See* Missouri v. Holland, 252 U.S. 416 (1920). The framers also objected to any delegation of the authority to make international agreements. *See* THE FEDERALIST NO. 64 (John Jay). This included involvement of the House, because it would involve the concurrence of too many different bodies. *See* THE FEDERALIST NO. 75 (Alexander Hamilton). *See also* Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking*, 18 MICH. J. INT'L L 445, 449-455 (1997) (evaluating the role of the "Senatorial Dominance Model," which places responsibility for treatymaking with the Senate, in interpreting framers intent as evidenced by behavior at the constitutional convention).

guaranteed equal representation by each state.[13] To provide greater protection for regional and state interests, the framers required that a super-majority (two-thirds of all Senators) approve any treaties adopted.[14]

Second, to provide the new government with greater authority to engage convincingly in international negotiations, the framers opted to include the executive branch in the treaty ratification process.[15] As originally proposed, the authority to make treaties would have been entrusted solely to a majority of the Senate, with no presidential participation.[16] The framers, however, decided that this structure entrusted too much power to the Senate, and amended the provision to include an active presidential role.[17] As a result, the Constitution gives primary authority for negotiations to the Executive Branch.[18] Finally, the framers feared encroachments by one branch against the nation's liberty. Therefore, they instituted the requirement for

13. *See* THE FEDERALIST NO. 64 (John Jay) (stating that the Senate preserves equal influence by each state).

14. *See* Madison, *supra* note 10, at 617 (defending concurrence of two-thirds as necessary, to prevent hasty action); THE FEDERALIST NO. 22 (Alexander Hamilton) (noting two-thirds requirement insures approval by a national majority); THE FEDERALIST NO. 64 (John Jay) (stating that "as all the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body"); THE FEDERALIST NO. 75 (Alexander Hamilton) (arguing that the two-thirds rule is "one of the best digested and most unexceptionable parts of the plan").

With early treaties, the Senate participated in both its "advice and consent" and approval roles. *See* U.S. Const. art. 2, § 2, cl. 2; THOMAS M. FRANCK AND EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 135-7 (1979). However by 1814, when the United States negotiated the Treaty of Ghent (Treaty of Peace and Amity, Dec. 24, 1814, 8 Stat. 218, TS 109, 12 Bevans 41), the Senate no longer sought to advise the President prior to treaty negotiation. *See* RALSTON HAYDEN, THE SENATE AND TREATIES (1789-1817) (1920). For an analysis of the "advice and consent" duty *see generally* Sklamberg, *supra* note 12, at 448 (advocating in favor of a return to an active Senate role in the negotiation of treaties).

15. *See* THE FEDERALIST NO. 75 (Alexander Hamilton).

16. *See* Edwards v. Carter, 580 F.2d 1055, 1063 (D.C. Cir. 1978) (holding that the framers made the treaty power available to the President, "the chief executant of foreign relations under our constitutional scheme," with the advice and consent of two-thirds of the Senate, as a means to accomplishing the public purpose of effective foreign affairs).

17. *See id.*

18. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 57 S. Ct. 216, 220 (1936); *see also* Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406 (1989).

Senate approval of negotiated treaties as a check on executive authority.[19]

The framers, when writing and discussing the Treaty Clause, failed to define the meaning of the term "treaty" within the text.[20] But Emmerich de Vattel, the leading legislative scholar of the time, in *The Law of Nations,* made distinctions between treaties and agreements.[21] Vattel indicated a difference based on importance and duration.[22] Chief Justice Taney recognized the influence of Vattel on the framers' conception of treaties, noting that treaties had greater consequences than non-treaty agreements.[23] The Supreme Court, in an attempt to provide a framework for reviewing international agreements, has defined a treaty as an agreement requiring ratification by two-thirds of the Senate.[24]

TREATY CLAUSE JURISPRUDENCE

The Supreme Court has never reviewed the exclusivity of the Treaty Clause, but lower courts have remarked on it.[25] In

19. *See* Madison, *supra* note 10, at 614-15 (emphasizing that a treaty is a law and therefore requires participation by the legislature to avoid tyranny); THE FEDERALIST NO. 75 (Alexander Hamilton) (arguing that the nation should not entrust its entire treaty making power to individual men, who by their very nature, cannot be trusted); *see also* HENKIN, *supra* note 10, at 36-37 (noting the deliberate shift by the framers to a check oriented system for treaty making in the Constitution based on their experience with the failed system included in the Articles of Confederation).

20. *See* THE FEDERALIST NO. 75 (Alexander Hamilton) (describing what treaties do, but failing to define what they are). *See also* HENKIN, *supra* note 10, at 175-76 (the framers did not differentiate treaties from international agreements).

21. *See* EMMERICH DE VATTEL, THE LAW OF NATIONS, §§§ 152, 153, 192 (1775). Scholarship on the views of the framers regarding Treaties cites the strong influence of their contemporaneous scholar, Monsieur De Vattel and his work *The Law of Nations. See, e.g.,*Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 Yale L.J. 664, 668 (1944). *Cf.* James Madison, *Letter to Thomas Jefferson, May 8, 1793, in* THE COMPLETE MADISON: HIS BASIC WRITINGS 257 (Saul K. Padover ed., 1953) (discussing role of Vattel in contemporary debates on the role of Treaties); Madison, *supra* note 10, at 611, 614 (noting Vattel as controlling scholar on the role of the legislature in international affairs).

22. *See* VATTEL, *supra* note 21 (arguing that Treaties involve issues of greater national importance and are of a longer duration than agreements).

23. *See* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569-70 (1840). *See also* Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-43 (1872) (Justice Clifford writing for the court).

24. *See* Edye v. Robertson, 112 U.S. 580, 598-99, 5 S. Ct. 247, 254 (1884); Weinberger v. Rossi, 456 U.S. 25, 29-30, 102 S. Ct. 1510, 1514 (1982).

25. *See* Made in the USA Found., 56 F. Supp.2d at 1226. *See, e.g.,*New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836) (invalidating treaty be-

the 1892 case of *In Re Sutherland*, the District Court of Oregon noted:

> [I]t does not appear that the treaty aforesaid. . .has ever been confirmed by the United States senate. The constitution (article 2, sec. 2) gives the president power to make treaties, 'with the advice and consent of the senate' and not without it. So far as appears, the senate not having advised and consented to this so-called 'treaty,' it has no legal force, and the proceedings taken thereunder are of no avail.[26]

While no higher court has adopted this language, neither has any higher court explicitly repudiated it. The former United States Court of Customs and Patent Appeals[27] differentiated treaties from international compacts, arguing that the latter did not require Senate approval.[28] The Tenth Circuit declined to consider whether an international promise constitutes an enforceable treaty or an executive agreement.[29] Citing the polit-

---

cause it violated the U.S. Constitution's Fifth Amendment Takings Clause); Edwards v. Carter, 580 F.2d at 1056 (upholding treaty against suit by House of Representatives challenging the return of Panama Canal to Panama as an unconstitutional transfer of property), *cert. denied*, 98 S. Ct. 2240 (May 15, 1978); *cf.* Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (recognizing the Missouri Compromise Act's prohibition on slavery as an unconstitutional taking and therefore invalidating the Act. Congress adopted the Missouri Compromise Act to implement the Louisiana purchase treaty). *See also*; Byrd, *supra* note 8, at 87-88 (evaluating decisions invalidating treaty implementation acts); WILLARD BUNCE COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INFERENCES AND DUE PROCESS OF LAW 159-176 (1941) (discussing the *Dred Scott* case for its role in treaty interpretation).

26. 53 F. 551, 552 (D. Or. 1892).

27. Succeeded by the United States Court of Appeals for the Federal Circuit.

28. *See* Star-Kist Foods, Inc. v. United States, 47 C.C.P.A. 52, 64, 275 F.2d 472, 483 (C.C.P.A. 1959).

29. *See* Dole v. Carter, 569 F.2d 1109, 1110 (10th Cir. 1977). *See also* Goldwater v. Carter, 444 U.S. 996, 1003-04, 100 S. Ct. 533, 537 (1979) (Rehnquist, J., concurring in the judgment) (discussing whether decision to withdraw from a treaty requires Senate approval is a political question); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989) (evaluating the role of the judiciary in foreign affairs). *But see* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Chief Justice Marshall) (construing treaties as equivalent to an act of the legislature and therefore within the review of the Court); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) (arguing that "statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution"); THE FEDERALIST NO. 22 (Alexander Hamilton) (stating: "The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."); THE FEDERALIST NO. 80 (Alexander Hamilton) (noting that courts must review treaties as part of their role in preserving the national peace). *See generally* BYRD, *supra* note 8, at 83-110; HENKIN, *supra* note 10, at 198-204; COWLES, *supra* note 25, at 12 (indicating that unconstitutional treaties are invalid and unenforceable).

ical question doctrine, the court held that this issue was not one for the courts to decide.[30] The Ninth Circuit has held that until ratified by two-thirds of the Senate a treaty remains without force.[31] The absence of Constitutional jurisprudence on this subject has allowed the President and Congress to expand their use of the congressional-executive agreement as a substitute for a formal treaty.

B. THE CONGRESSIONAL-EXECUTIVE AGREEMENT

Congressional-executive agreements do not follow the normal course of conduct under the Constitution in that they give the President greater latitude in forming international agreements.[32] In some agreements, Congress authorizes the President to conclude agreements already negotiated.[33] In others, Congress adopts implementing legislation or allocates funds to meet obligations created by Executive action.[34] The United States enters congressional-executive agreements through a two step process: the President negotiates terms with one or more foreign governments; Congress then approves the terms through either a statute or joint resolution.[35]

THE HISTORY OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

Prior to World War II, the United States entered into approximately 1,000 treaties and 200 executive agreements involving both international trade and foreign relations.[36] Starting in the 1940s, a shift occurred as American scholars and politicians started to defend the use of congressional-executive agreements

30. *See* Dole, 569 F.2d at 1110; *See generally,* Glennon, *supra* note 29, at 814 (defining political questions as nonjusticiable question involving issues best left to political branches to resolve); *See also* Baker v. Carr, 369 U.S. 186, 217 (1962) (establishing balancing test to determine if an issue is a political question).

31. *See* Securities and Exch. Comm'n v. International Swiss Inv. Corp., 895 F.2d 1272, 1275 (9th Cir. 1990).

32. *See* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements,* 86 CAL. L. REV. 671, 726-27 (1998).

33. *See* HENKIN, *supra* note 10, at 215 (citing the Headquarters Agreement with the United Nations and the International Monetary Fund agreements as examples).

34. *See id.* at 216.

35. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799, 804-5 (1995).

36. John B. Rehm, *Making Foreign Policy Through International Agreement, in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 126, 127 (Francis O. Wilcox and Richard A. Frank eds., 1976).

as an alternative method of forming international agreements.[37] Beginning in the New Deal era, the United States negotiated a number of substantial agreements using the congressional-executive agreement such as the Bretton Woods Agreement.[38] Despite protests by the Senate, which has been politically restrained from blocking agreements because they are not passed as treaties, the growing use of these agreements has continued.[39]

During the 1940s and 1950s, both houses of Congress passed numerous amendments proposing to alter the manner in which the United States enters international agreements.[40] In the 1940s, the House approved several amendments to replace the Senate supermajority requirement and replace it with a vote by both Houses.[41] In the 1950s, the Senate considered the most famous, the Bricker Amendment, which proposed replacing treaties with congressional legislation on foreign policy.[42] Attempts to pass the Bricker Amendment failed by a close margin because of opposition by both the Eisenhower administration and influential members of Congress.[43] They felt that the proposed amendment would place excessive power over foreign affairs in the House.[44]

While the United States used the congressional-executive agreement broadly after World War II, it became the preemi-

37. *See* QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922); HENKIN, *supra* note 10, at 215-18. *But see* Edwin Borchard, *Treaties and Executive Agreements - A Reply*, 54 YALE L. REV. 616 (1945) (opposing the growth of congressional-executive agreements and their replacement of the treaty).

38. *See* Bretton Woods Agreement Act (providing for participation in the International Monetary Fund), ch. 339, 59 Stat. 512 (1945); United States -Israel Free Trade Area, Pub. L. No. 99-47, 99 Stat. 82 (1985); United States-Canada Free Trade Agreement, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

39. *See* Henkin, *supra* note 18, at 417 (noting the historical resistance of the Senate to adopt agreements which circumvent the Treaty adoption procedure); *see also* REHM, *supra* note 36, at 126 (critiquing executive agreements because "through executive agreements the president can make international commitments that evade congressional consideration but still commit the United States to serious, and even questionable courses of action).

40. *See generally* Ackerman & Golove, *supra* note 35, at 862-889.

41. *See id*, at 864, n.289.

42. *See* Rehm, *supra* note 36, at 128. *See also* Edward Corwin, *The President's Treaty Making Power, in* CORWIN'S CONSTITUTION: ESSAYS AND INSIGHTS OF EDWARD S. CORWIN 211-17 (Kenneth D. Crews, ed. 1986) (critiquing the then recently proposed Bricker Amendment as both unnecessary and destructive to the structure of the government).

43. *See* Ackerman & Golove, *supra* note 35, at 899 (describing the history of the Bricker Amendment).

44. *See id.* at 899 n.450.

nent means of forming trade agreements following the passage of the Trade Act of 1974.[45] The Trade Act created a new "fast track" means of negotiating and approving international trade agreements."[46] Under fast track, a form of congressional-executive agreement, the President begins preliminary negotiations with other nations and notifies both houses of Congress of his intentions.[47] So long as the President fulfills his statutory obligations,[48] the bill passes straight to both houses for vote by the entire chamber.[49]

The United States entered its first regional free trade agreements utilizing the fast track route, and also utilized fast track provisions in its consideration of proposals under the General Agreement on Tariffs and Trade (GATT).[50]

IN DEFENSE OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

Two schools of thought defend the rising use of the congressional-executive agreement and the corresponding decline in Congress's use of the Treaty Clause. The first, adopted by the same scholars who originally advocated the expansive use of congressional-executive agreements, involves the theory of interchangeability.[51]

Interchangeability is the theory that the congressional-executive agreement evolved out of the formal treaty, negotiated by the president and approved by a supermajority of the Senate. As a result, it can be legitimately used to form fully binding in-

45. *See* Trade Act of 1974, Pub. L. No. 93-618, §§ 2101-2487, 88 Stat. 1978 (1975).

46. *See* JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 143 (1995).

47. *See* § 2112(e)(1) of the Trade Act of 1974; *see also* Theresa Wilson, *Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*, 47 DRAKE L. REV. 141, 170 (1998) (outlining the structure and application of "fast track").

48. *See* Harold Hongju Koh, *The Fast Track And United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 147 (1992) (describing Presidential responsibilities as including notification of the House Ways and Means Committee and Senate Finance Committee, and performing other minor procedural requirements).

49. *See* Wilson, *supra* note 47, at 171.

50. *See* JACKSON, *supra* note 46, at 147-49, 487-92.

51. *See* WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES 32 (1941); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L. REV. 181 (1945).

ternational agreements.[52] Proponents argue that the President and Congress draw their respective powers to form binding international agreements from the Constitution:[53] the President through his authority to make Treaties[54] and his powers as Commander in Chief;[55] and Congress from the Commerce Clause,[56] the Senate's right to approve treaties,[57] and the Necessary and Proper Clause.[58] Additionally, the inherent power of the federal government to regulate foreign affairs provides general external sovereignty to the President.[59]

The second theory, developed by Yale law professor Bruce Ackerman, endorses the use of the congressional-executive agreement as a substitute for the Treaty.[60] Ackerman argues that the Senate responded to the needs of the Roosevelt administration during World War II, by abdicating its responsibilities under the Treaty Clause in favor of the congressional-executive agreement.[61] Because popular sentiment, as measured by news-

52. *See generally* WRIGHT, *supra* note 37; MCCLURE, *supra* note 51. *But see* Ackerman & Golove, *supra* note 35, at 807, 813 (arguing that interchangeability is a fundamentally flawed theory because it focuses on slow evolution and advocating instead for a theory of constitutional moments which recognizes periods of major change in constitutional thinking).

53. *See* WRIGHT, *supra* note 37, at 232-6 (explaining the role of the executive and legislative branches in foreign affairs); HENKIN, *supra* note 10, at 34 (describing the President's enumerated and unenumerated powers in foreign affairs).

54. U.S. CONST. art. II, § 2.

55. U.S. CONST. art. II, § 1. *But see* I.M. DESTLER, AMERICAN TRADE POLITICS 14 (1995) ("in no sphere of government policy can the primacy of the legislature be clearer: Congress reigns supreme on trade"); Jacques J. Gorlin, *Foreign Trade and the Constitution*, *in* FOREIGN POLICE AND THE CONSTITUTION 54 (Robert A. Goldwin and Robert A. Licht eds., 1990).

56. U.S. CONST. art. I, § 8, cl. 2.

57. US. CONST. art. II, § 2, cl. 2.

58. U.S. CONST. art. I, § 8, cl. 18.

59. *See* United States v. Curtiss-Wright Export. Corp., 299 U.S. 304, 316, 318, 320 (1936) (naming the President the "sole organ of the nation" in foreign affairs); *see generally* THE FEDERALIST NO. 75 (Alexander Hamilton). *But see* Madison, *supra* note 10, at 621 (reasoning, "whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties; its is *clear, consistent* and *confident*, in deciding that the power is *plainly* and *evidently* not an *executive power*").

60. *See generally* Ackerman & Golove, *supra* note 35. Ackerman also supports portions of the interchangeability doctrine, arguing that the President and Congress have independent congressional authority for their actions in the adoption of international agreements. *See id.* at 919-23.

61. *See id.* at 869-896.

Ackerman believes law evolves based not on textual interpretation but "constitutional moments." *See generally*, BRUCE ACKERMAN, WE THE PEOPLE (1991) (explaining Ackerman's entire theory), Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997) (stating that "constitutional mean-

paper poll data, favored a retreat from isolationism, the American people effectively ratified this change as an amendment to the Constitution, and in doing so created an independently authorized method of entering binding international agreements.[62] Furthermore, the almost exclusive use of the congressional-executive agreement in the post-World War II period indicates that the Senate, House and American people accept this alternative to the Treaty Clause as constitutional.[63] Ackerman argues that Congress formalized this switch with the passage of the 1974 Trade Act, which created the fast track, congressional-executive alternative to treaty negotiation for trade agreements.[64] This "rule of recognition," approving the congressional-executive agreement, allowed Congress and the President to adopt NAFTA.[65]

---

ing is not primarily created by judges out of texts but emerges in the course of the struggle by ordinary Americans to hammer out fundamental political understandings.") *See also* David M. Golove, *Against Free-Form Formalism*, N.Y.U. L. REV. 1791, 1794 (1998) (responding to Harvard Law Professor Lawrence Tribe's critique of the Ackerman & Golove article). Applying this theory to the Treaty Clause, Ackerman explained that during World War II, Americans responded to their immediate need for international policy by altering their interpretation of the constitutional requirements for international agreements. *See* Ackerman & Golove, *supra* note 35, at 909-913. B*ut see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (stating "in the absence of a properly passed constitutional amendment," courts cannot "erode the structure envisioned by the framers"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223 (1995); Suzanna Sherry, *The Ghost of Liberalism Past,* 105 HARV. L. REV. 918 (1992); Paul, *supra* note 32, at 682 (critiquing Ackerman's thesis and calling for a return to Congressional involvement in international affairs).

62. *See cf.* Ackerman & Golove, *supra* note 35, at 929. (arguing that popular sentiment and political necessity make use of the Article V amendment procedure unnecessary). *See* Ackerman, *supra* note 61, at 1527-28 (stating that to ignore societal amendments during World War II era, and accept only amendments adopted using Article V, is to betray the greatest generation of Americans).

63. *See* Ackerman & Golove, *supra* note 35, at 914-925 (citing the lack of large-scale opposition to the shift away from the Treaty Clause). *But see* Made in the USA Foundation v. United States, 56 F. Supp.2d 1226 (N.D. Ala. 1999) (representing a challenge to notions of popular approval of the shift to congressional-executive agreements).

64. See Ackerman & Golove, *supra* note 35, at 904-907 (asserting that the fast track procedures codify the approval of the congressional-executive process).

65. *See id.* at 924; Ackerman, *supra* note 62, at 1526-27.

JUDICIAL INTERPRETATION OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

The Supreme Court of the United States has evaluated the constitutionality of numerous congressional-executive agreements. In *United States v. Belmont*, the Court held that Congress lawfully delegated to the President the power to make unilateral decisions related to international trade.[66] In another decision involving executive authority in international trade, *United States v. Curtiss-Wright Co.*, Justice Sutherland speaks of a nearly unlimited executive power over international relations.[67] However, Justice Sutherland notes that even this power "must be exercised in subordination of the applicable provisions of the Constitution."[68] The Supreme Court has never addressed the question of whether congressional-executive agreements can replace treaties.[69]

C. NAFTA

In 1991, pursuant to the 1974 Trade Act,[70] then-President George Bush and Congress began discussing the negotiation of a

66. *See e.g.* United States v. Belmont, 301 U.S. 324 (1936) (upholding Litinov Assignment and recognizing the President's exclusive authority to negotiate agreement recognizing other nations, here, the Soviet Union); United States v. Pink, 315 U.S. 203 (1941) (settling foreign claims involving the Litinov Assignment); Altman & Co. v. United States, 224 U.S. 593, 601 (1912) (recognizing international compacts regulate commercial relations); Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1982) (allowing President to enter into binding agreements involving commercial claims); Star-Kist Foods, Inc. v. United States, 47 C.C.P.A. 52, 65 (CCPA 1959) (noting that international compacts such as protocols, modus vivendi, postal conventions and tariff classifications do not require treaty approval).

67. *See* United States v. Curtiss-Wright Export. Corp., 299 U.S. 304, 319-20 (1936) (stating "it is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations"). The dicta in this decision is considered politically motivated because of Sutherland's involvement in Roosevelt's cabinet prior to his appointment to the court.

68. *Id.* at 319-20.

69. *See* BYRD, *supra* note 8, at 115 and accompanying text (describing the absence of Supreme Court review of the interchangeability of treaties and congressional-executive agreements).

70. *See* 1974 Trade Act § 19 U.S.C. ch.12 (1999). *See also* DESTLER, *supra* note 55, at 72 (noting that Congress adopted the 1974 Trade Act to extend the President's trade negotiating authority by providing the President the freedom and leverage to enter into international trade agreements); Alfred E. Eckes Jr., *U.S. Trade History, in* U.S. TRADE POLICY: HISTORY, THEORY, AND THE WTO 51, 87 (William A. Lovett et al. eds., 1999) (stating, "[i]n return for regular consul-

free trade agreement between the United States, Mexico and Canada.[71] Bush negotiated the treaty using the "fast track" provisions included in the 1974 Act.[72] On December 17, 1992, following congressional approval, the three countries signed NAFTA, the most comprehensive regional free trade pact ever negotiated.[73] Because Bush negotiated under "fast track" enactment procedures, Congress was required to vote on the agreement within ninety days of transmittal by President Clinton.[74] Congress approved NAFTA on Dec. 8, 1993,[75] and then adopted the NAFTA Implementation Act to allow the government to enforce provisions of NAFTA.[76]

The adoption of NAFTA was not without controversy. While proponents of the Treaty defended it on the grounds that it would improve the domestic economy and promote growth, critics voiced fears of job loss, environmental damage and economic downturn.[77] It was not until the congressional debates on

---

tation with Congress and private-sector representatives, Congress promised the Executive to waive the usual congressional procedures and permit a vote within 90 days on implementing legislation").

After considerable debate, and in the face of opposition from opponents of free trade, Congress renewed fast track authority in 1991. *See* DESTLER, *supra* note 55, at 99-102. This authority expired in 1997 and due to partisan politics, Congress failed to renew the authority. *See* E.J. Dionne, Jr. *Get Ready for Clinton's Third Act; He Seeks a Balance Between Hyperactive and Reactive*, THE WASHINGTON POST, Jan. 11, 1998, at C1.

71. *See* Koh, *supra* note 48, at 143 (discussing the use of fast track in U.S. trade policy).

72. *See id.* Fast track "authorizes the President to initiate a foreign affairs action, (for example, negotiation of an international trade agreement), but requires him to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval. Under modified House and Senate rules, Congress "promises" the President that it will automatically discharge the completed initiative from committee within a certain number of days, bar floor amendment of the submitted proposal, and limit floor debate, thereby ensuring the President and our trading partners that the submitted legislative package will be voted up or down without alteration within a fixed period of time." *See id.*

73. *See* Public Citizen v. United States Trade Representative, 5 F.3d 549, 550 (D.C. Cir. 1993); *cert. denied* 510 U.S. 1041 (1994). *See also* H.R. REP. No. 103-361, at 8 (1993)(reprinted in 1993 U.S.C.C.A.N. 2558) (calling NAFTA "the most comprehensive trade agreement ever negotiated").

74. *See Public Citizen*, 5 F.3d at 550.

75. *See* Tim Golden, *Tariffs Drop as Trade Agreement Kicks in with New Year's Arrival*, N.Y. TIMES, Jan. 1, 1994, at A1.

76. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) codified at 19 U.S. C. §§3301-3473.

77. *See e.g. The 'Great Debate' Over Nafta*, N. Y. TIMES, A16 (Nov. 9, 1993); *The 1993 Campaign; Transcript of 3d TV Debate Between Bush, Clinton and Perot*, N. Y. TIMES, A20 (quoting H. Ross Perot, "You implement that Nafta, the Mexican trade agreement, where they pay people $1 an hour, have no health

the agreement to approve the WTO, however, that commentators raised questions regarding the constitutionality of NAFTA.[78]

The courts have considered other legal challenges to NAFTA. Prior to the adoption of the agreement, environmental organizations brought suit in the District of Columbia to require the United States Trade Representative (USTR) to produce environmental impact statements prior to Treaty ratification.[79] The D.C. Circuit Court held that because the executive branch had not completed its statutorily required action, the court lacked jurisdiction to review the USTR's action.[80] In a second case, *American Coalition for Competitive Trade v. Clinton*, the same court reviewed the constitutionality of a binational review panel which evaluates allegations of dumping in violation of the treaty.[81] The court found the review panel, and NAFTA, constitutional.[82]

III. MADE IN THE USA FOUNDATION: THE DECISION

The opinion in *Made in the USA Foundation* addresses the legal challenges historically raised by political opponents of NAFTA. The institutional plaintiffs, Made in the America Foundation and the United Steelworks of America, represent workers and union members in Alabama who lost their jobs between 1993 and 1997, allegedly as a result of NAFTA trade policies.[83] Both plaintiffs objected to NAFTA before its implementation because they feared Mexican plants would take jobs from their workers. The issues adjudicated were purely matters of law, as

---

care, no retirement, no pollution controls, etc., etc., etc., and *you're going to hear a giant sucking sound* of jobs being pulled out of this country right at a time when we need the tax base to pay the debt, and pay down the interest on the debt and get our house back in order") (emphasis added) (Oct. 20, 1992).

78. *See* Ackerman & Golove, *supra* note 35, at 917-18 n.502 (emphasizing the role of the author and Harvard Law Professor Laurence Tribe in discussing the issue before Congress); *See* Tribe, *supra* note 61, at 1234 n.47 (describing the testimony of various scholars, including himself and Yale law professor Bruce Ackerman, in Congressional hearings regarding the approval of the WTO).

79. *See* Public Citizen v. Office of the United States Trade Representative 5 F.3d 549 (D.C. Cir. 1993), *cert. denied* 510 U.S. 1041 (Jan 10, 1994).

80. *Id.* at 550 (reversing the district court's grant of summary judgment in favor of Public Citizen because the President's actions are not "agency action" and thus cannot be reviewed under the Administrative Procedure Act).

81. 128 F.3d 761 (D.C. Cir. 1997).

82. *Id.* at 766-67.

83. Made in the USA Found. v. United States, 56 F. Supp.2d. 1226, 1237 (N.D. Al. 1999).

both parties acknowledged that no genuine issues of fact existed.[84]

The government responded by characterizing the questions raised by the plaintiffs as political, and therefore beyond the reach of the court.[85] They argued that foreign affairs and commerce are committed to the Executive and Legislative branches and therefore nonjusticiable.[86] Made in the USA countered that the issue was not whether the political branches used their power to enact good policy, but whether they enacted it using constitutionally permissible means.[87] The court reasoned that "foreign commitments cannot relieve the government of the obligation to operate within the bounds laid down by the Constitution."[88] Because this case involved construing the meaning and applicability of the Constitution, the political question doctrine did not apply.[89]

The complaint alleged that NAFTA constituted a treaty as contemplated by Article II, section 2, clause 2 of the Constitution.[90] The plaintiffs acknowledged that the text of the Constitution failed to establish a test for determining when an

84. *See id.* at 1228. The first two issues addressed by the court involved the standing of the plaintiffs. *See id.* at 1229. The standing questions considered whether the plaintiffs suffered injury and whether the Court could redress those injuries. The Court held that the individual plaintiffs, who alleged a dilution of voting rights, lacked standing for lack of injury. *See id.* at 1234. The institutional plaintiffs, who traced their injuries to the adoption of NAFTA and subsequent loss of work, successfully established a causal connection and therefore standing. *See id.* at 1253.

Finally the court considered the redressability of plaintiff's injuries. The government argued that the President need not act based on a decision of the Court so any alleged injuries would continue. *See id.* at 1244. Judge Probst ruled that he could not "conclude that a declaration that NAFTA was unconstitutionally made and implemented would be ignored by the executive branch. . .I will not assume that the President will ignore established law. I will not conclude that the President, like Andrew Jackson, would state that since the court has made its decision it could enforce it. I agree with Justice Story, who said in response 'The Court has done its duty. Let the Nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know at once, and look to the consequences.'" *See id.* at 1253. The court found that plaintiffs alleged injuries would be redressed. *See id.* at 1254.

85. *See id.* at 1254.

86. *See id.* at 1255. *See* Baker v. Carr, 369 U.S. 186, 217 (1962); Dole v. Carter, 569 F.2d 1109, 1100 (10th Cir. 1977); Goldwater v. Carter, 444 U.S. 996, 998 (1979).

87. *See* Made in the USA Found., 56 F. Supp.2d at 1257. *See also* I.N.S. v. Chadha, 462 U.S. 919, 940-41 (1982).

88. *See* 56 F. Supp.2d at 1258 (quoting Reid v. Covert, 354 U.S. 1, 14 (1957)).

89. *See id.* at 1276.

90. U.S. CONST. art II, § 2, cl. 2.

international agreement is a treaty instead of some other kind of agreement, but argued that framers' intent and court precedent suggest that a distinction can be drawn.[91] The framers indicated that agreements were treaties when they substantially affected sovereignty.[92] NAFTA, by altering the workplace standards, enacting binding arbitration procedures, and replacing large bodies of trade law, had substantial impact on sovereignty.[93]

Similarly, the plaintiffs cited lower courts' decisions on the constitutional meaning of the term treaty.[94] The major constraints facing the plaintiffs, according to the government, involved the absence of a definition for "treaty" in the Constitution's text[95] and that Congress implemented NAFTA using valid legislation.[96] The court quickly dismissed the first argument, noting that using that standard, the court could not decide most constitutional questions.[97] Moreover, the Court noted that because both sides agreed that the Senate could have legitimately approved NAFTA by two-thirds vote, it is a "treaty" as contemplated by the Treaty Clause.[98] Based on the extensive debates of the framers and their reliance on the definitional distinctions drawn by Vattel, the court held that NAFTA is a treaty.[99]

Judge Probst recognized the importance of his decision, noting that Made in the USA's suit brings to bear an "almost century-long bout of Constitutional theorizing about whether the Treaty Clause contained in Article II, Section 2 of the United States Constitution creates the exclusive means of making certain types of international agreements."[100]

The Government argued that the Constitution allows alternative international agreements because the Constitution does not explicitly outline the Treaty Clause as an exclusive procedure.[101] This silence allows the political branches to conclude

91. *See id.* at 1278 (quoting Harvard Professor Anne Marie Slaughter's analysis of framers' intent).
92. *See id.* at 1282.
93. *See id.* at 1283-84.
94. *See id.* at 1312.
95. *See id.* at 1261.
96. *See id.* at 1278.
97. *See id.* at 1261.
98. *See id.* at 1313. *See also* Holden v. Joy 84 U.S. 211, 242-3 (1872).
99. *See id.* at 1315 (assuming in dicta that NAFTA is a treaty for the purposes of analyzing question two). *See also* FEDERALIST NO. 64 (John Jay).
100. *See id.* at 1228.
101. *See id.* at 1293-94.

trade agreements through alternative means.[102] The rapid growth in executive agreements in the last fifty years confirms the legality of the practice.[103] Evaluating these arguments, the court concluded that Congress legally adopted NAFTA because the Constitution allows Congress and the President to enter into broad international agreements through methods other than the "treaty" process.[104] The Commerce Clause, with its grant of plenary power,[105] gives Congress broad powers to regulate commerce.[106] Because NAFTA regulates international trade, a type of commerce, the court held that Congress passed it constitutionally.[107] The Court found no reason to believe the Treaty Clause limits Congress's Commerce Clause power.[108]

IV. FLAWS IN *MADE IN THE USA FOUNDATION*: THE UNCONSTITUTIONALITY OF NAFTA

A. NAFTA Is a Treaty

The district court correctly determined that NAFTA is a treaty within the meaning established by the framers and the Constitution. To determine whether an international agreement is a treaty, the Court must use a number of factors, influenced by the framers' priorities in drafting the text.[109] The framers distinguished a treaty from a congressional-executive agreement by providing that a treaty (1) is extensive in scope and duration; and (2) affects issues of sovereignty.[110]

---

102. *See id.* at 1293-94. *See also* United States v. Curtiss-Wright Export. Corp., 299 U.S. 304, 316, 318 (1936); Weinberger v. Rossi, 456 U.S. 25, 29-30 (1982); United States v. Belmont; 301 U.S. 324 (1936); United States v. Pink, 315 U.S. 194 (1941).

103. *See id.* at 1290. *See also* BYRD, *supra* note 8 and accompanying text.

104. *See id.* at 1316.

105. *See* Gibbons v. Ogden, 22 U.S. 1, 187-88 (1824).

106. *See* 56 F. Supp.2d at 1316-17.

107. *See id.*

108. *See id.* at 1319.

109. *See id.* at 1280; *see also* BYRD, *supra* note 8, at 133 (reviewing factors to be considered in determining if an international agreement is a treaty). For an alternative solution to the problem of classifying international agreements, see Randall, *supra* note 9, at 1112-22 (proposes a topical distinction to determine whether a treaty or a congressional-executive agreement should be utilized which does not, however, place trade agreements in either category, or discuss how to evaluate other agreements not considered by his article).

110. *See* VATTEL, *supra* note 21 and accompanying text (outlining factors to be considered in determining the nature of an international agreement).

NAFTA IS THE UNITED STATES' LARGEST REGIONAL TRADE AGREEMENT

The framers adopted Vattel's interpretation of treaty as "the proper instrument of a major commitment and the executive agreement as the instrument of a minor one."[111] NAFTA subjects entire new areas of economic activity to international trade regulation, including trade service regulations, intellectual property and investment protections, and non-discrimination and non-residency rules.[112] More importantly, NAFTA includes binding international arbitration panels, whose determinations will bind American governing bodies.[113] As the most important regional trade agreement ever negotiated by the United States, NAFTA is certainly a major commitment.[114]

NAFTA SUBSTANTIALLY AFFECTS STATE AND PERSONAL SOVEREIGNTY

The framers emphasized the effect of an international agreement on sovereignty as central to its characterization.[115] Attempts to protect state sovereignty, particularly of the Southern states, guided the debate about the Treaty Clause during the Constitutional Convention.[116] Madison, for example, argued that the Treaty Clause included a supermajority provision because treaties can alter both external relations and the internal code.[117] The framers specifically selected the Senate as the treaty ratifying body and required a supermajority vote to insure protection of both individual and state interests.[118]

---

111. *See* 56 F. Supp.2d at 1280.

112. *See* Made in the USA Found., 56 F. Supp.2d at 1283.

113. *See id. at* 1283-84.

114. *See supra* note 73 and accompanying text (describing NAFTA as the scope and duration of NAFTA); *see also* JIM C. CHEN, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade*, 49 WASH. & LEE L.REV. 1455 (1992).

115. *See* HENKIN, *supra* note 19 and accompanying text (noting framers concerns in creating the treaty power). *See also supra* Tribe, note 61, at 1267 (tying the impact of an agreement on sovereignty to its connection to matters normally regulated by state and federal governments).

116. *See supra* note 12 and accompanying text (explaining reasons Senate chosen as legislative participant in the treaty process); *see also* Sklamberg, *supra* note 12, at 454 (surveying views of Northern and Southern delegates on the outcome of the Treaty Clause debate).

117. *See supra* note 10 and accompanying text (reviewing Madison's writing on the Treaty Clause).

118. *See supra* notes 10, 12, 14, 21 and accompanying text (outlining the rationale for placing authority in the Senate).

NAFTA, by altering both foreign and state law-making authority, constrains state sovereignty in exactly the manner feared by the framers.[119] NAFTA imposes on states and businesses new health, environmental and safety standards, all traditionally regulated through states' exercise of their police power.[120] The framers created the supermajority requirement to check the imposition of rigid public safety standards for the benefit of international trade.[121] By requiring a two-thirds vote, national interests receive a greater voice and compromise grows in an effort to gain sufficient support to approve the agreement.

B. THE TREATY CLAUSE IS EXCLUSIVE

Article II, section 2, clause 2 of the Constitution explicitly sets forth the procedure by which the United States may enter into treaties.[122] The text includes no alternative methods of entering treaties; similarly, the text affords the House no role in the approval of these international agreements.[123] The *Made in the USA* court, while correctly determining that NAFTA is a treaty within the meaning of the Treaty Clause, erroneously permitted alternate means of treaty adoption. This ruling was made in direct contravention of the text of the Constitution, the intent of the framers, and federal court precedent, all three of which collectively prove the exclusivity of the Treaty Clause.

CASE PRECEDENT AND EXCLUSIVITY

The Supreme Court has repeatedly restricted executive and legislative action when it exceeds constitutionally provided power. In three cases involving improper exercise of presidential and congressional power, the Supreme Court evaluated the Constitution's text and framers' intent in tandem.

---

119. *See* NAFTA, art. 105 at 728. *See also* Tribe, *supra* note 61, at 1267-68 (indicating that NAFTA removes legislative powers normally reserved to state and federal legislatures and places them under the law of the treaty).

120. *See e.g.* NAFTA, art. 709 at 971; *Id.*, art. 901 at. 998.

121. *See supra* note 14 and accompanying text (reviewing framers interest in preserving spheres of state responsibility).

122. *See supra* note 3 and accompanying text (quoting the constitutional text).

123. *See* Henkin, *supra* note 18, at 406 (noting that the President and Senate, together, have exclusive jurisdiction over the adoption of treaties); *see also* Tribe, *supra* note 61, at 1242 (describing Hamilton's approach of using the *expressio unius est exclusio alterius* canon to limit provisions of the constitution); THE FEDERALIST NO. 83 (Alexander Hamilton) (describing Treaty adoption procedure).

The case of *Buckley v. Valeo*[124] addressed the exclusivity of another Article 2, section 2, clause 2 power (the Appointments Clause).[125] In interpreting the exclusivity of this clause, the court relied on the lack of alternative textual procedures for appointments[126] and on the framers' desire to secure a separation of powers throughout the document.[127] The Court found that the text defines a method by which the President nominated superior officers to the Senate for their advice and consent, thus eliminating any alternative procedures.[128] Of equal importance, the Court found that the Appointments Clause, by prescribing an adoption procedure, preserves the Constitution's structural integrity by forestalling the aggrandizement of power by one political branch.[129]

The Court applied a similar approach in *I.N.S. v. Chadha*, which limits the function of the presentment clause to that proscribed by text because it is "a single, finely wrought and exhaustively considered, procedure."[130] The Court synthesized this standard into a two-part analysis in *Clinton v. City of New York*, in which the Supreme Court found powerful reasons to construe constitutional silence on presidential and congressional power as equivalent to an express prohibition.[131] The Court recognized the level of detail in the procedures laid out in the text[132] and the significance of the framers' lengthy debate in considering a portion of the Constitutional text as indicative of exclusivity.[133] The history of the Treaty Clause indicates that it satisfies both of these concerns.

---

124. 424 U.S. 1, 124-5 (1975) (asking whether art. 2, § 2, cl. 2 provides the sole means of executive appointment).

125. *See* U.S. CONST. art. II, § 2, cl. 2. Note that the framers grouped the Treaty Clause and Appointment Clause.

126. *See* Buckley, 424 U.S. at 127.

127. *See id.* at 124.

128. *See id.*

129. *See* Ryder v. United States, 515 U.S. 177, 182 (1995) (citing Buckley with approval regarding the appointment of military judges).

130. *See* 462 U.S. 919, 951 (1982) (holding that legislative veto violated the Presentment Clause).

131. Clinton v. City of New York, 118 S. Ct. at 2103 (1998) (holding the line-item veto unconstitutional). *Cf.* Edwards v. Carter, 580 F.2d 1055, 1057-58 (D.C. Cir. 1978) (finding that the Treaty Clause supersedes the Property Clause and this allowing transfer of Panama Canal).

132. *See* Clinton, 118 S. Ct. at 2107 (holding that line-item veto not envisioned by the Constitution's "finely wrought' procedure).

133. *See id.* at 2103 (arguing that Article I procedures resulted from great debate and compromise).

The extensive debate between the Founding Fathers concerning international obligations and treaty formation indicates the necessity of a two-thirds vote.[134] In fact, Alexander Hamilton specifically advanced the selection of the two-thirds requirement in the Treaty Clause as a highlight of the Constitution and strong rationale for its ratification.[135] The concerns expressed in the framers' debate during drafting of the Treaty Clause resulted in the incorporation of a supermajority, separate from the grant of legislative power in Article I of the Constitution.[136]

The structure of the Treaty Clause process and its incorporation of checks and balances further indicates exclusivity.[137] By providing the President with the authority to negotiate, and the Senate with the responsibility to ratify, the framers created a procedure consistent with the multiple branch provisions found throughout the Constitution's text.[138] The intent of the drafters supports an interpretation of a limited treaty clause.

CONSTRUING THE CONSTITUTIONALITY OF NAFTA

NAFTA violates the Constitution because Congress adopted the agreement pursuant to fast track procedure instead of complying with the requirements of the Treaty Clause.[139] Congress failed to enact NAFTA by the required supermajority vote.[140] More importantly, fast track involves a congressional delegation of power to the President that exceeds the scope envisioned by the framers, upsetting the checks and balances central to federal policy making.[141] Congress cannot evade this constitutional lim-

134. *See supra* note 10 and accompanying text (illustrating the framers' motivations).

135. *See supra* note 14 and accompanying text (quoting Hamilton's approval of the Treaty Clause).

136. U.S. CONST. art I. *See* Borchard, *supra* note 37, at 671 (arguing that all important constitutionally significant legislative actions require a supermajority vote, e.g.: impeachment (U.S. CONST. art. I, § 3, subd. 7); proposal and ratification of constitutional amendments (U.S. CONST. art. V); adoption of treaties (U.S. CONST. art. II. § 2, cl. 2)).

137. *See* Tribe, *supra* note 61, at 1241 (finding exclusivity central to state protecting structure of the Constitution and Treaty Clause).

138. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 138 (1990).

139. *See supra* notes 70-72 and accompanying text (outlining the difference between fast track procedures and the Treaty Clause requirements).

140. *See supra* note 70-72 and accompanying text (stating the method by which Congress approved NAFTA under fast track procedures).

141. *See* Koh, *supra* note 48, at 161-62 (discussing arguments voiced by Public Citizen in their objections to NAFTA).

itation by adopting NAFTA using the Commerce Clause.[142] In the Federalist Papers, Alexander Hamilton specifically stated that the power to make treaties provides a specific power separate from Congress' authority to enact laws.[143] The Constitution explicitly explains how the government should pass treaties and in no place suggests that an alternative method would work as well.[144]

The Court's interpretation of framers' intent supports a retreat from the unlimited use of congressional-executive agreements. *Holmes v. Jennison*, the earliest Supreme Court case addressing the scope of the Treaty Clause, includes an analysis of framers intent.[145] In his decision, Justice Taney states that the provision was designed to include all the subjects "which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty."[146] The cases cited by the government for the proposition that the government can use treaties and executive agreements interchangeably differ substantially from the principal case.

---

142. *See* Tribe, *supra* note 61, at 1250-51 (allowing Congress to enter international agreements though the Commerce Clause ignores the meaning of several other portions of the text).

143. *See* THE FEDERALIST NO. 75 (Alexander Hamilton); THE FEDERALIST NO. 64 (John Jay). While it may initially seem that this interpretation binds contemporary society to the sometimes vague and often difficult to ascertain intent of the framers, it instead focuses on fidelity to the text. *See* Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 FORDHAM L. REV. 1249, 1251-52 (1997) (explaining the differences between originalism and text). Context, however, is often needed to determine the precise meaning of text. Therefore, reference to framers' intent is often necessary. *See id.* at 1253.

Because the Constitution is binding law, the intent of its drafters is important in determining its meaning. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 145 (1990). Contemporary Supreme Court law indicates that the current Court also continues to respect framers' intent. *See e.g.* Clinton v. City of New York, 118 S. Ct. 2091, 2108-2110 (1998) (Kennedy, concurring) (arguing framers' intent key to achieving the liberty the constitution establishes); United States v. Lopez, 514 U.S. 549, 568-583 (1995) (Kennedy, concurring) (using framers' intent to understand Commerce Clause issue); United States v. 12,200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 131 (1972) (Douglas, dissenting) (advocating the use of framers' intent to determine reach of First Amendment in regulation of pornography).

144. *See* Tribe, *supra* note 61, at 1250-51 (discussing why, given the text of the Constitution, the Treaty Clause must be exclusive).

145. *See* Holmes v. Jennison, 39 U.S. 540, 569-70) (1840) (evaluating framers' intent on the meaning of the term "treaty").

146. *Id.*

For example, the Court's decisions in *Altman & Co v. United States*[147] and *Weinberger v. Rossi*[148] both define "treaty" broadly, but do so in terms of statutory interpretation. Moreover, both decisions explicitly state that the Constitution requires a more rigorous definition of treaty.[149] Similarly, the *Star-Kist Foods Inc. v. United States* decision notes that Congress has the authority to pass customs agreements,[150] which rise neither to the size nor the scope of NAFTA.

As a practical matter, not all international agreements can constitute "treaties" as intended by the framers.[151] However, as with the line-item veto, there is no provision in the constitution that authorizes the Congress and President to adopt treaties by congressional-executive agreement.[152] There are some areas that are properly the subjects of treaties and not fit for congressional executive agreements. "To deny this proposition is to affirm another, that there is no longer an arrangement of constitutionally distributed powers in the United States but rather a unitary form of government exists."[153] The Treaty Clause provides a balanced distribution of powers that Congress should have used to pass NAFTA, a treaty as envisioned by the framers. If the law intends to maintain some semblance of tradition, dependability and reverence for the Constitution as enacted, then Congress and the President must enact treaties through the procedure provided by the Treaty Clause.[154]

147. 224 U.S. 583, 600 (1912) (recognizing the validity of an international compact regulating commercial relations).

148. 456 U.S. 25, 29 (1982) (determining Congress' intended meaning of the term "treaty" in the statute at issue).

149. *See id.* at 29-30; Altman, 224 U.S. 582 at 601; Edye v. Robertson, 112 U.S. 580, 599 (1884).

150. *See* 47 C.C.P.A. 52, 64, 275 F.2d 472, 483 (CCPA 1959).

151. *See* BYRD, *supra* note 8, at 132 (stating that the law should distinguish between treaties and international agreements); *see also* Tribe, *supra* note 61, at 1266 (arguing that framers distinguished between types of international agreements in their understanding of foreign relations).

152. *See* Clinton v. City of New York, 118 S. Ct. 2091 at 2103 (1998) (arguing that the failure of the framers to include a line-item veto weighed strongly toward the final decision to declare the mechanism unconstitutional).

153. BYRD, *supra* note 8, at 115 (noting that the constitution lacks any provision authorizing congressional-executive agreements and questioning their legality for certain types of agreements); *see* Tribe, *supra* note 61, at 1237 (noting that constitutional text cannot be interpreted in a way that alters the structure of government or the fundamental relationships between the federal government's component parts).

154. *Cf.* I.N.S. v. Chadha, 462 U.S. 919 (1982) (noting that the framers prized values other than efficiency).

C. INAPPLICABILITY OF THE POLITICAL QUESTION DOCTRINE

The government, in *Made in the USA Foundation,* made two central arguments under the guise of justiciability and the political question doctrine.[155] First, it argued that fast track negotiating procedure and congressional-executive agreements have become *de facto* legal. Second, it argued that the political branches should address questions concerning the division of power between Congress and the President. The Court has held, however, that acting beyond constitutionally established powers constitutes an abuse of power.[156] Overreaching by any sovereign actor undermines our structure of government. Similarly, the Court cannot uphold procedures contrary to the Constitution no matter how efficient or convenient.[157]

Next, supporters of the congressional-executive agreement argue, in part, that the Senate's apparent acquiescence to its lost authority in the approval of international agreements amounts to constitutional acceptability.[158] This argument is flawed for two reasons. First, the framers designed this constitutional provision to protect minority interests in the Senate; as a result, there is no reason to expect that a majority of Congress would object to the change in procedure. More importantly, to allow the political branches to evaluate constitutionality chips away at fundamental liberty by violating the separation of powers.[159] Additionally, perpetuation of a manifest constitutional violation will eventually result in declining public respect for the courts.[160] While the general population may not lose respect for a government that enters trade agreements in violation of its founding document, similar violations in areas of free speech,

155. *See* 56 F. Supp.2d 1226, 1229 (N.D. Ala. 1999).

156. *See* Lillian B. BeVier, *The Moment and the Millennium: A Question of Time or Law?*, 66 G. WASH. L. REV. 1112, 1114 (1998).

157. *See* I.N.S. v. Chadha, 462. U.S. 919, 944 (1982).

158. *See* Henkin *supra* note 18, at 423 (stating that the Senate consents each time it approves an executive-congressional agreement). *See* Made in the USA Found., 56 F. Supp.2d at 1268-69 (N.D. Ala. 1999).

159. *See* Clinton v. City of New York, 118 S. Ct. at 2108-9 (Kennedy, concurring) (arguing that preserving separation of powers is central to American conceptions of liberty). The fact that a branch of government surrenders its own authority offers no defense, for voluntary action does not make cession of power innocuous. *Id.* "Abdication of responsibility," Kennedy notes, "is not part of the constitutional design." *Id.*

160. *See* GLENNON, *supra* note 29, at 871 (noting that "the moral cost of permitting a manifest constitutional violation to continue, both to society in general and to the supreme court in particular, far outweighs whatever benefits" derive from avoiding political questions). *See* Tribe, *supra* note 61, at 1282 (comparing *Chadha* to the Treaty Clause).

equal protection or voting rights could not go unchallenged. Should the Court decline to review a violation of plain constitutional text simply because the political branches of government acquiesced in its perpetuation, it would be setting a dangerous precedent. In *Chadha*, the Court explicitly rejected this defense[161] and overturned hundreds of statutes with a single decision.

Finally, the government provided a laundry list of policy risks stemming from a decision for the plaintiffs in the principal case. The United States essentially argues that a decision in favor of the plaintiffs would remove the ability of the Federal Government to enter international agreements.[162] However, the Federal Government would still negotiate and enter international agreements, compacts and treaties as envisioned by the framers.[163] Less significant agreements than NAFTA would still proceed through customary congressional-executive agreement procedures while the Senate would consider treaties negotiated by the President through a supermajority vote.

V. REINTRODUCING THE TREATY CLAUSE AND PRESERVING CONSTITUTIONAL INTEGRITY

The *Made in the USA Foundation v. United States* opinion represents a radical shift away from the distribution of power established by the Constitution. While the decision certainly provides stability to our trading regime and ensures Congressional involvement in United States foreign relations, it poses a threat for the future legitimacy of both political decision-making and constitutional stability. As explained, the passage of NAFTA, using fast track negotiating procedure instead of the Treaty Clause represents a radical switch from constitutionally authorized process.[164] "Constitutional legitimacy requires that both Congress and the President, when exercising authority in foreign affairs, justify their actions in constitutional text or implication."[165] When the branches act beyond their constitution-

161. *See* Made in the USA Found., 56 F. Supp. at 1266 (N.D. Ala. 1999); see *supra* Tribe, note 61, at 1281.

162. *See* Made in the USA Found., 56 F. Supp. at 1264-65 (N.D. Ala. 1999).

163. *See* THE FEDERALIST NO. 63 (James Madison) (arguing that drafters placed power in the Senate to garner the esteem of foreign powers).

164. *Cf.* Borchard, *supra* note 37 (arguing that replacement of the Treaty Clause with the political congressional-executive agreement disrupts Constitutional stability).

165. HENKIN, *supra* note 10, at 29.

ally limited powers, the legitimacy of the entire text is threatened.

While conceptually the decline of the Treaty Clause may seem a purely academic issue, the weakening of the Constitution involves practical considerations as well. In the absence of enforceable procedure ensuring checks and balances, political aggrandizement can occur.[166] For example, disappointed with the recent failure in the Senate of the Nuclear Test Ban Treaty,[167] or any other agreement named as a Treaty, the President and his supporters could resubmit the same proposal as a congressional-executive agreement. Similarly, the President and partisan supporters could pass international trade agreements that affect geographic regions, racial groups, or domestic industries disproportionately.[168] While these agreements could pass a Senate utilizing a supermajority requirement, the imposition of a greater approval requirement should significantly limit the ability of any interest group to enter major international commitments that deliberately damage a competing interest group.

Looking beyond the Treaty Clause and international agreements, the failure of Congress and the President to recognize the supermajority requirement for treaties risks their refusal to recognize it in other constitutionally mandated situations.[169] If the Court finds that the Constitution allows a simple majority vote to enter international agreements, it could have difficulty requiring the supermajority for impeachment, or the override of the presidential veto.[170] Considering the increasingly partisan nature of national politics, a simple majority requirement could ease the removal of the President from office.[171] Similarly, the

166. *See* FEDERALIST NO. 75 (Alexander Hamilton).

167. *See* David E. Sanger, *Defeat of A Treaty: The Overview*, THE NEW YORK TIMES A1 (October 15, 1999).

168. *See also* THE FEDERALIST NO. 62 (James Madison).

169. *See* U.S. CONST. art. I, § 3, cl. 7 (impeachment); U.S. CONST. art. V (amendments). *See also* Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and The Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L. J. 363 (1998) (arguing that in their specific context, constitutional supermajority rules further popular sovereignty).

170. *See supra* note 169 and accompanying text.

171. *See* Alison Mitchell, *The President's Trial: the Overview; Senate Condemns Clinton in Debate; Is Ready to Acquit*, THE NEW YORK TIMES, Feb. 12, 1999 at A1. *See also e.g.* Lori Fisher Damrosch, *Impeachment as a Technique of Parliamentary Control Over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525 (1999) (arguing that impeachment pressure rises over Congressional dissatisfaction with a President's foreign policy and that this use violates that which was intended by drafters); Mark R. Slusar, Comment, *The*

number of proposed constitutional amendments[172] approved might rise rapidly, avoiding the non-partisan, national interest requirement the framers considered when adopted the two-thirds requirement.[173]

Finally, maintaining the supermajority requirement for treaties, as well as for the other procedures in which it is used, helps to foster necessary debate and discussion. Because Congress approved NAFTA with a "yes or no" vote under fast track,[174] the legislature lost the "advice and consent"[175] power that normally allows the Senate to shape international treaties.[176] The procedure created by the Constitution specifically allowed for extended debate by those citizens with the most political information, ability, and national interest.[177] Political debate enhances the public involvement in the political process, legitimizes the final decisions, and furthers the public good.[178] In the absence of political debate and discussion, it is more likely that sentiment, special interests, or the elite will control decision making.[179]

The Court has an obligation to end this encroachment. Our nation's system of governance and the freedoms protected under

---

Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment, 49 CASE W. RES. L. REV. 869 (1999) (arguing that variances from the framers' intended impeachment process weaken the Constitution); Michael Stokes Paulson, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999) (discussing *United States v. Nixon*).

172. *See* U.S. CONST. art V. *See also e.g.* Mason Kalfus, *The Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437 (1999) (arguing that time limits in the amendment process disrupt the constitutional balance of power).

173. *See* THE FEDERALIST NO. 65 (Alexander Hamilton) (explaining the impeachment provisions). Alexander Hamilton explained that the drafters' included stringent requirements for impeachment to prevent decisions based on partisan strength not guilt or innocence. *Id.*

174. *See supra* notes 70-73 and accompanying text (explaining the fast track adoption procedures).

175. *See* U.S. CONST. art. II, § 2, cl. 2.

176. *See* Borchard, *supra* note 21, at 667 (noting the role of the Senate in helping to create foreign policy as conceived by the framers).

177. *See* THE FEDERALIST NO. 64 (John Jay).

178. *See* THE FEDERALIST NO. 10 (James Madison) (arguing that factional debate results in the public good).

179. *See generally* Whitney v. California, 274 U.S. 357, 372-380 (1927) (Brandeis, concurring) (stating that the framers' conceived of speech as essential to public information and effective decision-making); Abrams v. United States, 250 U.S. 616, 40 S. Ct. 17 (1919) (Holmes, dissenting) (explaining that debate is essential to promote a marketplace of ideas).

our Constitution rely on adherence to the meanings established by our Founders and retained through judicial interpretation.[180]

> The Constitution's architectural safeguards were specially designed to protect the states, citizens, and each branch of the federal government both from aggrandizement of power and from neglect of constitutional responsibility by those who temporarily hold public office – even when such aggrandizement or neglect seems wise as a matter of policy.[181]

While NAFTA may provide sound policy, the destabilizing effects on governmental structure and harmful implications for constitutional legitimacy indicate that upon review the courts should find it unconstitutional.

180. *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 G. WASH. L. REV 1119, 1121 (1998) (stating that the Constitution is a contract; for political legitimacy, the Court must provide society with consistent interpretations of its terms).

181. Tribe, *supra* note 61, at 1282.