Free Trade Agreements and the New Federalism

By Charles Tiefer*

I. INTRODUCTION

During the 1990s, the jurisprudence of federalism and free trade agreements has been revolutionized. Issues of state law have new, heightened importance. NAFTA and the Uruguay Round agreements, approved in 1993 and 1994 respectively, require compliance at the "subnational" (state) level. Such compliance, just now getting underway, involves novel legal controversies like the stalled border-opening to Mexican truck-

* Associate Professor, University of Baltimore Law School; B.A., *summa cum laude*, Columbia College, 1974; J.D., *magna cum laude*, Harvard Law School, 1977. The author would like to thank Michael Glennon and Eric Schneider for their helpful comments; Michael Blumenfeld for his able research assistance; and the skilled staff of Emily R. Greenberg for its library and computer assistance.

ing in 1996-97.[1] In the next decade, the Executive Branch faces the major challenge of negotiating and implementing NAFTA expansion and the Free Trade Area in the Americas Agreement. This will further necessitate controversial state compliance.[2]

Recent federal doctrinal and political shifts, however, have increased the states' protections against what such agreements impose. By the 1990s, the Supreme Court's general pro-federalism position[3] had generated new, strong federalism-protecting doctrines in contexts such as the dormant Foreign Commerce Clause. The Court refused to override state laws to which foreign enterprises objected, such as trade matters involving state taxation of foreign enterprises and state procurement that disadvantaged foreign suppliers.[4] Moreover, the President had a politically limited capability to clear away such state laws. In the 1990s, Presidents Bush and Clinton found themselves challenged by the divisive, party-splitting internal politics of free trade. This made winning Congressional fast-track renewals and minimal agreement implementation difficult, without the further burden of trying to challenge American "dual sovereignty."

These political and doctrinal developments regarding federalism brought forth a new legal paradigm. In the past decade, as Solicitor and Deputy General Counsel of the House of Repre-

---

1. *NAFTA: Mexican Trucks and Drivers Are Safe for NAFTA Implementation, Experts Contend*, 14 Int'l Trade Rep. (BNA) 408 (Mar. 5, 1997); *see also infra* note 83.

2. *See, e.g., International Agreements: FTAA Group on Procurement Is Making Progress, Allgeier Says*, 14 Int'l Trade Rep. No. 11, at (BNA) 480 (Mar. 12, 1997); *The Administration Weaves the 'World Network of Commerce,'* 14 Int'l Trade Rep. (BNA) 132 (Jan. 22, 1997); Melissa Ann Miller, *Will the Circle Be Unbroken? Chile's Accession to the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153 (1996); *see also infra* note 59.

3. *See, e.g.*, Richard C. Reuben, *The New Federalism*, 81 A.B.A. J. 76, 78-79 (Apr. 1995) (discussing the conservative cry for a return to true federalism); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

4. For discussions of the dormant commerce clauses, see, for example, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (arguing that the dormant commerce clause undermines federalism); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 109, 1193-1202 (1986) (defining protectionism); Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) (encouraging the creation of a coherent set of guidelines for the dormant commerce clause). *See also infra* note 15.

sentatives, I have been in a position to observe the dramatic developments in the congressionally shaped implementation law for trade agreements that have responded to these legal and political shifts regarding federalism.[5] This article argues that the new paradigm regarding federalism consists of a new form of "weak" preemption in implementation following state "partnering" in negotiation. In negotiating internationally on state issues, the President seeks volunteered concessions by the states and tailors his international proposals, negotiations, and actions to these state concessions. In this regard, the President functions partly as the national director of international relations and partly as a spokesperson and mediator for a league of sovereign states.

In addition to the "partnering" approach, Congress has developed a remarkable new approach to implementation, dubbed "weak" preemption in this Article. Ordinarily, it would be safe to assume that, as governing federal law, substantive principles in the Uruguay Round agreements and NAFTA displace any out-of-step state laws.[6] However, by utilizing this new approach, Congress's implementation laws unobtrusively, yet decisively, reduce the actual degree of internationally dictated preemptive effect. By denying foreign challengers access to federal and probably even state courts and by creating layers of political insulation around the states, Congress's "weak" preemptive implementation laws treat deferentially and protectively the state laws or actions to which foreign enterprises object. Nothing like "weak" preemption has been encountered before in the international agreement context.[7] Nonetheless, it bears a conceptual resemblance to past congressional federalism-protecting approaches in domestic matters, such as Con-

5. As Solicitor of the House of Representatives, the author personally represented the House of Representatives in a number of separation of powers cases with national security implications, *see, e.g.*, American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) (vacating ruling striking down as unconstitutional a limitation in an appropriation bill), *on remand*, 732 F. Supp. 13 (D.D.C. 1990), and participated in investigations with national security implications, *see, e.g.*, Report of the Congressional Committees Investigating the Iran-Contra Affair (1987) (chapter on Boland Amendments co-authored by the author as the House Committee's Special Deputy Chief Counsel).

6. Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479, 486 (1990).

7. *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989) (vigorously supporting preemption).

gressional acts protecting state tax systems from federal court constitutional challenges.

This Article uses several stages to describe the new legal structure of federalism and federal trade law. It begins with the older paradigm of the national government's forcefulness vis-a-vis the states, epitomized by the 1979 Supreme Court decision in *Japan Line, Ltd. v. County of Los Angeles.*[8] It then discusses the trade impact of the Court's new pro-federalism state market participant doctrine and the *Barclays Bank*[9] decision regarding state taxes. Both the doctrine and the decision have a magnified effect in light of the structural safeguards of federalism. In the 1990s, the President finds himself squeezed. On the one hand, he faces the new Supreme Court doctrines that tolerate state laws disadvantaging foreign enterprises. On the other hand, he faces the structural problem of Congress, which magnifies the divisive, party-splitting political opposition to domestic grants of trade concessions to foreign enterprises.[10]

Part III of this Article delves into the emerging paradigm of "weak" preemption. In the 1990s, trade agreement negotiations are no longer solely a matter of the national executive branch exercising a national government prerogative. Instead, negotiations now follow the new "partnering" approach between the executive branch and the states. The Uruguay Round negotiation of the Agreement on Government Procurement illustrates this new approach of "partnering" with the states. In making proposals, the U.S. Trade Representative could put forth only what the states themselves had volunteered. In addition, in implementing NAFTA, the President acted not as an imposer upon states, but as a mediator among them. Rather than being asked by states to be left alone during controversies such as the Mexican trucking moratorium of 1996-97, he found himself being pushed by border state governors to implement NAFTA even more vigorously.

More importantly, the implementation machinery of the Uruguay Round agreements and NAFTA demonstrates how Congress established a novel legal mechanism to reduce the pre-

8. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (holding a California ad valorem property tax unconstitutional under the commerce clause).

9. Barclays Bank v. Franchise Tax Bd., 512 U.S. 298 (1994).

10. For a look at how contemporary Congressional politics squeezes the President, see Paul Blustein, *'Fast-Track' Trade Plan Pits White House Against Top Congressional Democrats*, WASH. POST, Mar. 22, 1997, at A11; *see also infra* note 52.

emptive effect of agreements. Congress virtually took the federal courts out of the business of striking down state laws in this context, mirroring the deferential Congressional acts in other federalism-sensitive areas like state taxes. Simultaneously, Congress has insulated the states from actions by complaining foreign governments, first by restricting challenges to government-only proceedings and then by denying these proceedings a direct effect upon states. The new "weak" preemption has intriguing parallels among past mechanisms by which Congress protected federalism. It also raises some unexplored questions regarding the legal interaction of federal and state authorities.

This Article concludes by predicting the future jurisprudence of federalism and free trade. While the President signs instruments of international law that appear to legally define state obligations,[11] it is the domestic political process with major state participation that actually determines these obligations concretely. How Congress sets up these domestic political processes will determine how the United States integrates its "dual sovereignty" system with the international negotiating regime. Only this new paradigm can reconcile free trade agreements with the new federalism.

II. THE 1990s DILEMMA OF FREE TRADE AGREEMENTS AND FEDERALISM

A. FEDERALISM AND FREE TRADE IN THE *JAPAN LINE* ERA

As recently as 1979, the Supreme Court powerfully demonstrated the old paradigm, in which it simply shouldered aside state laws that disadvantaged foreign enterprises. In the *Japan Line* case of 1979, the Supreme Court developed the potent "one voice" doctrine and employed it in the federalism-sensitive context of state taxation.[12] The case arose from California's application of a state property tax to the cargo containers of Japanese shippers.[13] The shippers claimed that this method of taxation violated the dormant Foreign Commerce Clause,[14] which limits how much states can interfere with foreign commerce absent

11. *See generally* Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967 (1996).

12. 441 U.S. at 448-51.

13. *Id.* at 436-37.

14. *Id.* at 437-39; U.S. CONST. art. I, § 8, cl.3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .").

Congressional authorization.[15] The California tax, however, did not discriminate against out-of-state enterprises, and it had been held perfectly valid for domestic commerce purposes.[16] Nonetheless, a nearly unanimous Supreme Court, with only Justice Rehnquist dissenting, struck down California's approach.[17] "[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments," the Court announced.[18]

What is particularly notable about the Court's "one voice" doctrine is how it released foreign enterprises from getting the congressional "voice" to speak. Congress had not enacted or ratified anything preempting California's property tax law. In fact, no statute had clearly expressed a position antipathetic to California's, or even mildly opposed to it.[19] Through the Solicitor General, the Executive Branch had filed a brief for the United States as amicus curiae in support of Japan.[20] The Court, however, cited a press release of the European Economic Community to show a "risk of retaliation" that "of necessity would be felt by the Nation as a whole."[21] As we will see, the Court's solicitude for the executive branch and for the risk of retaliation in this case markedly contrasts with the Court's approach in the 1990s.

The Supreme Court of the *Japan Line* era, in effect, volunteered to aid the executive branch in clearing away state-created problems, without awaiting Congressional action. The *Japan Line* decision carried over to the federalism and free trade context the jurisprudence that international considerations must

15. For a discussion of the dormant commerce clauses, see, for example, Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (discussing the political theories behind the dormant Commerce Clause); *see also supra* note 4.

16. 441 U.S. at 445.

17. *Id.* at 457

18. *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (discussing the Import-Export Clause)). The Court said that "with respect to foreign intercourse and trade the people of the United States act through a single government." *Id.* at 448 (quoting Board of Trustees v. United States, 289 U.S. 48, 59 (1933)).

19. In a footnote, the Court cited the Customs Convention on Containers, a federal regulation, and the Convention Between the United States of America and Japan for the Avoidance of Double Taxation. *Id.* at 446 n.10 and 452-53. Each of these said something regarding containers being associated with ships or being instruments of international commerce. Neither squarely discussed state property taxes, as opposed to import duties and income taxes.

20. *Id.* at 452 n.17 (United States as amicus curiae).

21. *Id.* at 453 & n.18.

override state laws, typified by the famous case of *Zschernig v. Miller*.[22] In that case, all the Supreme Court needed to do to displace state rules on the descent of property—a realm where the states, rather than the federal government, have traditionally had the power to make the law—was to consider the state law as intruding upon the exclusive role of the national government in foreign policy.[23]

In what might be called a "strong" preemptive approach,[24] the Court cleared a comparatively easy path for the executive branch in trade relations. Foreign enterprises had a court-paved road for challenging state laws or actions that disadvantaged them, without forcing the federal executive branch to engage in any heavy lifting in Congress. In fact, foreign enterprises did not even need to work through their own governments and diplomatic channels to knock out stark state barriers. Instead, they could apply on their own to the American federal and state judicial systems, through traditional challenges against state "protectionist" barriers under the dormant foreign commerce clauses, and sue a defendant state to have its allegedly protectionist actions struck down.

Today, foreign enterprises also have a possibility of taking this course of action with regard to another developing state issue: state and local government procurement. A perennial and growing issue in state procurement is state action that favors local suppliers and disfavors some, or all, foreign ones. This issue has gradually become more important with the growth of both state procurement and foreign trade.[25] It arises afresh today in Massachusetts where the state is considering procurement legislation that would disfavor enterprises that have invested in Indonesia, in light of human rights violations

22. Zschernig v. Miller, 389 U.S. 429 (1968). There, the Supreme Court struck down an Oregon statute limiting the rights of East German heirs of an Oregon decedent because of East Germany's lack of reciprocating recognition. For discussion, see THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 793-94 (2d ed. 1993); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 263-64 (1990).

23. The Court acted without a showing of adverse effect on international relations, and without a congressional expression of opposition to the state's approach. 389 U.S. at 459-62 (Harlan, J., concurring).

24. *See generally* Maier, *supra* note 7.

25. *See* Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576 (1973) (discussing the burden placed on interstate commerce by home-state preferences in light of an increasingly interstate economy).

there.[26] Disfavored foreign suppliers could challenge such state procurement laws as violating either the dormant commerce clauses or trade agreements.[27] Several courts have decided cases on the question of whether state procurement rules disfavoring foreign suppliers violate federal prohibitions. Some courts have ruled in favor of the foreign suppliers and some have ruled against them.[28]

B. SUPREME COURT'S NEW DOCTRINES: STATE "MARKET PARTICIPATION" AND *BARCLAYS BANK*

Even at the time of the *Japan Line* decision, the New Federalism movement had already begun in the Supreme Court. The Burger Court had a general commitment to constitutional doctrines that would protect the states from the federal government.[29] In 1976, the Court first enunciated its "market participant" exception to the dormant Interstate Commerce Clause.[30] It said that a state government acting not as a regulator of that state's commercial market, but as a decisionmaker on how the state would handle its own state-funded procurement, could "exercis[e] the right to favor its own citizens over others."[31]

---

26. *Sanctions: U.S., European Companies Urge Massachusetts to Reject Plan to Sanction Investment in Indonesia*, 14 Int'l Trade Rep. (BNA) No. 5, at 179 (Jan. 29, 1997) (discussing the strong opposition to the Massachusetts proposal to impose unilateral economic sanctions on companies with investments in Indonesia).

27. Note, *State Buy-American Laws—Invalidity of State Attempts to Favor American Producers*, 64 MINN. L. REV. 389, 412 (1980).

28. *See, e.g.*, Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 819 (1962) (replacing "place of manufacture" provisions with treaty provisions); Bethlehem Steel Corp. v. Bd. of Comm'rs, 276 Cal. App. 2d 221, 225-29 (1969) (holding the California Buy American Act unconstitutional). Foreign suppliers did lose some decisions. *See, e.g.*, K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 381 A.2d 774 (N.J. 1977) (holding that the New Jersey Buy American provision was not preempted by GATT, did not interfere with foreign affairs, and was not proscribed state action under the commerce clause).

29. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating federal minimum wage requirement as applied to state agencies).

30. *See generally* Benjamin C. Bair, *The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception*, 93 MICH. L. REV. 2408 (1995); Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions, and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. CHI. L. REV. 615 (1993).

31. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

The Court further elucidated the doctrine in the 1980s, explaining two applicable considerations. When a state government buys or sells for itself, the Court said, the state exercises "the long-recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[32] Moreover, regarding state procurement, "[r]estraint in this area is also counseled by considerations of state sovereignty [and] the role of each State 'as guardian and trustee for its people.'"[33]

The "market participant" cases still purported to leave *Japan Line* intact for the time being, because the Supreme Court had limited its rulings to upholding state barriers to domestic, not foreign, commerce.[34] However, the writing was on the wall, and the Court began pulling back from *Japan Line.*[35] In fact, a federal appellate court extended the "market participant" analysis to allow states to disfavor foreign suppliers as well as out-of-state domestic ones.[36]

Ultimately, in the *Barclays Bank* case, the Supreme Court all but ended the era of the *Japan Line* "one voice" doctrine.[37]

---

32. Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

33. *Id.* at 438 (quoting Heim v. McCall, 239 U.S. 175, 191 (1915)). *Accord*, White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 207 & n.3 (1983). For the doctrine's further development, see Big Country Foods, Inc. v. Board of Educ., 952 F.2d 1173 (9th Cir. 1992) (holding that a statutory preference requiring schools that received state funds to buy dairy products produced within the state fell within the market participation exception).

34. In fact, the Court carefully distinguished *Japan Line*, saying "that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged. *See Japan Line, Ltd.*" 447 U.S. at 437-38 n.9 (arguing that the "power of states to affect foreign commerce is far more strictly limited than is their power to affect interstate commerce"). Commentators still thought state Buy American laws might not pass muster under the dormant Foreign Commerce Clause. Note, *supra* note 27, at 412.

35. *See* Wardair Canada Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986); Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 160-61 (1983) (distinguishing *Japan Line*). While these cases foreshadowed *Barclays Bank*, there was still a serious argument to be made against the state tax at issue in that case. Elizabeth Harris, *Desperate for Revenue: The States' Unconstitutional Use of the Unitary Method to Apportion the Taxable Income of Foreign Parent Corporations*, 19 HASTINGS CONST. L.Q. 1077, 1086-1101 (1992).

36. Trojan Technologies, Inc. v. Pennsylvania, 916 F.2d 903, 912 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2814 (1991).

37. Barclays Bank v. Franchise Tax Bd., 512 U.S. 298 (1994). *See generally* Robert Charles Griffitts, Note, *Broadening the States' Power to Tax Foreign Multinational Corporations:* Barclays Bank v. Franchise Tax Board, 46 CATH. U. L. REV. 243 (1996).

As in *Japan Line*, the Supreme Court scrutinized a California tax method that burdened foreign enterprises. This time it reviewed the state's corporate income ("franchise") tax measured for foreign multinationals by their worldwide income. Once more, the foreign taxpayer asserted that the state tax would trigger foreign retaliation, citing warnings by foreign countries. The Executive Branch again filed a brief that agreed with the foreign taxpayer.[38]

Treating *Japan Line* as having been "effectively modified,"[39] the Court upheld California's approach. It brushed aside any concerns about retaliation, stating that "[t]he judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'"[40] In other words, the Court withdrew from its previous practice of anticipating possible foreign retaliations and heading them off. Now, it would leave the politically strenuous duty of making states obey foreign preferences to Congress.

Whereas in the *Japan Line* era the Court had heeded the Executive Branch's wishes to override state laws, now the Court attended to Congress's refusal to pass strong preemptive laws as a protection of federalism. The Court gave the President's view virtually no weight, declaring that "neither he nor we were to make that decision, but only . . . Congress."[41] Instead, the Court carefully traced and recited the history of numerous Congressional bills and hearings that had considered the matter. Requests by the President to stop this state practice that had gone unheeded now signified approval of it. The Court concluded that "an unreceptive Congress . . . is not evidence that the practice interfered with the Nation's ability to speak with one voice."[42]

The Court brushed aside the *Japan Line* "one voice" argument, stating that "Congress may more passively indicate" acceptance of state practices disfavoring foreign enterprises, and that Congress "need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce."[43] The *Barclays Bank* opinion

38. 512 U.S. at 328 nn.29-30.
39. *Id.* at 319 n.18.
40. *Id.* at 328 (quoting Container Corp. of America, 463 U.S. at 194).
41. *Id.* at 329 (quoting Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 81 (1993) (Scalia, J., concurring)).
42. *Id.*
43. *Id.* at 323.

was a telling example of how the Senate protects the states. As the Court explained, the Senate had rejected the version of a tax treaty with the United Kingdom that would have protected Barclays Bank against California's method of taxation. The Senate then ratified a subsequent version of the treaty, utilizing its power of reservation to specify that the treaty's provisions not apply to states.[44]

C. FEDERALISM'S STRUCTURAL PROTECTIONS IN THE SEPARATION OF POWERS

While the Supreme Court's new doctrines pressured the President from one side, structural protections in Congress pressured him from the other. An eminent line of scholarly analysis has traced the special protection that the legislative branch has provided to federalism, most notably through the structuring of the Senate.[45] The bicameral Congress, with a state-based Senate, provides an immense reservoir of protection for the states.

At the center of this protection for state interests lies the process of selecting the members of the two chambers of Congress on a state-by-state, district-by-district basis.[46] Since each member owes her election (as well as her prospects for reelection) to a local constituency, each must accommodate local interests. The chambers must, therefore, respond to the collective sum of local interests. Moreover, the structure of Congress, with its manifold "veto gates" and other means of delaying, amending, or defeating legislation, allows the hostility of a fraction of the national population to have a significant impact. The enactment of measures which too strongly encroach upon the states is

---

44. *Id.* at 327. For a discussion of the Senate's treaty reservation power and procedure, see Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 263-66 (1983).

45. *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that Congress rather than the Court has the ultimate authority for managing federalism); Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 276 (1977) (arguing that the "states have been left to do what the federal government chooses not to do"). For a history of the procedure that epitomizes Senate protection of states, see CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 693-706 (1989).

46. Some commentators think that direct election of Senators, as opposed to the pre-Seventeenth Amendment system of having state legislatures choose them, markedly reduced the Senate's protections of federalism. Roger G. Brooks, Comment, Garcia, *The Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J. L. & PUB. POL'Y 189, 196-208 (1987); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 467-69 (1955).

difficult, and sometimes impossible, absent special factors. These realities are consonant with Supreme Court doctrines that interpret statutes so as not to interfere with the states without explicit congressional authorization. Proenforcement forces must move explicit provisions past locally-accountable resistance which can oppose all those "veto gates."[47]

Finally, simply having an elected legislative institution with entirely different political accountability than the President's creates an impediment for the executive branch. Presidents Bush and Clinton concluded that they should support programs of negotiating and implementing international trade agreements. Both perceived that the positive effects, namely export promotion and import cheapening, outweighed the adverse job impacts likely to befall particular localities. These Presidents would have had an easier time effectuating their shared program in the 1990s if the Supreme Court had struck down some or all of the state laws in the way. However, in the "market participant" cases and the *Barclays Bank* decision, the federalism-minded Court stopped voluntarily clearing adverse state laws out of the way. This left the President to deal with the states in some other fashion.[48]

The President had the option of asking Congress, in the course of the legislative implementation of such agreements, to clear away any adverse state laws. The President, however, found himself squeezed between the historic politics of trade, particularly those of the 1990s, and the Court's profederalism doctrines.[49] Furthermore, the elections of the last half-century have made this an era of divided government, when Presidents have rarely been the leaders of the majority party in Congress.[50]

---

47. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 359-72 (1991) (discussing the political role of interest groups).

48. Such "decision[s] erroneously placed a burden upon the federal government to actively legislate a prohibition on state Buy American laws should these laws run counter to foreign trade policy." Geraldo Pascual, Note, *State Buy American Laws in a World of Liberal Trade*, 7 CONN. J. INT'L L. 311, 311 (1992) (referring to Trojan Technologies, Inc. v. Pennsylvania, 499 U.S. 917 (1991)).

49. "[N]either Congress nor the White House was willing in the early 1980s to order state governments to abandon their unitary taxation formulas . . . as a result, they were basically bystanders as foreign-based multinational corporations pursued their case in the federal court system." Dr. Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance*, 20 CAN.-U.S. L.J. 303, 311 (1994).

50. For an introduction to the general theory of postwar divided government, see CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY 25-26 (1994).

This diminishes their ability to resort to their parties to overcome Congress's institutional resistance. In 1992, following a national recession that hit hard locally, New Hampshire gave a large primary vote to Pat Buchanan over President Bush, reflecting, in part, Buchanan's anti-free trade principles. In 1996, following the national controversies surrounding the approval of NAFTA and the Uruguay Round agreements, New Hampshire gave an actual victory to Pat Buchanan, reflecting again, in part, the state's views about trade. In addition, in both years the national electorate in the Presidential election gave a strikingly large vote to H. Ross Perot, reflecting in part his anti-free trade principles. A considerable faction of congressional Republicans, looking at the strength in their own party primaries of Pat Buchanan and H. Ross Perot, developed strong reservations about trade agreements.[51]

In Congress, the controversial nature of trade agreements has split both parties. A large faction, on some matters a majority, of congressional Democrats have strong reservations about trade agreements, even those urged by President Clinton. For example, in 1997 both the Democratic House minority leader and minority whip opposed the renewal of "fast track" authority unless labor and environmental protection played a more central role.[52]

Furthermore, as previously noted, the *Barclays Bank* opinion itself cites a prime example of Senate protection of the states, namely the rejection of one treaty with the United Kingdom and the Senate reservation upon its successor. Both of these actions preserved state taxing authority. In addition, the history of GATT is itself an example on a grand scale. The original modern impetus for establishing international trade agreements goes back to the post-Depression, post-World War II reaction against the doleful history of high tariffs and their destructive effects on trade. However, the Senate would not ratify the international agreements establishing GATT, either in the initial version of the late 1940s Havana Charter for an International Trade Organization or in the more limited revised version

51. *Trade Policy: Staffers See Little Activity in Trade for 104th Congress*, 13 Int'l Trade Rep. (BNA) No. 8, at 280 (Feb. 21, 1996).

52. *Trade Policy: Gephardt Opposes Open-Ended Authority for Fast Track and Extension of NAFTA*, 14 Int'l Trade Rep. (BNA) No. 10, at 407 (Mar. 5, 1997); *see also supra* note 10.

which involved an Organization for Trade Cooperation.[53] This left GATT somewhat in limbo.[54]

Reflecting its protection of many interests, including federalism, Congress hardly gave the President a free hand to implement international trade agreements domestically. After decades of experience authorizing Presidents to negotiate reciprocal trade agreements, Congress ultimately adopted the Trade Act of 1974, carried forward with modifications by the Trade Agreement Act of 1979 and by modifying and renewing legislation in 1984 and 1988.[55] This legislation established a middle ground for the 1990s between, on one hand, the unacceptable alternative of Senate or congressional delegation to the President of complete freedom to negotiate any free trade arrangements he wished, and on the other, the equally unacceptable alternative of allowing congressional approval of individual trade agreements to be bogged down in delays and floor amendments.[56]

The 1974 Act created a system by which the President negotiates agreements, anticipating the need to obtain congressional approval, and then submits implementing bills for the trade agreements to Congress.[57] Congress, in turn, binds itself procedurally to move the implementing bills submitted by the President along an internal "fast track," free from floor amendments and excessive delays.[58] "Fast track" treatment remains essential for effective Presidential negotiation of trade agreements. The importance of "fast track" authority is illustrated by President Clinton's ongoing struggle to convince Congress to renew this power, in preparation for the admittance of Chile to NAFTA

53. John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 265-66 (1967).

54. President Truman adopted the revised version by executive act. This made the effect of GATT on domestic law debatable in instances when particular agreements might be inconsistent with federal or state statutory law. *See, e.g.*, Thomas William France, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481, 1494-99 (1994).

55. Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 475-81 (1990).

56. Harold Hongju Koh, *The Fast Track and the United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 152-61 (1992).

57. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1201-03 (1986).

58. 19 U.S.C. §§ 2191-2193 (1994).

in the short term, and for the consummation of the Free Trade Area in the Americas agreement by 2005.[59]

However, the need for Congress to renew the "fast track" legislation, and to pass an implementation bill for the trade agreements, makes those trade agreements vulnerable to political controversy. In addition, local antipathy to such agreements remains strong, fueling Congressional reluctance.[60] The short way to describe the result is that the Supreme Court's profederalism doctrines forced the President to depend upon congressionally-enacted preemption provisions exactly when the structural protections for federalism in Congress magnified political resistance to strong preemption. This is the situation giving rise to the new paradigm of "weak" preemption.

The limits of NAFTA are a quiet, yet dramatic, demonstration of the strength of federalism's protections. The next section will demonstrate how the Uruguay Round agreements affected state procurement laws. NAFTA, which was concluded in 1992[61] and implemented by Congress in 1993,[62] did not do much in the state procurement area. In fact, NAFTA only applies to federal government procurement, not to state procurement.[63]

III. FEDERALISM'S NEW PROTECTIONS: "WEAK" PREEMPTION AND PARTNERING

A. SEPARATION OF POWERS AND "PARTNERING" IN NEGOTIATION: URUGUAY ROUND EXAMPLE

The Uruguay Round negotiations focused on several state issues. Most notably, the previous GATT Tokyo Round Agreement on Government Procurement ("AGP")[64] had deliberately avoided the large sphere of state and local government procure-

59. *See, e.g.*, I.M. DESTLER, RENEWING FAST-TRACK LEGISLATION 35-36 (1997); *see also supra* note 2.

60. For general introductions to the Congressional politics of trade, see Pietro S. Nivola, *Trade Policy: Refereeing the Playing Field, in* A QUESTION OF BALANCE: THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY 201, 218-29 (Thomas E. Mann ed., 1990); JAMES A. ROBINSON, CONGRESS AND FOREIGN POLICY MAKING: A STUDY IN LEGISLATIVE INFLUENCE AND INITIATIVE 59-61 (Norton E. Long ed., rev. ed. 1967).

61. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., *reprinted in* 32 I.L.M. 296-456 & 605-800.

62. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

63. North American Free Trade Agreement, *supra* note 61, pt. 4, ch. 10, sec. A, art. 1001.

64. Agreement on Government Procurement, Apr. 11, 1979, GATT B.I.S.D. (26th Supp.) at 33 (1980); *see generally* Martin J. Golub & Sandra Lee Fenske,

ment legislation because of anticipated resistance from the U.S. Congress.[65] As a result, the Uruguay Round negotiations aimed to extend the AGP to state and local government procurement laws. Similarly, the Uruguay Round Agreement on Trade in Services[66] aimed to cover services, some of which the states regulate, such as banking and insurance.[67] In addition, the Agreement on Sanitary and Phytosanitary Standards[68] aimed at uniformity in environmental laws, including state laws, that might restrict commerce.[69] These latter two agreements paralleled the implications of NAFTA, in that state compliance would be necessary.[70]

Once the Uruguay Round negotiations got underway in 1990, U.S. negotiators proposed a voluntary compliance plan for the states. Under this plan, signatories would attempt to obtain agreement to coverage by subcentral government entities.[71] The preliminary AGP proposal presumed a code drafted to apply to some sphere of state and local procurement laws and government-owned enterprises. Its actual coverage, though, would be set out for each signatory country in schedules or annexes to the agreement that would be collectively negotiated, but individually adapted to the particular situation of each signatory. As this approach suggests, the Bush Administration could foresee opposition from both the states and Congress for rules that

---

U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors, 20 GEO. WASH. J. INT'L L. & ECON. 567 (1987).

65. "[T]here were at least some perceptions during the [Tokyo Round] negotiations that some members of Congress might have opposed approval of an international government procurement code designed to apply to state government purchases." JOHN H. JACKSON, ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 200 (1984).

66. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31; in 33 I.L.M. 44 (1994).

67. Jeffry Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, 86 (1992).

68. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, GATT Doc. MTN/FA II-AIA-4.

69. Melinda Byrns O'Brien, *The General Agreement on Tariffs and Trade: An International Agreement's Effect on Local Environmental Law*, 5 INT'L LEGAL PERSP., Fall 1993, at 88-91.

70. Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 156-59 (1993).

71. James D. Southwick, *Binding the States: A Survey of State Law Conformance With the Standards of the GATT Procurement Code*, 13 U. PA. INT'L BUS. L. 57, 63 (1992).

would uniformly preempt in-state procurement preferences in all fifty states. As in its other approaches to the Uruguay Round, the administration planned ahead to negotiate only what would be acceptable to the states.[72]

In response to a request by U.S. Trade Representative Carla Hills, the National Governors' Association passed a resolution in August 1991 urging its members to pledge to keep their states' nondiscriminatory procurement practices open by placing them under the coverage of the Government Procurement Code.[73] Accordingly, the United States was able to offer that its annexes to NAFTA would list the coverage of twenty-four states. This meant that twenty-four states had voluntarily agreed to let the federal government include them in its coverage.[74] Here, the "partnering" approach had already manifested itself. The President was not imposing international obligations on hapless states. Rather, he was gathering the states' concessions and then, almost as a spokesman for a league of sovereigns, was presenting to other nations what the American states had offered.

By 1992, the voluntary state compliance portion of the Uruguay Round talks had temporarily stalled.[75] The United States had objected that European government-owned enterprises, like national telecommunications and utility companies, were not open. Meanwhile, the Europeans complained that more than half of the U.S. states applied "buy local" policies, as did thirteen of the twenty-four largest U.S. cities.[76] When the Europeans de-

72. Clark, *supra* note 67, at 106 (describing 1990 survey of fifty states' service regulatory systems).

73. *Governors Adopt Resolutions Supporting NAFTA, GATT Procurement*, 8 Int'l Trade Rep. (BNA) No. 34, at 1237 (Aug. 21, 1991).

74. Steven S. Diamond & Rosemary Maxwell, *Opening the International Government Marketplace: New Developments on the NAFTA, U.S.-EC, and GATT Fronts*, 62 Fed. Cont. Rep. (BNA), at n.82 and accompanying text (July 25, 1994).

75. The lead in this matter was taken by negotiations between the European Union and the United States on a bilateral agreement on government procurement, akin to the U.S.-Canada free trade agreement approved in 1979. These bilateral talks had stalled over the question of the balance between the size of the sectors that the European Union and the United States were each offering to open (their "tenders"). Gerard De Graaf & Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT'L LAW. 435 (1995).

76. *Id.* at 442-43. *See also* SERVICES OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON UNITED STATES TRADE BARRIERS AND UNFAIR PRACTICES 1991: PROBLEMS OF DOING BUSINESS WITH THE U.S. 53-57 (1991) (listing state procurement preferences). It is open to question whether the Europeans

manded more, American negotiators had to pause for consultation with the states. While negotiations had progressed on other points by April 1993, the United States was not initially ready to make commitments for the coverage of its states and localities.

As talks continued, the U.S. Trade Representative for the Clinton administration obtained voluntary commitments from thirty-three states.[77] Ultimately, the United States was able to improve its offer to thirty-seven states that agreed to be bound by the AGP. These included the five largest states (California, New York, Texas, Illinois, and Florida), accounting for approximately eighty percent of total state procurement.[78]

As for the notion of "partnering," it is worth noting that the National Governors' Association resisted challenging the AGP on federalism grounds. On the contrary, the National Governors' Association sparked the support for negotiating the AGP, just as the National Association of State Procurement Officers ("NASPO") came forward as a major avenue for effectuating it. The pro-trade states, which possessed an overwhelming portion of the national economy, used the executive branch as their broker, their mediator, and ultimately their solution to the "Prisoner's Dilemma"[79] of arranging among a majority of the states a collective position for an international deal.

An important controversy during NAFTA's implementation took the relationship between the federal and state governments a step further. One of the chief controversies regarding NAFTA's implementation concerned the Mexican trucking industry's transportation of goods into the United States. NAFTA signaled a commitment to opening the border states to Mexican trucking, and initially the President moved forward with that commitment. A defender of federalism might well characterize the situation as a bullying executive branch overriding what states chose for themselves. After all, the Executive Branch did, in fact, take the issue into its own hands by preempting state truck driver licensing laws.[80] In so doing, it overrode the ability

---

cared as intensely about opening American state and local procurement as they seemed to be, or if instead they pressed the point partly to counterbalance the sensitive issues being advanced by the American side. Certainly the issue of "buy local" policies had also become important in the negotiations leading up to the Canada-U.S. Free Trade Agreement, which took effect in late 1987 and early 1988 (and which was superseded by NAFTA).

77. De Graaf & King, *supra* note 75, at 444.

78. *Id.* at 447-49.

79. Bednar & Eskridge, *supra* note 3, at 1471-72.

80. Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 741 (1994).

of the California state legislature to continue enforcement of its licensing requirements.[81]

Once NAFTA went into effect, the Republican governors of the states along the U.S.-Mexican border expressed a desire for a vigorous implementation of NAFTA.[82] It was President Clinton who deferred this aspect of NAFTA's implementation. The governors' group which criticized him did so not on the grounds that one might have imagined, that of as a President too roughly imposing international trade interests. Instead, they criticized the President for moving too slowly and gently in imposing the international trade measures that these governors wanted.[83]

Once again, the President emerged not as a national dictator of internationally derived commands. Instead, he emerged as the broker and mediator among states which differed primarily in their willingness to make concessions to foreign enterprises in order to support free trade. Because the Supreme Court had largely removed itself from the business of striking down state laws disadvantaging foreign enterprise, the President's negotiation of trade agreements had to occur in partnership with state political processes in order to broker a solution capable of achieving congressional approval.

B. SEPARATION OF POWERS AND "WEAK" PREEMPTION IN RECENT AGREEMENT IMPLEMENTATION LAWS

Even after the President, with state support, negotiated the Uruguay Round agreements, the agreements still required affirmative congressional approval in the form of an implementation bill. It was during this approval process that the new

---

81. Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 653-54 (1994).

82. *NAFTA: Border Governors Pledge Fight Against NAFTA Circumvention Efforts*, 13 Int'l Trade Rep. (BNA) No. 23, at 942 (June 5, 1996); *NAFTA: Key GOP Members Question Decision to Delay Mexico Trucking Provisions*, 13 Int'l Trade Rep. (BNA) No. 2, at 42 (Jan. 10, 1996). The governors have many views that differ from those of state legislators, including how foreign competition undermines the Teamsters Union for the benefit of the governors' own political supporters among their states' business interests.

83. *Trucking Provision Implementation Urged by Industry, State Officials*, 14 Int'l Trade Rep. (BNA) No. 10, at 27 (Mar. 5, 1997); *see also supra* note 1. Proposals to admit Mexican trucking elicited the respectable opposition of the insurer's association, at least partly because of comparative laxity in Mexican truck driver licensing. The individual states traditionally decide whether to accept foreign truck drivers' licenses.

"weak" preemption mechanism, previously devised for NAFTA,[84] had its greatest impact.

Under the "fast track" mechanism, both the President and Congress engaged in intense joint consideration of the Uruguay Round agreements even before they were concluded in April 1994. Congress began a series of committee hearings during the negotiations.[85] By July 1994, the states had expressed strong concerns about the Uruguay Round agreements, including the AGP. A letter signed by forty-two state attorneys general was sent to the President and reprinted in the Congressional Record. Among its list of "serious concerns" were "[w]hether GATT grants any private party a right of action to challenge a State law in federal court," "[w]hether States may maintain public procurement laws that favor in-State business in bidding for public contracts, and "[w]hether the implementing legislation adequately guarantees States that the federal government will genuinely consider accepting trade sanctions rather than pressuring States to change State laws which are successfully challenged in the WTO."[86]

It was not until September 27, 1994, that the President transmitted to Congress H.R. 5220, the implementation bill for

---

84. A system similar to the one described below for the Uruguay Round agreements effectuates NAFTA with regard to state laws. *See* North American Free Trade Association Implementation Act, Pub. L. No. 103-182, § 102(b), 107 Stat. 2057 (1993), codified at 19 U.S.C. § 3301(b). It is explained by an Administration Statement and a legislative history similar to the one for the Uruguay Round agreements. H.R. Rep. No. 103-361 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552.

85. The House Report on the Uruguay Round agreements summarizes the House hearings:

> Following the 120-day advance notice to Congress on December 15, 1993, of the President's intent to enter into the agreements, the full Committee held a hearing on January 26, 1994, followed by four days of comprehensive Subcommittee hearings on February 1, 2, 8 and 22 to review the final results of the Uruguay Round negotiations (Serial No. 103-73). Finally, the full Committee held a hearing on June 10, 1994 on the World Trade Organization and its implications for U.S. sovereignty.

H.R. Rep. No. 103-826, pt. 1, at 19-20 (1994), *reprinted in* 1994 U.S.C.C.A.N., at 3791-92.

86. 140 Cong. Rec. S8853 (daily ed. July 13, 1994). The Congressional Record also reprinted an intense critique by the state-organized Multistate Tax Commission of a GATT panel ruling on Canada's challenge to certain U.S. tax laws regarding beer. This critique fleshed out the states' legal concerns that the procedures used to effectuate GATT principles were too intrusive. 140 Cong. Rec. S8856 (daily ed. July 13, 1994) (concerning the panel decision commonly known as the "Beer II" decision).

the Uruguay Round agreements.[87] The President also submitted a "Statement of Administrative Action."[88] To further clarify the matter, the U.S. Trade Representative provided a set of answers to questions from NASPO.[89]

The hearings on the Uruguay Round agreements included a memorable debate that once more reflected the structural protection of federalism in Congress.[90] Professor Laurence Tribe of Harvard Law School questioned the constitutionality of approving the agreements by legislation. He argued that the Constitution only envisaged such an agreement as a treaty requiring ratification by two-thirds of the Senate, a level of support the agreements might not achieve. Professor Bruce Ackerman of Yale Law School defended the constitutionality of legislatively implementing the agreements. The debate between the two professors exposed the vulnerability that the executive branch would experience if it attempted to impose too harsh a preemptive regime upon the states in the form of a trade agreement. States opposed to the trade agreement would have supplemented their direct opposition with the constitutional argument offered by Professor Tribe that federalism-threatening strong preemption should occur only with the advice and consent of two-thirds of the Senate.

After a hard struggle, President Clinton obtained enactment of the implementation bills for NAFTA and the Uruguay Round agreements.[91] It is fair to say that enactment required all the steps that had been taken to reduce opposition. For purposes of this Article, the most pertinent step was the creation of the "weak" preemption mechanism.

While NAFTA and the Uruguay Round agreements seemed to substantively establish rights for foreign enterprises, aggrieved foreign businesses might have hoped for a more potent litigative recourse. The incomplete nature of the substantive rules in these agreements makes the remedies particularly important. The agreements describe many of the applicable princi-

87. H.R. Rep. No. 103-826, pt. 2, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4013.

88. *Id.* at 4040.

89. These are reprinted in Margaret E. McConnell, *The Code's Adaptability to Some New Trends*, *in* RIDING THE WAVE OF CHANGE IN STATE AND LOCAL PROCUREMENT, 1995 A.B.A. SEC. PUB. CONT. L. § E.

90. *GATT Implementing Legislation: Hearing on S. 2467 Before the Sen. Comm. On Commerce, Science, and Transportation*, 103d Cong. 285-339 (1994).

91. I.M. DESTLER, AMERICAN TRADE POLITICS 222-28 (3d ed. 1995) (describing the enactment of NAFTA's implementation bill), 251-54 (describing the enactment of the Uruguay Round implementation bill).

ples so incompletely that they have received the label "political theatre." "[As to] the WTO's foundation agreements . . . . Cracks can be found in all of the major agreements in the package, including agreements regarding agriculture, services, intellectual property, and textiles. In no case is the real meaning of these agreements what it appears to be."[92] As another commentator put it, "[w]hile the General Agreement on Trade in Services (GATS) purports to extend unconditional MFN to trade in services, the working provisions read more like an oratory wish list than a binding set of regulations."[93]

Two examples of the types of controversy that can arise should further clarify why the remedies matter so much. The AGP purports to forbid state laws that discriminate in favor of in-state suppliers and against foreign suppliers. However, the AGP does not invalidate "in-state preference" laws on their face. Instead, states remain free to have in-state preferences, so long as they apply them only to foreign suppliers from non-signatory countries and to domestic suppliers from the other forty-nine states. Since most state suppliers are domestic, states have much of the same motivation for in-state preferences as they always have.

However, as long as a state has such a preference on its books, its state procurement officers obviously may refrain on some occasions from relieving foreign suppliers from the effects of the state preference. In these cases, it is critically important whether the aggrieved foreign supplier has a quick and easy judicial remedy available or is instead required to take a long, roundabout, expensive, and uncertain route in pursuit of uncertain relief.

In another context, both the Uruguay Round agreements and NAFTA aroused concern based on their potential to override state and local environmental laws.[94] The Uruguay Round Sanitary and Phytosanitary Agreement[95] requires that governments "accept the sanitary or phytosanitary measures of other Members as equivalent . . . if the exporting Member objectively demonstrates . . . that its measures achieve the importing Mem-

92. Robert E. Hudec, *International Economic Law: The Political Theatre Dimension*, 17 U. PA. J. INT'L ECON. L. 9, 14 (1996).

93. Kim, *supra* note 11, at 1006-07.

94. O'Brien, *supra* note 69, at 86-120; Ursula Kettlewell, *GATT - Will Liberalized Trade Aid Global Environmental Protection?*, 21 DENV. J. INT'L L. & POL'Y 55 (1992).

95. Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* note 68.

ber's appropriate level of . . . protection."[96] When a state decides that a foreign measure is not "equivalent," the foreign supplier challenging this determination has an obvious interest in the remedies available. In addition, the Technical Barriers to Trade Agreement[97] allows state environmental protections, provided "that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination."[98] Commonly, the political coalition supporting a state or local environmental provision combines local producers or their employees, who plainly have protectionist goals, with some number of environmental advocates. The ability of an aggrieved foreign enterprise to overcome the state measure will depend on both the relative strength of the environmental justification for the provision and the ease and effectiveness of the available remedy. To put it differently, the absence of any preemptive remedy, making state compliance totally voluntary, is not expected to produce meaningful results.

As previously discussed, under the Foreign Commerce Clause, foreign interests had enjoyed the right to apply directly to the federal courts in challenging allegedly protectionist state laws. They did not have to get the federal executive branch to help, although this support was available in major test cases where foreign countries had asked for the assistance of the executive branch. Moreover, foreign suppliers found the ease and independence of the federal judicial system much more effective than asking their own governments to help them through slow and uncertain international diplomatic processes. Foreign enterprises which might invoke NAFTA and the Uruguay Round agreements against state barriers might have hoped to get a similar private federal judicial remedy. Unfortunately for them, they did not.

Congress dramatically closed the federal courthouse doors to such challenges. It should be recalled that one of the questions the forty-two state attorneys general asked was "whether GATT grants any private party a right of action to challenge a State law in Federal court." Section 102(c) of the Uruguay

96. *Id.* art. 4(1); *see also* Zane O. Gresham & Thomas A. Bloomfield, *Rhetoric or Reality: The Impact of the Uruguay Round Agreement on Federal and State Environmental Laws*, 35 SANTA CLARA L. REV. 1143, 1154 (1995) (quoting agreement).

97. Agreement on Technical Barriers to Trade, *opened for signature* Apr. 12, 1979, 31 U.S.T. 405.

98. *Id.* preamble; *see also* Gresham & Bloomfield, *supra* note 96, at 1156 (quoting agreement).

Round implementation law bars private causes of action or defenses based on the Uruguay Round agreements.[99] It precludes any private suit against any state on the ground that the state has taken a procurement action inconsistent with the agreements.[100]

The Administration and Congress, thus, deliberately took away from aggrieved foreign suppliers the ability to bring the type of legal action that historically had been the most powerful tool in breaking down state discrimination against out-of-state business. There are other contexts in which the federal courts have been held back from enforcing otherwise applicable federal law on grounds of federalism. Specifically, there are three different levels of remedy limitation to restrain the federal courts. First, the Eleventh Amendment protects the state treasuries against federal court suits.[101] Second, Congress's enactment of measures such as the Tax Anti-Injunction Act protects the collection of state taxes.[102] Third, there are judicially established abstention principles, such as those for state criminal prosecutions.[103] With respect to the sensitive federalism issues raised by the substantively preemptive international agreements, Congress and the President together decided to leave the states alone by keeping the flash-point of conflict away from foreign enterprises suing in federal district courts.

That still leaves the aggrieved foreign enterprise a remedy that both domestic and foreign suppliers use against allegedly illegal state actions—the state's own judicial remedies. The extent to which a foreign supplier can raise the Uruguay Round agreements or NAFTA in a state judicial forum poses an interesting question. It can be argued that no state judicial forum has the power to entertain such an issue.[104] Congress went out

99. 19 U.S.C. § 3512(c)(1)(A).

100. 19 U.S.C. § 3512(c)(1)(B). *See also* Julie Long, Note, *Racheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 MINN. L. REV. 231, 261 (1995).

101. RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1041-1105 (4th ed. 1996).

102. *Id.* at 1189-1212.

103. *Id.* at 1225-1336.

104. The legislative history says that "[u]nder this section, no state law may be declared invalid on the ground that it is inconsistent with the Uruguay Round Agreement, except in an action brought by the United States for the purpose of declaring such law invalid." H.R. REP. No. 103-826, pt. 2, at 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4013, 4028. The provision regarding actions by the United States provides for suits only in federal court, so that it may be that no state law may be declared invalid on this ground in state court.

of its way to declare in the implementation law that its "intent" was to preclude such a scenario from arising. This involved the unusual situation where the statute's words explicitly specify Congressional intent:

> INTENT OF CONGRESS—It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements . . . .[105]

Nothing about this declaration of intent limits its applicability to actions in federal court. The words of the text, the administrative intent, and the legislative history apply equally to actions in state fora. As the Administration explained, keeping these issues out of the court system involved conscious foreign affairs goals.[106] Surely, Congress and the President together have the power, in negotiating and approving an international agreement, to keep it from being raised in any administrative or judicial forum, including that of a state.

On the other hand, whether all the state courts will keep away from these issues is another matter. In the past, state courts have heard, and will continue to hear, appeals by foreign enterprises, such as appeals by rejected bidders on state contracts. Thus, their doors will probably remain open. With the foreign enterprises present on one side and the state authorities present on the other, it will require conscious effort for state judges to resist eliciting and considering the state authorities' defense of state actions allegedly violating the Uruguay Round agreements or NAFTA. A state court might find some parallel right under state law to whatever these agreements provide.

A particularly intriguing question under the new "weak" preemption is what will occur if a state court mistakenly applies a trade agreement to override a state law. Can the state government, or some aggrieved domestic party, seek review of the state court action in the Supreme Court or a lower federal court? The

---

105. 19 U.S.C. § 3512(c)(2).

106. With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round agreements. Suits of this nature may interfere with the President's conduct of trade and foreign relations and with suitable resolution of disagreement or disputes under those agreements.
1994 U.S.C.C.A.N. 4013, 4055.

Supreme Court might well have the authority to review state court mistakes concerning federal trade law in order to give effect to Congress's intent that these agreements not be raised in these courts at all. However, Supreme Court review is rare and difficult to secure. Whether foreign enterprises could get a federal district court to review a case in order to effectuate Congress's intent that no private cause of action exists in state court is a more complex question.

Section 102(b)(2) of the implementing bill does establish the authority of the U.S. Attorney General to file an action in federal court to declare a state law invalid for being inconsistent with the Uruguay Round agreements.[107] However, both the legislative history and the Administration Statement make clear that "[t]he authority conferred on the United States under this paragraph is intended to be used only as a 'last resort.'"[108] This simply reinforces the presumption that the Attorney General would be unlikely to file such actions merely to effectuate the law or to please foreign enterprises. The executive branch and Congress anticipated that this authority would only be used to deal with foreign governments that apply pressure through the WTO panel process or at some other level which forces the federal government to act to vindicate the agreements. The Attorney General will likely fulfill these expectations.

C. HOW THE NEW "WEAK" PREEMPTION DEFERS TO FEDERALISM

The NAFTA and Uruguay Round agreements implementation bills establish an extraordinarily attenuated remedial process for the aggrieved foreign business. First, the foreign business must enlist its government, which must then invoke a public international law process, such as the WTO panel process. Even that marks only the beginning of "weak" preemption.

In addition, only nations can participate as parties in the panel process. However, Congress did not give federal authorities complete control over the handling of a foreign nation's complaint about a state law or action. Once a signatory nation files a complaint with the WTO alleging that an American state practice violates an agreement, the complaint will be referred to a panel. The panel receives written and oral submissions from the other nation and from the U.S. Trade Representative. While the

107. 19 U.S.C. § 3512(b)(2)(B).
108. 1994 U.S.C.C.A.N. 4013, 4029.

American state, as a "subfederal entity," does not formally participate as a party, the implementation bill provides for the Trade Representative to consult and involve the state.[109] The Administration submitted a statement elaborating on the degree of consultation required.[110]

Even if the panel concludes that the American state's practice violates the AGP, "the Uruguay Round agreements do not automatically 'preempt' or invalidate state laws that do not conform to the rules set out in those agreements."[111] The implementation law provides that after such a panel ruling, "the Trade Representative shall consult with the State concerned in an effort to develop a mutually agreeable response to the report of the panel."[112] The Administration Statement and legislative history anticipated that an elaborate "cooperative approach"[113] would be followed. In addition, NAFTA provided for a similar mandatory process of federal consultations with the states.[114]

Even if the Attorney General files such a suit, the implementing law favors the state by assigning the burden of proof to the United States,[115] by explicitly denying binding effect or even deference to the panel ruling,[116] and by allowing the court to consider the matter de novo.[117] Moreover, the Supreme Court's deference to federalism might also help the state.

The details of each part of what Congress sets up matter less than how the overall system of "weak" preemption operates. State authorities receive complete protection against the strongest but most aggravating remedy, the private federal court suit. They arguably even receive statutory protection against private state court suit. A complainant must work through foreign governments and diplomatic channels seeking to get first its own

109. 19 U.S.C. § 3512(b)(1)(C)(ii,iii).

110. 1994 U.S.C.C.A.N. 4013, 4050-54.

111. *Id.* at 4028.

112. 19 U.S.C. § 3512(b)(1)(c)(iv).

113. 1994 U.S.C.C.A.N. 4013, 4029.

114. A.J. Tangeman, *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, 265-69 (1996).

115. 19 U.S.C. § 3512(b)(2)(B)(ii).

116. 19 U.S.C. § 3512(b)(2)(B)(i).

117. As the legislative history and the Administration Statement explain: "The United States would base any such proceeding on the provisions of the relevant Uruguay Round Agreement—not a panel report—and the court would thus consider the matter de novo . . . . [T]he court would reach its own, independent interpretation of the relevant provisions [of the Agreement]." 1994 U.S.C.C.A.N. 4013, 4040.

country, then a WTO panel or parallel NAFTA committee, and finally the U.S. government, to go its way.

Even in these proceedings, the U.S. government is less a controlling and commanding figure than a mediating entity that consults with the sovereign state. As the Mexican trucking controversy demonstrated, the President may be less inclined than the state governors to break down American barriers for foreign enterprises. Furthermore, foreign governments may not push the President too hard because of political considerations. Only after a long process, where the foreign government insists on a formal proceeding and the federal government loses, can the foreign business attempt to overcome the state in court. Even then, though, the state has its own cards to play in the ensuing court proceeding.

Ultimately, this results in delay, deferral, and a long sequence of political processes and buffers to complement the highly attenuated legal remedy. "Weak" preemption exists less as a legal tool for private complainants to use in breaking down state trade barriers than as a series of occasions for federal and state administrative and other authorities to discuss the subject. Dual sovereignty of this kind is familiar. Federal and state authorities prosecute, tax, regulate, procure, and conduct all kinds of administrative business side-by-side, negotiating their differences generally without judicial recourse. "Weak" preemption thus parallels familiar aspects of the working world of dual American sovereignty and develops those familiar aspects in the entirely new realm of international trade agreement implementation.

IV. CONCLUSION

In the 1990s, the President's potential ability to negotiate trade agreements affecting state laws was squeezed from two sides. The profederalism dormant commerce clause doctrines of the Supreme Court meant that state laws could no longer be cleared away to enable trade agreements to take effect. Meanwhile, efforts to find some other way to forcibly direct the states faced the Constitution's structural protection for federalism, namely Congress's solicitude for local interests. This situation was exacerbated by the past decade's divisive, party-splitting politics of trade, with strong factions in Congress opposing agreements on a variety of grounds and likely to resist their implementation by emphasizing any tendency for those agreements to "strongly" prempt state laws.

The solution lay in a new paradigm for federalism and free trade. Part of this consists of a new form of international negotiation that essentially makes states "partners" with the President. In effect, the President becomes less the director of a national sovereign government and more a broker finding common ground between differing state governments. The other part consists of "weak" preemption. In this implementation format, foreign enterprises have few or no legal tools for overcoming state actions. Instead, a series of political processes exist to enable federal and state authorities to resolve the rare situation in which a foreign government applies major pressure upon the United States because a state has violated the agreements.

Why does this new paradigm work for the President? It is noticeable that the Supreme Court has become considerably more sanguine, as evidenced by its shift from *Japan Line* to *Barclays Bank*, in how it views the prospect of foreign government retaliation for state "anti-foreign" actions. In the trade sphere, as distinct from some aspects of the defense sphere during the Cold War, foreign retaliation is not a matter of catastrophic war or peace. It is a matter of dollars and cents, or more accurately dollars and other currency. In the large trade agreement picture, the President can count his efforts a success if he can show enough likelihood of states acquiescing in negotiated agreements to satisfy the other countries that there is sufficient mutuality of obligation. While imperfect compliance does not wreck the nation's position in international affairs,[118] it poses a political problem with modest economic dimensions for which political solutions suffice.

The next decade may, therefore, bring flaws or delays in how some state and local governments comply with international agreements. However, the inclusion of the states as "partners" in the negotiations, and the eagerness of many states to make concessions to promote trade, guarantee a significant level of compliance. On that basis, the President will seek congressional renewal of fast-track authority to negotiate agreements and accept being dealt the same comparatively "weak" hand in what he can promise foreign countries in the way of American domestic implementation as he sits down at the table to negoti-

118. Other nations, like Canada, may have worse problems than the United States when it comes to making their subnational governments live by international agreements. *See generally* Greg N. Anderson, Note, *Achieving United States-Canadian Reciprocity in Sub-National Government Procurement: Federalism and the Canada-United States Free Trade Agreement*, 4 IND. INT'L & COMP. L. REV. 131 (1993).

ate the next decade's agreements. Foreign countries will merely factor that in as they defend the imperfections in their own level of compliance with past agreements and their own limitations on implementation of future ones.

In this fashion, the American "dual sovereignty" system will get on with the negotiation of trade agreements with other nations at a pace which will depend on political forces. As experience with it accumulates, "weak" preemption will take its place in the tool-kit of federal-state legal relations. What Winston Churchill said of democracy in general, he could have said in particular for how a "dual sovereign" democracy handles international trade relations: watching it in operation, it seems like the worst possible system of government—except for all the others.