Interpreting Uruguay Round Agreements Act Section 102(B)'s Safeguards for State Sovereignty: Reconciling Judicial Independence with the United States Trade Representative's Policy Expertise

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STUDENT NOTE

INTERPRETING URUGUAY ROUND AGREEMENTS ACT SECTION 102(B)’S SAFEGUARDS FOR STATE SOVEREIGNTY: RECONCILING JUDICIAL INDEPENDENCE WITH THE UNITED STATES TRADE REPRESENTATIVE’S POLICY EXPERTISE

Brandon Johnson*

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In 1994, the United States joined the World Trade Organization (WTO), and thereby agreed to resolve disputes in accordance with the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Accordingly, when the WTO Dispute Settlement Body (DSB) adopts the finding of a Dispute Settlement Panel (Panel) or Appellate Body that a federal or state law is in conflict with the WTO Agreement, this judgment imposes a binding international obligation on the United States to remedy the conflict.

Despite the fact that the WTO Agreement has clearly fulfilled its promise of creating high-wage jobs in the export sector and contributing to overall economic growth, it has increasingly come under attack by a
diverse coalition of interest groups and non-governmental organizations concerned with labor and environmental standards, human rights, consumer safety and health, and the potential loss of national and state sovereignty. While the riots in Seattle in November 1999 are the most dramatic evidence of opposition to the WTO, since its inception academic commentators have pointed out the dangers and defects of the global trading regime established by the WTO.

In this Note, I address the concerns of one aspect of this academic commentary—the claim that the WTO Agreement may cause a tectonic shift in domestic regulatory power, away from the states and toward the federal government and/or the WTO. I argue that while the concerns about the loss of national sovereignty are exaggerated, there is a very real threat to the sovereignty of the States.

5. Some commentators are primarily concerned with potential loss of state sovereignty to the federal government. See, e.g., Barry Friedman, Federalism's Future in the Global Village, 47 VAND. L. REV. 1441, 1447 (1994). Friedman argues that one of the primary functions of the WTO is to remove non-tariff trade barriers, in part through the "harmonization" of federal and state laws that affect international commerce.

This process of harmonization will have an important impact on American federalism. In part, non-uniformity is inherent in the idea of American federalism—the notion that fifty different states and numerous local governments can go their own way in developing regulatory frameworks ... [W]e are on the front end of a new wave of nationalizing, this one brought about through international pressures. And with this latest wave will come even more pressure to 'harmonize,' and a concomitant pressure to reduce state autonomy.


6. As of the writing of this Note, the threat to state sovereignty has not yet materialized. Of the 35 complaints filed against the United States by other countries, only one concerned a state law—Massachusetts' Act Regulating State Contracts with companies doing Business with Burma (Myanmar), which the European Union and Japan alleged violated the Government Procurement Agreement—and none has been found by a panel to conflict with the WTO Agreement. See MASS. GEN. LAWS ch. 7, § 22A–22M, 40F ½ (2000); Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex WTO Agreement, Annex 4, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994). A Panel was established on October 21, 1998, but was subsequently suspended on February 10, 1999. See Secretariat of the World Trade Organization, Overview of the State-of-Play of WTO Disputes, 10 ¶ VI.(3)(a) (Sept. 1, 1999) at http://www.wto.org/wto/dispute/bulletin.htm (last viewed November 15, 2001). The Supreme Court has subsequently determined that Massachusetts' law was implicitly pre-empted by a subsequent federal law governing sanctions on Burma, the Federal Operations, Export Financing and Related Programs Appropriations Act. Crosby v.
danger and included a variety of provisions designed specifically to protect state sovereignty from federal encroachment in the Uruguay Round Agreements Act (URAA), the federal legislation incorporating the WTO Agreement into U.S. law. These safeguards are embodied in URAA section 102(b). Rather than automatically preempting state laws that a WTO Panel or Appellate Body has found to be in conflict with the WTO Agreement, section 102(b) gives the states an opportunity to present their case before a U.S. court, whom the statute commands to make an independent final determination as to the existence of a conflict. But an erroneous interpretation of two of section 102(b)'s key provisions—the judicial independence mandated by section 102(b)(2)(B)(i) and (ii) and the preemptive scope of section 102(b)(2)(A)—may deprive the States of the safeguards Congress put in place, and could cause an unintended shift of regulatory and interpretive authority towards the executive branch of the federal government. Preempting state laws that conflict with the WTO Agreement is a two-step process. First, the WTO DSB must adopt a WTO Panel or Appellate Body report finding that the state law in question conflicts with a provision of the WTO Agreement. Second, the United States, through the United States Trade Representative (USTR), must bring a separate action against the state in federal court for the purpose of invalidating the statute pursuant to section 102(b)(2)(A). The URAA's legislative history states that the URAA does "not automatically preempt or invalidate State laws that do not conform to the agreements even if there is a dispute settlement finding that the State measure is inconsistent," but it does not specify the standard federal courts are to use to determine whether the URAA preempts a challenged state law.

The determination of the appropriate standard involves two separate, but interrelated, issues. First, to what degree should courts defer to the USTR's determination that a conflict exists? Second, what is the preemptive scope of URAA section 102(b)(2)(A)? With respect to the

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first question, there are three possible levels of deference: (i) no deference, which is the standard courts pay to ordinary litigants, (ii) *Skidmore* deference, whereby an agency’s interpretation has non-binding, persuasive authority, or (iii) *Chevron* deference, according to which the agency’s interpretation is binding on courts so long as the agency is acting within the scope of its delegated authority. There are also three possible preemptive scopes that section 102(b)(2)(A) may allow: (i) conflict preemption, which invalidates state laws in cases where it is physically impossible to comply with both federal and state laws, (ii) obstacle preemption, which preempts state laws that frustrate the purpose of the federal law or that stand as an obstacle to the policies underlying the federal law, and (iii) occupation of the field preemption (field preemption), which invalidates all state legislation in fields exclusively regulated by federal law. I contend that *Skidmore* deference and obstacle preemption are the appropriate standards.

In Part II, I describe the process of successive challenges to state law, first, under the Dispute Settlement Understanding of the WTO Agreement, and second, under U.S. domestic law. In Part III, I outline the differences between the various standards of deference and contend that Congress did not intend federal courts to give the USTR binding, *Chevron* deference. The USTR is instead owed *Skidmore* deference, because, as the agency charged with setting international trade policies, it is in a better position than courts are to determine whether the state law in question frustrates those policies. In Part IV, I argue that, of the three preemption standards, only obstacle preemption would make the URAA sufficiently flexible to achieve its broad purpose of liberalizing international trade in goods, services, and intellectual property.

II. PROTECTION OF STATE LAWS BY URAA § 102(b)

The unifying purpose of URAA section 102 is to preserve U.S. sovereignty by ensuring that appropriate organs of the federal government make the final determination as to how the United States will comply with its international obligations. While section 102(b) provides a variety of mechanisms to protect state laws that conflict with the WTO Agreement, it is not designed to allow state interests to frustrate U.S. international trade policy or to limit the authority of the federal government to implement and coordinate its policy objectives.

First, I give an overview of the rules and procedures that govern the WTO’s dispute settlement process. Second, I describe the effect of the WTO Agreement in and on U.S. law. Finally, I discuss the provisions of URAA section 102(b), outlining the procedures to be followed in the
event that a WTO Panel or Appellate Body finds that a state law conflicts with the WTO Agreement: (i) the federal-state consultations required by section 102(b)(1)(C), (ii) congressional oversight of consultations and lawsuits between the USTR and affected state government(s) contained in section 102(b)(2)(C), and (iii) USTR legal challenges to state laws pursuant to § 102(b)(2)(A).

A. WTO DSB Proceedings

One of the primary differences between the WTO Agreement and the former GATT treaty is the creation of the Dispute Settlement Body (DSB), which has the power to resolve disputes among Member States. The DSB itself does not directly adjudicate disputes; instead, it does so by deciding whether to approve or reject Panel or Appellate Body reports. The DSU contains the rules and procedures that the DSB, Panels and the Appellate Body are to follow in resolving disputes.

"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." Its function is to ensure Member State compliance with the terms of the covered agreements, including in its jurisdiction regulations enacted by regional or local governments or authorities within the territory of Member States.

The DSU provides a variety of mechanisms for settling disputes among Member States, including negotiation, arbitration, judicial proceedings in front of a Panel, appellate review, and finally, the imposition of sanctions. There are nine separate steps leading from the initial complaint to the suspension of concessions from the offending nation.

10. See DSU art. 2(1).
11. See id. art. 1(1).
12. Id. art. 3(2).

Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

Id.
First, the disputing parties are required to consult with one another and attempt to reach a negotiated solution. Second, if this fails, the Director-General of the WTO can offer to mediate, but parties are not bound to accept the Director-General's decision. Negotiation and arbitration are the preferred means of settling disputes.

Third, if consultation fails to produce a negotiated solution within 60 days, the parties have a right to demand that a Panel be established. Fourth, the Secretariat shall propose nominations for the panel to the parties. The parties may oppose nominations for compelling reasons. Fifth, if the parties cannot agree on the panelists, the Director-General may appoint a Panel on his own authority. Sixth, the terms of reference must be determined.

Seventh, the parties present written arguments to the Panel. Other Member States may intervene, but the Panel considers only issues raised by the principal parties. Proceedings are not public. After deliberation, the Panel presents its conclusions and legal analysis. The Panel report should normally be issued within six to eight months after establishment of the Panel. Eighth, Panel reports are to be adopted automatically unless there is a unanimous vote by the DSB not to adopt the Panel report. The adoption of binding and automatic judgments is a radical departure from the previous GATT regime, where collective action against offending nations could be vetoed by any nation, including the nation threatened with sanctions. This allowed the U.S. government to protect offending

14. See DSU art. 4. Additionally, "when a WTO member requests consultations with the United States . . . concerning whether the law of a State is inconsistent with the obligations undertaken by the United States in any of the Uruguay Round Agreements," the USTR must notify Governor or the Governor's designee of the affected State(s) within seven days. URAA, 19 U.S.C. § 3512(b)(1)(C)(i). Furthermore, the USTR must consult with the representatives of the affected State(s) within 30 days after receiving such a request. Id. § 3512(b)(1)(C)(ii).

15. See DSU art. 5.

16. "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." Id. art. 3(7).

17. See id. art. 6. The panel is to be established unless there is a consensus against it, which cannot be formed where a complaining party refuses to join the rest of the Members. If the dispute involves a state law, the USTR must inform the affected state(s) within seven days of the demand for establishment of a Panel. URAA, 19 U.S.C. § 3512(b)(1)(C)(iii)(I–II).

18. See DSU art. 8.

19. The standard terms of reference are the following: "To examine, in the light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Id. art. 7. See also JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 342 (3d ed. 1995).

20. See DSU art. 12.

21. See id. art. 16.
state regulations by providing the single dissenting vote to prevent the imposition of sanctions.  

Ninth, the parties may seek appellate review of the Panel report by the Appellate Body. This body is made up of seven persons appointed for four years. The Appellate Body sits in panels of three judges to hear each particular case. It is limited to considering issues of law and normally takes 60 days or 90 days maximum to give its report. This decision is also automatically adopted, unless there is a consensus against adoption.

Finally, concessions may be suspended for noncompliance with Panel or Appellate Body reports. The losing respondent is required to indicate what actions it plans to take to implement the Panel’s recommendations within a reasonable period of time. Normally, this will not exceed 15 months. "If the recommendations are not implemented, the prevailing party may be entitled to seek compensation or the authority to suspend concessions previously made to that member." Suspension of concessions is authorized automatically in the absence of implementation or compensation, unless the DSB votes unanimously against suspension. The withdrawal of a nonconforming measure is preferred to compensation or suspension of concessions; suspension of concessions is to be used only as a last resort.

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22. See Wilson, supra note 5, at 406.
23. See DSU art. 17. The USTR must notify the affected State(s) within seven days after a WTO member gives notice that it will appeal a Panel report. URAA, 19 U.S.C. § 3512(b)(1)(C)(iii)(I).
24. See DSU art. 22.
25. Id. art. 21(3).
26. JACKSON, supra note 19, at 344.
27. Id.
28. See DSU art. 22(6).
29. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure, which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the Dispute Settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to the authorization by the DSB of such measures. Id. art. 3(7).
The relationship between international law and U.S. domestic law is described as ‘dualist.’ When the United States enters into an international agreement, the obligations created by it are binding on the United States as a nation. Unless the agreement is ‘self-executing,’ the agreement has no effect in domestic law until it has been ‘incorporated’ into U.S. law. If the required implementing legislation has not been adopted or the implementing legislation is inconsistent with the international agreement, the United States is bound by the terms of the international agreement. Even though only the implementing act has legal force, courts are to, if possible, construe the implementing act so that it will not conflict with the international agreement.

The WTO Agreement is not ‘self executing’ and has no effect in U.S. domestic law apart from its implementing legislation, the URAA. The President negotiated and signed the WTO Agreement pursuant to ‘Fast
Track” authority delegated to him by Congress. The terms of “Fast Track” authorization manifest the above-mentioned intent that the WTO Agreement would not have any effect in U.S. law unless and until Congress approved the implementing legislation. Congress also expressed this intention in the statutory text. Section 102(a) provides:

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No Provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States . . .

The legislative history explains that the intent of section 102(a) is to ensure that all changes in federal law due to conflicts with the WTO Agreement, whether statutory or regulatory, will be specifically enacted by Congress or through normal agency proce-


37. The Uruguay Round agreements cannot enter into force for the United States and become binding as a matter of domestic law unless the President meets the requirements specified under section 1102 and 1103 for consultation with the Congress and implementing legislation approving the agreement and any changes in U.S. statutes are enacted into law.

H.R. REP. NO. 103-826 (I), at 18 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3790. These requirements are: (1) Before signing the agreement, the President must consult with the congressional committees having jurisdiction over subject matters affected by the agreement. (2) 120 days before signing an international agreement, the President must notify Congress of his intent to enter into an agreement. The Executive must then submit a reasonably complete draft of the agreement so that Congress can have input into the negotiations. (3) The President must submit to Congress a copy of the agreement, a draft implementing bill, and a statement of administrative action intended to implement the agreement, an explanation of how the bill changes or affects existing law, and why such changes are required. (4) Committees have up to 45 legislative days to report the implementing legislation. (5) Each House will vote on the bill within 15 legislative days after implementing legislation is reported out of committee. No amendments are allowed. See id. at 18–19.


Section 102(a)(1) clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill . . . [T]he section reflects the
Interpreting URAA Section 102(b)

Congress thereby ensured that U.S. sovereignty was not sacrificed through accession to the WTO. If the DSB adopts a Panel or Appellate Body report finding that a state law conflicts with the WTO Agreement, this imposes an international obligation on the United States to bring the offending state law into compliance. Such a finding, however, does not automatically invalidate or preempt the challenged state law. "In all cases, following a panel report, the DSU leaves to the discretion of the United States any change in federal or state law and the manner in which any such change may be implemented—whether through the adoption of legislation, a change in regulation, judicial action, or otherwise." In response to an adverse Panel or Appellate Body report involving a state law or regulation, the U.S. Government has five options: (1) Congress may legislatively preempt the state law, (2) the USTR can seek a negotiated solution with the State, whereby the State voluntarily changes the offending law or regulation, pursuant to the federal-state consultations provisions in 102(b)(1)(C), (3) the United States may do nothing and accept sanctions, (4) Congress may withdraw the U.S. from the GATT/WTO, or (5) the USTR may bring an action in federal court for the purpose of preempting the conflicting state law pursuant to section 102(b)(2)(A). The application of this final option is the subject of this Note. The following section outlines the preconditions for and the procedures governing legal challenges.

Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by those agreements.

Id. 40. See id. "[I]f a change in regulation is required, [the Administration would need to] follow normal agency procedures for amending regulations." Id. See also id. at 1032. "[P]anel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations, such as those related to human, animal or plant health, or the environment." Id.

41. Id. at 659. "U.S. sovereignty is fully protected under the WTO Agreement. . . The WTO will have no power to change U.S. law. . . Moreover, as explained in greater detail in this Statement in connection with the Dispute Settlement Understanding, WTO dispute settlement panels will not have any power to change U.S. law or order such a change." Id.

42. See DSU art. 22(9). "When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance." Id.


44. See WTO Agreement, art. XV, 33 I.L.M. 1125; URAA, 19 U.S.C. § 3535.
C. URAA § 102. Protection of State Laws from Adverse DSB Decisions


URAA section 102(b)(1)(C) requires the USTR to consult with the affected state government(s) and to allow the state government(s) to participate in formulating the U.S. position, defending the affected state law before a Panel or the Appellate Body, and in determining the U.S. response to adverse Panel or Appellate Body reports. First, the USTR must notify state governments within seven days of a request for consultations by another Member State or the establishment of a Panel regarding that state's law. Second, the USTR must initiate consultations with that state’s government within 30 days of receiving such a request. Third, the USTR must provide the affected state(s) with the opportunity to advise and assist it in preparing factual information and argumentation for presentations by the United States in consultations or proceedings before a Panel or the Appellate Body.

Finally, the USTR must consult with the affected state(s) to develop a “mutually agreeable response” to an adverse Panel or Appellate Body report. Section 102(b)(1) requires the USTR to consult with the affected state government(s) in order to reach a negotiated solution whereby the state voluntarily brings its laws into compliance with the WTO Agreement. Alternately, this consultation process can be used to formulate the U.S. response and to determine whether to accept retaliation from the complaining Member State. Furthermore, this process “is triggered automatically when a foreign nation requests that the federal government negotiate to resolve an offending statute.”

46. See id. § 3512(b)(1)(C)(ii).
47. See id. § 3512(b)(1)(C)(iii)(I).
48. See id. § 3512(b)(1)(C)(ii).
49. See id. § 3512(b)(1)(C)(iii)(II). The USTR must provide to state representatives all documents and submissions in connection with Panel or Appellate Body proceedings, and the opportunity to advise and assist the USTR in preparing any factual information or argumentation concerning the state measure for use in any written or oral presentations by the United States in consultations or panel proceedings. Additionally, the USTR will invite the state representative to attend Panel or Appellate body proceedings as part of the official U.S. delegation and, where appropriate, to make presentations to the Panel or Appellate Body on the state measure concerned. See SAA, H.R. REP. No. 103-826(I), at 673 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4052.
51. Id. § 3512(b)(1).
52. “The Trade Representative shall establish . . . a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreements that directly relate to, or will potentially have a direct effect on, the States.” Id. § 3512(b)(1)(B).
53. Id. § 3512(b)(1)(C)(i).
2. Congressional Oversight

The URAA requires the USTR to report to Congress on the existence, status, and disposition of complaints by other Member States and to report the same information concerning USTR lawsuits against States. Section 123 directs the USTR to notify the relevant Congressional committees of jurisdiction promptly after the establishment of a Panel to hear a complaint against federal or state laws. The USTR also must inform these committees of jurisdiction whether and how it plans to implement an adverse report's recommendations. If the USTR plans to do so by legally challenging the state law, section 102(b)(2)(C) requires the USTR to report to the House Ways and Means Committee and the Senate Finance Committee at least 30 days before it files an action against the state. This report must describe the proposed action, efforts by the USTR to resolve the matter with the state by other means, and certify that the USTR has substantially complied with the above described federal-state consultations mandated by section 102(b)(1)(C).

Furthermore, the USTR must annually prepare a report for Congress that describes the major activities of the WTO, including the status and disposition of disputes. Every five years the USTR must give Congress its own independent evaluation of "the effects of the WTO Agreement on the interests of the United States, the costs and benefits of U.S. participation in the WTO, and the value of continued participation." The annual report is designed to assure Congress that, among other things, the WTO "will not intrude on the sovereignty of individual nations, and remains responsive to the interests of the United States." The five-year review reflects Congress' intent to be an active partner, with the President, in determining whether the U.S. will continue to participate in the WTO. Congress may vote on a joint resolution to

54. Id. § 3533.
55. See id.
58. See id. § 3535.
59. Id. § 3535(a)(2).
61. See id.

The purpose of this provision is to provide an opportunity for Congress to periodically assess whether continued membership in this organization is in the best interest of the United States. It is the desire of the Committee to assess this decision totally in the hands of the Executive Branch and for settling trade disputes among sovereign nations.
withdraw U.S. approval of the WTO Agreement, and thereby to end U.S. participation in the WTO, within 90 legislative days of the submission of the five-year review.

3. Procedures Governing Legal Challenges

If a negotiated solution cannot be reached, the USTR may bring an action in federal court for the purpose of having the state law declared invalid. Section 102(b)(2)(B) provides a variety of procedures governing the legal challenge that are designed to safeguard state sovereignty. The two that are relevant to the issue addressed in this Note are in clauses (i) and (ii).

(B) Procedures governing action

In any action described in subparagraph (A) that is brought by the United States against a State or any subdivision thereof—

(i) a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference;

(ii) the United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question . . . .

Section 102(C) governs the effect WTO Panel and Appellate Body reports have in U.S. domestic law. It makes clear that legal proceedings initiated by the USTR are the sole means of challenging state laws under the WTO Agreement. Private parties are denied both a cause of action based on state non-compliance with the URAA as well as the use of such non-compliance as a defense. This is true even after the USTR has obtained a judgment in federal court invalidating the state measure.

65. Id. § 3512 (b)(2)(B)(i)-(ii).
66. See id. § 3512(c)(1). "No person, other than the United States, shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of the Uruguay Round Agreements." Id. In addition, Congress stated its intention to "occupy the field," precluding any person, other than the United States, (id. § 3512(c)(2)) "[from challenging], in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any [s]tate, or any political subdivision of a [s]tate on the ground that such action or inaction is inconsistent with [the Uruguay Round Agreements]." Id. § 3512(c)(1).
Section 102(C) thus closes the federal court doors to aggrieved foreign corporations or governments.

III. SKIDMORE DEFERENCE

The danger that this Note seeks to address and avert is that the USTR may usurp the interpretive authority that Congress assigned to the courts by contending that the preemptive scope of section 102(b)(2)(A) is ambiguous and that this ambiguity represents an implicit congressional delegation of interpretive authority to the USTR. Where Congress implicitly delegates interpretive authority to an administrative agency, courts must give the agency's decisions binding *Chevron* deference.

However, because section 102(b) reflects Congress' intent to carve out an exception to the USTR's interpretive authority when state sovereignty is at stake, *Chevron* deference is not the appropriate standard. In the first section of this Part, I will describe the differing deference standards elaborated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* 68 and *Skidmore v. Swift & Co.*, 69 the types of agency decisions and rules to which they apply, and the Court's reasons for adopting these two standards. In the second section, I will show that the statutory structure of section 102(b) is inconsistent with giving the USTR *Chevron* deference. Next, I will describe the Court's standard for reviewing agencies' preemption decisions, and show that these decisions also foreclose *Chevron* deference to the USTR in legal proceedings pursuant to section 102(b)(2)(A). Finally, I will present the positive argument for *Skidmore* deference.

A. Standards of Review for Agency Rules

1. Legislative vs. Nonlegislative Rules

The Administrative Procedure Act (APA) defines "rule" broadly enough "to encompass virtually any statement an agency might make in any context." 70 It includes statements "of general or particular applicability," which means that a rule can cover generic classes, even if there is only a single individual in the class, and rulemaking addressed to named

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70. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.1, at 226 (3d ed. 1994). See also Administrative Procedure Act (APA) 5 U.S.C. § 551(4) (1996) defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...." *Id.*
persons. Therefore, the USTR's interpretation of section 102(b) may be treated as a rule.

According to Davis & Pierce, a rule may be either legislative or interpretive. There are four distinctions between legislative and interpretive rules, though only two of them are relevant here. First, legislative rules have the same binding effect as a statute on the public, the agency, and the courts, while interpretive rules have only persuasive authority. For this reason, courts must give legislative rules Chevron deference, while interpretive rules receive only Skidmore deference. Second, an agency may only issue legislative rules if Congress has specifically authorized it to, while an agency has the inherent authority to issue interpretive rules.

2. Chevron Deference for Legislative Rules

In Chevron U.S.A. v. Natural Resources Defense Council, the Supreme Court established the standard of review it would apply to agencies' constructions of the statutes they administer.

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In order for a court to find that Congress has "directly spoken" to an issue in step one, it is not necessary to show that Congress had a specific intent with respect to this issue or that the statutory text directly addresses

71. See Davis & Pierce, supra note 70, § 6.2, at 226.
72. The term "interpretive rule" can be misleading, because legislative rules are often interpretations of statutory language. The distinction between the two, which will be developed in greater detail in the discussion of Chevron deference, concerns the agency's authority to promulgate binding interpretations of the statute.
73. See Davis & Pierce, supra note 70, § 6.3, at 233–34.
74. See infra Parts III.A.2 and 3.
75. See Davis & Pierce, supra note 70, § 6.3, at 234.
77. Chevron, 467 U.S. at 842–43.
Interpreting URAA Section 102(b)

the particular question at hand. For this reason, if a court determines that the agency's construction conflicts with a more general or abstract statutory purpose, it may reject the agency construction in step one, even if there is no contrary specific intent in the statute's text or legislative history.

Because the preemptive scope of section 102(b)(2)(A) is arguably ambiguous, the USTR could argue that this ambiguity represents an implicit delegation of interpretive authority, thereby limiting the court to reasonableness review. In order to do so, however, the USTR must first demonstrate that Congress delegated it the legislative rulemaking authority to interpret the URAA, because Chevron deference applies only to legislative rules.

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Thus, stage two has two elements: First, has Congress delegated legislative authority to the agency? Second, is the agency's interpretation reasonable? Though Congress expressly delegated to the USTR the authority to issue legislative regulations pursuant to section 141 of the Trade Act of 1974, in the following section I will argue that the statutory scheme embodied in section 102(b) clearly expresses a specific, contrary intent that the USTR's litigating position against a state in legal proceedings pursuant to section 102(b)(2)(A) should not be given binding deference, and that section 102(b) overrides section 141's more general grant of authority.

Certain passages of Chevron suggest that where Congress has not expressly delegated interpretive authority to an agency, ambiguity or silence ipso facto delegates interpretive authority. But such an interpretation is inconsistent with the Court's rationale for deference to agency interpretations, expertise and political accountability, as well as with subsequent

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79. See Robert A. Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 YALE J. ON REG. 1, 24 (1990). If the Court were to hold otherwise, Congress' only means of limiting agency discretion would be to list off every conceivable situation covered by the statute and to prescribe in detail what the agency is to do under each set of circumstances.
80. Chevron, 467 U.S. at 843-44 (emphasis added).
81. See Anthony, supra note 79, at 31.
82. See id. at 32-3. See also Chevron, 467 U.S at 865. "For judicial purposes, it matters not" whether Congress "consciously desired the Administrator to strike the balance at this level" or if Congress "simply did not consider the question at this level."
83. Chevron, 467 U.S. at 865.
cases. When the reviewing court finds that there is a gap in stage one, deference to the agency is not based on its superior expertise in interpreting congressional intent, because there is none to interpret. "The agency is not clarifying Congress’ decision, it is making the decision itself." Conversely, *Chevron* deference is not appropriate where Congress has expressed an intent, but has done so ambiguously, as it did in section 102(b)(2)(A). In the third section of this Part, I will show that when the interpretive issue is the scope of an agency’s delegated authority to preempt state laws, the Court has not applied the *Chevron* analysis to agency constructions, even if the scope of delegated authority is arguably ambiguous, but instead has independently interpreted the statute.

3. *Skidmore* Deference for Interpretive Rules

The issue in *Skidmore v. Swift & Co.* was the weight to be given to the administrator’s interpretation of the Fair Labor Standards Act of 1938. The Act explicitly denied the Administrator the power to issue legislative rules, but in order to perform his assigned task of enforcement, the Administrator had to determine the meaning of the Act’s provisions. The Court announced the following standard of review for such interpretive rules and regulations:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

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Judges . . . are not part of either political branch of the Government . . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices . . . .

*Id.*


85. See *Chevron*, 867 U.S. at 843 n.9. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." See also Herz, *supra* note 84, at 199.

86. 323 U.S. 134 (1944).
earlier and later pronouncements, and all those factors which give
it power to persuade, if lacking power to control.\(^{87}\)

The Court has affirmed the principle that interpretive rules deserve a
lower degree of deference than legislative rules in subsequent cases.\(^{88}\) Furthermore, in elaborating the Skidmore standard, the Court has given
weight to a number of other factors that strengthen an agency's claim to
persuasive authority:\(^{89}\) whether the agency helped draft the statute;\(^{90}\) the
agency's technical expertise and familiarity with the statute;\(^{91}\) whether the
agency's construction of the statute is contemporaneous with enactment\(^ {92}\)
or longstanding and consistent;\(^ {93}\) or whether Congress has reenacted or
amended the statute and left the relevant portion unchanged.\(^ {94}\) The first two
of the above factors, that the USTR helped draft the URAA and that it has
expertise and familiarity with it, would be present in any legal proceeding
pursuant to section 102(b)(2)(A). Whether the other factors work in the
USTR's favor would depend on the particular facts of the dispute and the
prior positions the USTR had taken on the issue.

Unlike Chevron deference, which is based on a delegation of legisla-
tive authority, "Skidmore deference is based solely on common sense."\(^ {95}\)
An agency has often carefully considered potential alternative resolutions
and how they relate to the statutory language, purpose, and legislative history,
as well as its own capabilities and resources available for implementing the statute.\(^ {96}\) When a court affirms an interpretive rule, the

\(^{87}\) Skidmore, 323 U.S. at 140.

\(^{88}\) See General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Court held that because Congress did not grant the EEOC legislative rulemaking power, the ruling of the EEOC was an interpretive rule and applied Skidmore deference. Id. at 140–43. The Court then rejected the EEOC's decision because it was neither contemporaneous, nor consistent over time, conflicting with earlier pronouncements. See also EEOC v. ARAMCO, 499 U.S. 244 (1991) (giving Skidmore deference to an EEOC interpretive rule, and rejecting it for the same reasons as it had in Gilbert).

\(^{89}\) See Herz, supra note 84, at 194–97. The following list of factors and supporting cases is taken from Herz's article.

\(^{90}\) See Miller v. Youakim, 440 U.S. 125, 144 (1979) ("Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision.").

\(^{91}\) See Udall v. Tallman, 380 U.S. 1, 16 (1965).


\(^{93}\) See EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) ("[C]onstruction deserves special deference when it has remained consistent over a long period of time."); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) ("Longstanding and consistent administrative interpretation is entitled to considerable weight.").


\(^{95}\) Davis & Pierce, supra note 70, § 6.3, at 242.

\(^{96}\) See id. at 243. See also Skidmore, 323 U.S. at 139–40. ("[T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do
source of authority is either Congress or the court, but never the agency. It is Congress if the court determines that there is only one permissible construction of the provision in question. It is the court if there are multiple possible constructions. In that case the court determines which interpretation is best, even if the court ultimately agrees with the agency's construction.

B. The USTR's Interpretation Does not Deserve Chevron Deference

Section 102(b) mandates a variety of procedures in the event that a WTO Panel or Appellate Body finds that a state law conflicts with the WTO Agreement. Rather than stipulating that such state laws are automatically preempted upon such a finding, or even that, after independent review, the USTR may preempt them at its discretion, section 102(b) requires the USTR to first initiate consultations with the affected state government(s). If, and only if, the USTR and the state(s) cannot find a "mutually agreeable response," then the USTR may bring an action against the state(s) for the purpose of having the state law declared invalid. In such a proceeding, the statute directs the court to make its decision independent of both the WTO Panel or Appellate Body report and the USTR, which is inconsistent with giving the USTR Chevron deference. But before turning to these arguments, I will outline the statutory duties and powers of the USTR, which would, under other circumstances, justify Chevron deference to its interpretation of statutes touching upon international trade policy. I will end this section with a discussion of Bowen v. Georgetown University Hospital, which provides an independent rationale for refusing to give the USTR's litigating position Chevron deference.

1. Scope of USTR Duties and Powers

Section 141 of the Trade Act of 1974 defines the duties and powers of the Office of the United States Trade Representative. The USTR and the three Deputy United States Trade Representatives are political appointees,

determine the policy which will guide applications for enforcement by injunction on behalf of the Government.

98. See id. See also Jamie A. Yavelberg, The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. ARAMCO, 42 DUKE L.J. 166, 186 (1992). "The critical distinction between Chevron and Skidmore is that when applying the Skidmore deference principle, a court is always free to substitute its own judgment for that of the agency.
who serve at the pleasure of the President. The duties of the USTR include the following:

(1) The United States Trade Representative shall—

(A) have primary responsibility for developing, and coordinating the implementation of, United States international trade policy . . .

(B) serve as the principal advisor to the President on international trade policy . . .

(C) have lead responsibility for the conduct of, and shall be the chief representative of the United States for, international trade negotiations, including all negotiations on any matter considered under the auspices of the World Trade Organization . . .

(D) issue and coordinate policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of international trade functions, including any matter considered under the auspices of the World Trade Organization, to the extent necessary to assure coordination of international trade policy and consistent with any other law;

(E) act as the principal spokesman of the President on international trade;

(F) report directly to the President and Congress regarding, and be responsible to the President and the Congress for the administration of trade agreements programs . . .

Furthermore, the USTR has the power to “promulgate such rules and regulations as may be necessary to carry out the functions, powers and duties vested in him.” Where Congress has delegated an agency such broad regulatory authority, courts give *Chevron* deference to legislative rules promulgated by the agency.

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102. Id. § 2171(e)(3).
103. See, e.g., United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (U.S. Customs Service regulations interpreting the Harmonized Tariff Schedule entitled to *Chevron* deference); Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660 (Fed. Cir. 1992) (Department of Commerce interpretation of Tariff Act receives *Chevron* deference). The Supreme Court and the Court of Appeals for the Federal Circuit applied the *Chevron* standard to issues involving international trade in the same way that courts apply it generally, and did not mention that the international trade context requires any modification to the normal *Chevron* analysis.
2. Judicial Independence and the Statement of Administrative Action

Though these provisions of the Trade Act of 1974 may give the USTR the authority to issue legislative regulations, to which *Chevron* deference is due in other circumstances, the text and structure of section 102(b) represent a clear congressional intent that courts should not give the USTR *Chevron* deference in legal proceedings pursuant to section 102(b)(2)(A). The text of sections 102(b)(2)(B)(i) and (ii), along with their legislative history, make it clear that the findings of neither the WTO Panel or Appellate Body nor the USTR are binding on the reviewing court.

(B) Procedures governing action

In any action described in subparagraph (A) that is brought by the United States against a State or any subdivision thereof—

(i) a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference;

(ii) the United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question.

104. In what follows, I rely heavily on the Statement of Administrative Action (SAA) submitted by the President to Congress prior to congressional approval of the URAA. The SAA is an authoritative source for interpretation and application of the URAA.

Pursuant to section 2903 of this title and section 2191 of this title, the Congress approves—

(1) the trade agreements described in subsection (d) of this section resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, entered into on April 15, 1994, and submitted to the Congress on September 27, 1994; and

(2) the statement of administrative action proposed to implement the agreement that was submitted to the Congress on September 27, 1994.


The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

Id. at § 3512(d).

105. *Id.* § 3512(b)(2)(B)(i), (ii).
It could be argued that the statute only denies deference or binding effect to WTO Panel or Appellate Body findings, but not the USTR. According to this argument, placing the burden of proof on the USTR is consistent with giving it *Chevron* deference. In such cases, carrying the burden would consist of the USTR showing that its construction is a "permissible construction of the statute," i.e., that is not "arbitrary, capricious or manifestly contrary to the statute." But the Statement of Administrative Action (SAA) for the URRAA contradicts this assertion. The SAA directs the court to consider the issue "de novo."  

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* . . . . In any such proceeding, the United States would have the burden of proof and the court would reach its own, independent interpretation of the relevant provisions in the light of the agreement's negotiating and legislative history, including this Statement.  

Where *Chevron* deference is appropriate, "the court does not simply impose its own construction on the statute." Here, by contrast, the legislative history commands courts to do just that. Furthermore, the SAA sharply limits the discretion and authority of the USTR to authoritatively interpret the various provisions of the URRAA. Section 102(d) provides that:

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

This statutory provision, read together with the above portion of the legislative history, indicates a clear congressional intent not to delegate the interpretive authority to the USTR when the issue is whether state laws conflict with the URRAA. By adopting the SAA at the same time as it enacted the URRAA, Congress made clear that the SAA is the last word on congressional intent for any of the matters it covers. Whatever

107. Id. (second emphasis added).
ambiguities regarding deference or preemptive scope there may be in section 102(b)(2)(A) or (B) are resolved by the accompanying legislative history. But even if these provisions were ambiguous, section 102(d) makes clear that the text of the statute itself and the SAA are the primary sources of interpretive authority.

In determining how to deal with conflicts between state law and the WTO Agreement, Congress had several options open to it and various legislative means of accomplishing its purpose. It could have provided that in such cases the state law is automatically preempted, but Congress expressly declined to do so. If its purpose was solely to protect U.S. sovereignty, it could have provided that the USTR could preempt the state law at its own discretion, and courts would have to give such decisions Chevron deference. But again, Congress refused to do so. Instead, it chose to acknowledge the importance of not only national sovereignty, but of state sovereignty as well. Rather than let the USTR be the judge in its own cause, Congress decided that the USTR would have to challenge the state law in federal court and to convince an independent tribunal that the state law in question conflicts with the URAA. To give the USTR Chevron deference would turn both of these provisions from section 102(b)(2)(B) on their head. It would shift decision-making authority from the judiciary to the USTR, and it would do more than merely shift the burden of proof from the USTR to the State, but rather give the USTR a presumption of validity, as courts would have to accept the USTR's interpretations unless they were "arbitrary, capricious, or manifestly contrary to the statute."

Before moving on to discuss the consultation provisions, I must address a case that seems to contradict the above argument. The Court held in United States v. Haggar Apparel Co. that: "[d]eference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, de novo." Therefore, Chevron deference is not inconsistent with de novo review or with the court's obligation to reach a correct decision.

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110. Chevron, 467 U.S. at 844.
111. 526 U.S. 380 (1999). The challenged regulation in this case was a legislative regulation promulgated by the U.S. Customs Service after notice and comment procedures. The regulation interpreted a provision of the Harmonized Tariff Schedule that gave an exemption from duties where the product was assembled abroad but all of the component parts were manufactured in the United States and had "not been advanced in value or approved in condition abroad." Id. at 385–86.
112. Id. at 391. The governing statute, 28 U.S.C. § 2643, provided that if the Court of International Trade was "unable to reach the correct decision" in the first trial, it could order a retrial or rehearing or any other administrative or adjudicative procedures "necessary to reach the correct decision." 28 U.S.C. § 2643. Haggar Apparel contended that in this retrial the
While it is true that, as a general principle, *Chevron* deference is not inconsistent with *de novo* review, *Chevron* deference is inconsistent with the procedures governing legal challenges contained in section 102(b)(2)(B). First of all, the Court justified its decision in *Haggar Apparel* on the ground that Congress had not expressed its intent to deviate from the "usual rule that the regulations of an administering agency warrant judicial deference." For the reasons discussed above, section 102(b), along with the relevant provisions of the SAA, is a clear statement by Congress of its intent to deviate from the 'usual rule' in matters relating to the legal challenges of state laws. Second, the regulations in *Haggar Apparel* were legislative regulations adopted pursuant to notice-and-comment procedures. The Court in *Haggar Apparel* emphasized that "[d]e novo proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law." As will be demonstrated in the following section, the USTR's litigating position should not be treated as a legislative regulation, and therefore not as a part of the controlling law.

3. The Consultation Provisions and *Bowen v. Georgetown University Hospital*

Although the USTR has the power to issue legislative regulations, the time at which it does so affects the weight courts are to give to them. Specifically, if the USTR had not promulgated such regulations prior to a WTO Panel report finding that a state law conflicts with the WTO Agreement, the USTR's position would not be entitled to *Chevron* deference in subsequent litigation. To do so would be inconsistent with the provisions governing federal-state consultations and with the Supreme Court's decision in *Bowen v. Georgetown University Hospital*.

In the event of an adverse panel or Appellate Body report, section 102(b)(1)(C)(iv) requires the USTR not only to initiate consultations with state governments, but it also directs the USTR to seek a Court of International Trade must consider the issue *de novo*, which in and of itself precluded giving Customs Service regulations *Chevron* deference. *Haggar Apparel*, 526 U.S. at 390–91.

114. *Id.*
115. *Id.* If there were already legislative rules in place governing the subject matter that the challenged state law sought to regulate or legislative rules that preempted the state law, the Court's analysis would apply. But in cases where the USTR or other federal regulations governed, the state law would have already been preempted and there would be no complaint to the WTO in the first place. There is also the possibility that the state and federal regulation could be in conflict and coexist, perhaps because the issue of whether there was a conflict that had not been litigated. In such cases, the first finding of a conflict would be by a WTO Panel and the Supreme Court's approach in *Haggar Apparel* may apply.

117. *See infra* Part II.C.1.
“mutually agreeable response” to the report.\textsuperscript{118} If the USTR were to characterize its litigating position as a legislative rule, its position could not be given \textit{Chevron} deference, because this unilateral action cannot be a “mutually agreeable response.”\textsuperscript{119} In enacting section 102(b), Congress required the federal government to bargain with state governments to achieve a cooperative solution. If the USTR were able to promulgate legislative regulations in the middle of this bargaining process, the USTR would effectively have the power to veto state law, so long as the regulation was not clearly inconsistent with the statute. This would upset the federal-state balance established by section 102(b) and violate the clear terms of the statute and thereby \textit{Chevron’s} step two.

Apart from the inconsistency with the particular provisions of the URAA, there is a more general rule according to which courts do not give \textit{Chevron} deference to agency litigating positions. In \textit{Bowen},\textsuperscript{120} the Court held that it would not defer to a Department of Health and Human Services’ (HHS) litigating position that was “wholly unsupported by regulations, rulings, or administrative practice.”\textsuperscript{121} In \textit{Bowen}, the Court was interpreting the Medicare Act, which gives the HHS express authority to promulgate regulations governing Medicare reimbursement to health care providers. HHS contended that regulations pursuant to this broad grant of rulemaking authority are due \textit{Chevron} deference. The Court held that under the circumstances, i.e., where the evidence indicated that the HHS adopted its position for the purpose of litigation, \textit{Chevron} deference was not appropriate.

\begin{itemize}
\item \textsuperscript{118} URAA, 19 U.S.C. § 3512(b)(1)(C)(iv).
\item \textsuperscript{119} If a dispute settlement panel or the Appellate Body finds that the law of a State is inconsistent with any of the Uruguay Round Agreements, the Trade Representative shall consult with the State concerned in an effort to develop a mutually agreeable response to the report of the panel or the Appellate Body and shall make every effort to ensure that the State concerned is involved in the development of the United States position regarding the response.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{119} This is not to say that the state may not voluntarily comply, in which case, no legal proceedings would be instituted in the first place. On the other hand, assuming that Congress had delegated interpretive authority to the USTR, if the legislative rule preempting the particular state law entered into force prior to the complaint or establishment of the panel, there would be nothing for other Member States to complain about.
\item \textsuperscript{120} 488 U.S. 204 (1988).
\item \textsuperscript{121} \textit{Bowen}, 488 U.S. at 212. The primary issue in this case was whether grants of legislative authority to agencies include the power to make retroactive rules. The dispute in \textit{Bowen} concerned a rule that the Secretary of Health and Human Services had promulgated in 1981 without the required notice and comment procedures and which had been struck down for that reason. The Secretary then followed the proper procedures and reenacted the rule again in 1984 with the same 1981 effective date.
\end{itemize}
We have declined to give deference to an agency's counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.' Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.

The relevance of this case to future disputes involving state laws would depend on whether or not the USTR had taken a position on the issue in question prior to the adverse Panel or Appellate Body Report. Bowen makes clear that if the USTR had taken no position or a contrary position prior to the litigation, courts will not give Chevron deference to its subsequent litigating positions. On the other hand, if the USTR's position were consistent with long-standing practice, contemporaneous with enactment, or if Congress had reenacted or amended the statute without changing this provision, its position would be strengthened—not because it is entitled to Chevron deference, but rather because these are the same factors that strengthen an agency's persuasive authority under Skidmore.

The Supreme Court has subsequently elaborated on the principle announced in Bowen. In Adams Fruit Co. v. Barrett, the Court held that it need not give Chevron deference to the Secretary of Labor's interpretation of the Agricultural Worker Protection Act (AWPA), because "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising

122. Id. at 212–13. The quoted passage adopts a principle somewhat broader than required to decide the case. The Court placed great weight on the fact that HHS had argued in past litigation for a contrary interpretation of the statutory provision in question, and thus was not dealing with a situation where HHS had taken no position at all on the issue. See id.

123. An open question is whether the beginning of litigation will be determined from the filing of the complaint at the WTO, once consultations begin, or once the USTR files in federal court. The first option seems unrealistic, because it would remove from the USTR the discretion to independently arrive at a position contrary to the State's, even if this is what the law, treaty, or administration policy requires.

124. See infra Part III.A.3. Another open question is whether it would be possible for there to be legislative regulations already issued. Section 2171 does not deprive the USTR of authority to make legislative rules concerning section 102(b). I would argue that any such rules that are contrary to the interpretation I laid out in Part III.B supra, are contrary to the statute and fail Chevron step one. Therefore, no such rules would exist prior to the beginning of the litigation, after which beginning they would automatically lose their legislative character due to Bowen.

under the statute." The scheme established by the URAA clearly differs in important respects—it does not give rise to private causes of action—but the statute clearly provides that the Judiciary, rather than the USTR, is to adjudicate conflicts between state and federal law. Therefore, if the USTR were to argue that its interpretation of section 102(b) is entitled to *Chevron* deference, it would be attempting to "regulate the scope of the judicial power vested by the statute," and thereby run afoul of the Court's holding in *Adams Fruit*.

### C. Chevron Deference Does not Apply to Agency Preemption

In addition to the above structural arguments specific to the URAA, there is a more general principle of administrative law that agency interpretations of the scope of their own, delegated authority do not merit *Chevron* deference from courts. The Court's leading agency preemption cases do not even mention *Chevron* when interpreting the scope of congressionally delegated authority. Instead, the Court has performed its own independent analysis of the statutory language to determine whether the agency was authorized to preempt the state law in question. Thus, even though section 141 of the Trade Act of 1974 delegates to the USTR the authority to issue legislative regulations, its interpretation of the scope of that rulemaking authority is not owed any deference.

The Court announced the standard for review of agency decisions to preempt state law in a pre-*Chevron* case, *United States v. Shimer*. At issue in *Shimer* was the scope of authority delegated to the Veterans’

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126. *Id.* at 649. The Court in *Adams Fruit* refused to defer to the Secretary of Labor's interpretation of the scope of the statutory provision providing a private cause of action. The Court acknowledged that Congress delegated to the Department of Labor the authority to promulgate regulations, but held that "[t]his delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id.* at 650. See also *Crandon v. United States*, 494 U.S. 152 (1990). In *Crandon*, Justice Scalia argued in a concurring opinion that administrative interpretations were not entitled to *Chevron* deference because "[t]he law in question . . . is not administered by any agency but by the courts." *Id.* at 177.


128. This Note is concerned with statutory preemption, specifically, the preemptive effect of URAA § 102(b)(2)(A), rather than "administrative preemption," which concerns the preemptive effect of agency regulations. I will not address the preemptive effect of legislative regulations that the USTR may issue, but, for the reasons presented in sections B.2 and B.3 above, the USTR is not empowered to issue legislative regulations interpreting the preemptive scope of section 102(b). See Howard P. Walthall, Jr., *Chevron v. Federalism: A Ressassement [sic] of Deference to Administrative Preemption*, 28 CUMB. L. REV. 715, 727 (1998). Walthall argues that there are two types of administrative preemption. "First, the regulation may determine the interpretation of a federal statute which in turn preempts state law. Second, the regulation may itself preempt state law." *Id.* at 715 n.1. If the USTR were empowered to promulgate such regulations, which I argue that they are not, they would be of the first sort.

Administration. The clause that authorized the Veterans’ Administration to promulgate regulations that preempt state laws is nearly identical to the clause authorizing the USTR to do so.\textsuperscript{130} The Court held that where Congress has delegated such broad discretion, the Court should defer to agency interpretations when the decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations . . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or the legislative history that the accommodation is not one that Congress would have sanctioned.\textsuperscript{131}

Thus, there are two preconditions for deference to agency preemption decisions. First, interpretation of the statute must involve reconciling conflicting policies, policies for which special expertise is necessary to understand. Second, this accommodation must be one that Congress would have sanctioned. In the remainder of this section, I will show that neither of these preconditions is satisfied with regard to a construction giving the USTR \textit{Chevron} deference. In the following section, however, I will argue that both of these rationales are consistent with \textit{Skidmore} deference.

\textit{Post-Chevron} agency preemption cases have elaborated on the \textit{Shimer} standard, without applying the \textit{Chevron} test to agency interpretations of the scope of their delegated authority.\textsuperscript{132} The Court’s

\textsuperscript{130} See \textit{Shimer}, 367 U.S. at 382 n.9 (“Section 504 of the Act provides: ‘The Administrator is authorized to promulgate such rules and regulations not inconsistent with this title, as amended, as are necessary and appropriate for carrying out the provisions of this title . . . .’”).

\textsuperscript{131} \textit{Id.} at 382–83. The Supreme Court has reiterated this rationale in numerous cases, quoting the last sentence of the above quotation. \textit{See}, e.g., Fidelity Fed. Sav. & Loan v. de la Cuesta, 458 U.S. 141, 154 (1982); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700 (1984); City of New York v. FCC, 486 U.S. 57, 64 (1988).

\textsuperscript{132} The fact that the Court has not mentioned \textit{Chevron} is all the more striking because \textit{Chevron} cites the exact same cases in support of agency deference as \textit{Shimer} does. Compare \textit{Shimer}, 367 U.S. at 382 with \textit{Chevron}, 467 U.S. at 844–45. Some commentators have argued that cases like \textit{Medtronic} v. Lohr, 518 U.S. 470 (1996), and \textit{Hillsborough} v. Automated Med. Lab., 471 U.S. 707 (1985), stand for the proposition that the Court gives \textit{Chevron} deference to agencies when their interpretations limit the preemptive scope of the statutes they are charged with enforcing, but not when they interpret their authority broadly. \textit{See} \textit{Walthall}, \textit{supra} note 128, at 758–62; Jack W. Campbell IV, \textit{Regulatory Preemption in the Garcia/Chevron Era}, 59 U. \textit{PITT. L. REV.} 805, 841 (1998). In \textit{Medtronic}, the Court relied on the FDA’s refusal to preempt the state laws in question to conclude that the state law claims in question were not preempted. The \textit{Hillsborough} Court similarly refused to find state regulations preempted
approach is illustrated by City of New York v. FCC\textsuperscript{133} and Louisiana Public Service Commission v. FCC.\textsuperscript{134} In both cases, the FCC, pursuant to a broad delegation of interpretive authority,\textsuperscript{135} had preempted state laws. The Court applied a two step analysis to determine the preemptive effect of such regulations, without even mentioning Chevron. The first step is to determine whether the agency intends the regulation to preemt state law, and the second is “whether that action is within the scope of the [agency’s] delegated authority.”\textsuperscript{136} If these conditions are met, “[f]ederal regulations, if consistent with the governing statute, will preempt any state or local law that either conflicts with those regulations or frustrates their purpose.”\textsuperscript{137}

It is the second step of this analysis that is relevant to the issue at hand. The focus in the second inquiry is not on whether or not Congress intended to preemt state law,\textsuperscript{138} but whether or not the regulation is consistent with delegated authority.\textsuperscript{139} In Louisiana Public Service Commission v. FCC, the Court did not give Chevron deference to the FCC’s interpretation of its authority to preemt state laws. Instead, it conducted its own independent analysis of the scope of authority delegated by the statute,\textsuperscript{130} refusing to defer to the FCC’s reasonable

\textsuperscript{133} 486 U.S. 57 (1988).
\textsuperscript{134} 476 U.S. 355 (1986).
\textsuperscript{135} See City of New York, 486 U.S. at 66–7. The statute stated that Congress had delegated to the FCC the authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter... 47 U.S.C. §§ 303, 303(r).” Id.
\textsuperscript{136} Fidelity, 458 U.S. at 154.
\textsuperscript{138} See City of New York, 486 U.S. at 64 (“[A] ‘narrow focus on Congress’ intent to supersede state law [is] misdirected,’ for ‘[a] pre-emptive regulation’s force does not depend on express congressional authorization to displace state law.’”).
\textsuperscript{139} See Louisiana Public Service Comm’n, 476 U.S. at 374 (“[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.”).
\textsuperscript{140} See Walthall, supra note 128, at 734–40.
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Despite the FCC's policy expertise, the Court found that deference to it as to the scope of its own authority would allow the agency to override Congress' intent to limit the FCC's power. Similarly, in City of New York, the Court independently interpreted the FCC's statutory authority. Although the Court upheld the FCC regulations preempting state law, the Court did not suggest that it should defer to the agency, or even mention what the agency thought the scope of its statutory authority was. The Court noted that deference to agency determinations of their own authority is only appropriate where the decision "involve[s] a broad grant of authority to reconcile conflicting policies."

Just as in Louisiana Public Service Comm'n, Congress expressed its intent to limit the USTR's authority to preempt state laws in section 102(b). The USTR cannot contend that courts should defer to its construction of this provision, because it satisfies neither of the preconditions set forth in Shimer. Though Congress clearly has delegated to the USTR broad authority to reconcile conflicting international trade policies, it did not do so with respect to the policies underlying section 102(b). Congress expressed two clear policies in section 102(b), both of which are designed to protect state laws and to promote state sovereignty. First, Congress commanded the USTR to make its best efforts to develop a "mutually agreeable response" to adverse WTO panel or Appellate Body reports. Preemption is a "last resort," available

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141. See Louisiana Public Service Comm'n, 476 U.S. at 379 ("Like many statutes, the Act contains some internal inconsistencies, vague language, and areas of uncertainty. It is not a perfect puzzle into which all the pieces fit. Thus, it is with the recognition that there are not crisp answers to all of the contentions of either party that we conclude that § 152(b) represents a bar to federal pre-emption of state regulation . . . "). See also Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256 (1985) (applying its own independent analysis of the preemptive scope of the statute, the Court concluded that the agency was acting within delegated discretion).

142. See Louisiana Public Service Comm'n, 476 U.S. at 374 ("An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.").

143. See City of New York, 486 U.S. at 69-70. In upholding the FCC regulation, the Court relied on Congress' awareness of the FCC practice of preempting the field for certain aspects of cable television regulation when it enacted 1984 Cable Act as well as passages from the legislative history stating that Congress did not intend to change the balance of power between federal and local authorities in that field in concluding that the FCC's action was not contrary to congressional intent. "In sum, we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards . . . is not one that Congress would have sanctioned." Id. at 69 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).


only after all efforts to find a cooperative solution have failed.\textsuperscript{146} Second, Congress commanded courts to reach their own, independent interpretation of the URAA and required the USTR to carry the burden of proving that the state law conflicts with the URAA. With regard to \textit{Shimer}'s second precondition, Congress would not have sanctioned giving the USTR \textit{Chevron} deference. Congress entrusted the courts, rather than the USTR, to reconcile the policy of respecting state sovereignty with the policy of complying with the United States' international obligations.

\textbf{D. Skidmore Deference is the Appropriate Standard}

Section 102(b) commands courts to interpret the relevant provisions independent of both the USTR and WTO Panel or Appellate Body reports. Its provisions could be consistent with either \textit{Skidmore} deference or with a non-deferential standard, but in the context of international trade, the USTR's policy expertise and statutorily designated policymaking authority favor the \textit{Skidmore} standard.

While \textit{Chevron} deference gives administrative agencies all, or almost all, the interpretive authority and a non-deferential standard leaves it all to the courts, \textit{Skidmore} deference splits interpretive authority between them. The \textit{Skidmore} standard is the best reconciliation of the statutory commandment of judicial independence with the Judiciary's limited institutional competence, which is discussed below. Thus it is no coincidence that several of the factors mentioned by the Supreme Court as supporting \textit{Skidmore} deference would be present in a USTR legal challenge: (i) the USTR has greater policy expertise than courts in this area, (ii) it has greater familiarity with the statutory scheme and purposes, (iii) it participated in negotiating the WTO Agreement and drafting the URAA and the accompanying SAA, and (iv) it is charged with implementing and enforcing the URAA.

Though the Supreme Court's cases interpreting international agreements do not explicitly discuss \textit{Skidmore} or \textit{Chevron} deference, they support my contention in holding that the Executive branch is institutionally more competent than the Judiciary to interpret treaties. This division of labor in construing treaties is based on both the respective institutional competences of the Executive vis-à-vis the Judiciary, as well as on our constitutional structure, which delegates to the Executive responsibility for foreign affairs. In \textit{United States v. Lui-Kin Hong},\textsuperscript{147} the Court of Appeals for the First Circuit explained why "the executive branch's construction of a treaty, although not binding on the courts, is

\begin{itemize}
\item \textsuperscript{147} \textit{Lui-Kin Hong}, 110 F.3d 103, 110 (1st Cir. 1997).
\end{itemize}
Interpreting URAA Section 102(b) entitled to great weight. In Lui-Kin Hong, the Secretary of State had decided to extradite a citizen of the People’s Republic of China pursuant to his statutorily authorized discretion. The court explained that interpreting international treaties requires a division of labor between the Executive and Judiciary, according to which each branch takes responsibility for those issues most suited to its particular area of competence. Lui-Kin Hong involved an extradition treaty, which is a somewhat unique context, but the Supreme Court has in other contexts affirmed the principle that Executive Branch interpretations have persuasive, but not binding authority on courts, as do those of administrative agencies charged with negotiating and enforcing the treaty. This deference applies to implementing legislation, as well as to treaties.

Therefore, though section 102(b) is clearly inconsistent with Chevron deference and commands courts to reach their own, independent interpretation, precedents interpreting international agreements make it clear that courts must give some level of deference to the USTR’s policy judgments due to their limited institutional competence. Furthermore, though Congress limited the scope of the USTR’s discretion, it did not take away its authority for interpreting, coordinating, and implementing international trade policy.

148. Id. at 110.
149. Id.

This bifurcated procedure reflects the fact that extradition proceedings contain legal issues peculiarly suited for judicial resolution, such as questions of the standard of proof, competence or evidence, and treaty construction, yet simultaneously implicate questions of foreign policy, which are better answered by the executive branch. Both institutional competence rationales and our constitutional structure, which places primary responsibility for foreign affairs in the executive branch, support this division of labor.

Id. (citations omitted).

150. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." (emphasis added)).

151. See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by departments of government particularly charged with their negotiation and enforcement is given great weight."); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

152. See Mayaguezanos Por La Salud y El Ambiente v. United States, 1999 WL 1191443 at *6 (1st Cir. (Puerto Rico) 1999) (citing the cases above in support of Executive branch interpretation of the implementing legislation for the EURATOM Agreement, the Atomic Energy Act).
IV. URAA § 102(b)(2) OBSTACLE PREEMPTION

There are three possible scopes of federal preemption of state laws—conflict, obstacle, and field preemption. In this Part, I will argue that the obstacle preemption standard is most consistent with the purposes of the URAA, Supreme Court precedents, and the USTR's policy expertise and statutorily delegated policy-making discretion.

First, I will describe the two sets of classifications used in preemption analysis: (i) classification in terms of preemptive scope—actual conflict, obstacle, and field preemption—and (ii) classification in terms of Congressional intent—explicit or implicit. Second, I will show that obstacle preemption is the standard that is most consistent with the purposes of the URAA. If courts were only to preempt state laws that actually conflict with the URAA, states would be able to tax and otherwise financially burden international trade, to prohibit activities that the URAA and WTO Agreement permit, and to permit activities that they prohibit. On the other hand, if courts were to infer that Congress intended to occupy all of the fields covered by the URAA, they would do so contrary to Congress' clear intent, and would create a regulatory vacuum over wide swathes of the economy. Because in preemption analysis "each case turns on the peculiarities and special features of the federal regulatory scheme in question," past precedents do not provide precise guidelines for interpreting the preemptive scope of a particular statute. For this reason, my argument for obstacle preemption will be based on the structure and purpose of the URAA; general, imprecise principles of preemption doctrine; and the adverse consequences of the alternatives, rather than the text or legislative history of particular statutory provisions.

A. Preemption Analysis

Most commentators split preemption analysis into two different sets of categories. First, preemption is categorized by its scope into conflict preemption, obstacle preemption, and occupation of the field preemption. Second, "[p]re-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" In

both cases, "the question whether a certain state action is pre-empted by federal law is one of congressional intent."

1. Conflict, Obstacle, and Field Preemption

Both courts and commentators have acknowledged that the categories of conflict, obstacle, and field preemption are neither "rigidly distinct" nor well defined. Some commentators have even argued that obstacle and field preemption analyses are indistinguishable. Nevertheless, important consequences follow from the way in which a court categorizes the preemptive scope of the federal law. The most important difference is that states may not regulate at all in a field occupied by the federal government. The obstacle standard permits states to regulate so long as state laws either do not interfere with the federal purpose or actually promote it.

Conflict preemption is the narrowest of the three. It is the paradigm example of the operation of the Supremacy Clause. An actual conflict exists where the state law forbids something that the federal law


157. See, e.g., Palmer v. Liggett Group, 825 F.2d 620, 624 (1st Cir. 1987) ("[W]e are somewhat wary that these ready citations list, but do not describe, and catalog, but do not define, any real distinctions among the various types of preemption . . . .").


By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation. Nevertheless, because we previously have adverted to the three-category framework, we invoke and apply it here.

English, 496 U.S. at 79–80 n.5.
requires, or vice versa, so that "compliance with both federal and state regulations is a physical impossibility." Some commentators contend that because direct conflict preemption is simply the automatic operation of the Supremacy Clause, congressional intent to override the conflicting law is either unnecessary or irrelevant. Another interpretation is that "Congress presumably intends its statutes to be obeyed, despite any state law to the contrary, so any state law directly conflicting with federal law is preempted." Conflict preemption thus differs fundamentally from the other two types, which require courts to determine whether or not Congress intended federal law to supersede state laws.

If a federal law preempts only those state laws that actually conflict with it, states remain free to regulate the same subject matter as the federal law. The conflict between the state and federal law must be irreconcilable, such that state law requires individuals or entities to violate the federal law, for the state law to be preempted. A conflict does not exist where the state law merely permits what the federal law prohibits, or prohibits what the federal law permits. Similarly, if a state law only subjects individuals or entities to liability or otherwise increases the cost of engaging in activities regulated by the federal law, the state law does not actually conflict with the federal law. For example, state tort causes of actions or provisions for punitive damages are

160. See Gardbaum, supra note 156, at 770-73. See also Starr, supra note 137, at 8-15 (characterizing Gibbons v. Ogden as a case of conflict preemption and arguing that actual, direct conflicts of state and federal laws differ fundamentally from preemption); Florida Lime and Avocado Growers, 373 U.S. at 142-43 ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."). That is not to say that Congress could not stipulate that state law might trump conflicting federal law, which Congress often does through express "Savings Clauses." See, e.g., Gade v. Nat’l Solid Wastes Mgmt Ass’n, 505 U.S. 88, 97 (1992).
161. Walthall, supra note 128, at 721 (citations omitted).
162. See, e.g., Rice v. Norman Williams Co., 458 U.S. 654, 659-700 (1982) (discussing California Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc., 445 U.S. 97 (1980) where the Court held that a state statute facially conflicted with the Sherman Act “because it mandated resale price maintenance, an activity that has long been regarded as a per se violation of the Sherman Act.”). See, e.g., Rice v. Norman Williams, 458 U.S. at 659-61 (holding that “[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have anticompetitive effect.”). The Court concluded that a state law “may be condemned under antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases.”).
163. See, e.g., Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (finding no irreconcilable conflict between federal law that permitted certain banks to sell insurance and a state statute prohibiting them from selling insurance, because “[t]he two statutes do not impose directly conflicting duties on national banks.”).
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normally not preempted by federal regulation of a given field, 165 because it is not physically impossible to comply with both federal and state laws; it is just more expensive. 166 Other examples are state labeling requirements that require information in addition to that required by federal law, 167 state corporate laws that make takeover attempts more expensive than federal securities laws, 168 or state tax laws.

State laws may also be preempted if they stand as an obstacle to the purposes of the federal law, even though it is possible to comply with both federal and state law. A state law stands as an obstacle to federal law if it has the effect of discouraging conduct or policies that the federal law was specifically intended to encourage or promote, 169 or if it has the effect of encouraging conduct or policies that the federal law was intended to prohibit or discourage. 170 For example, where federal laws or regulations governing banks permit, but do not require, banks to sell insurance, state laws prohibiting banks from selling insurance are preempted. 171 State laws also may stand as an obstacle if they disturb the

165. See English v. General Elec. Co., 496 U.S. 72, 82 (1990) (holding that plaintiff's state cause of action for intentional infliction of emotional distress, which resulted from employer's retaliation against whistleblower employee, and provision for punitive damages were not preempted, even though Congress had occupied the field pertaining to the "radiological safety aspects involved in the construction and operation of a nuclear plant."). In the absence of clear congressional intent, "state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law." Id. at 89.

166. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (state tort remedies for personal injuries resulting from violation of federal regulations governing nuclear power plants were not preempted because "[p]laying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible.").

167. See Jones v. Rath Packing Co., 430 U.S. 519, 540 (1977) (finding that there was no actual conflict where it was possible to comply with both federal and California law pertaining to labeling requirements for packages of flour, even though compliance with California law would be more expensive for out-of-state producers).

168. See CTS Corp. v. Dynamics Corp., 481 U.S. 69, 82 n.7 (1987) (finding no actual conflict with state law governing tender offers, Indiana Control Share Acquisitions Act, which made tender offers more expensive by imposing procedural requirements over and above federal law, the Williams Act, even though these additional costs could conceivably deter some tender offers).

169. See Felder v. Casey, 487 U.S. 131 (1988). In Casey the Court held that a state notice-of-claim statute, the purpose of which was to limit governmental liability, conflicted with the purpose of federal civil rights statute, 42 U.S.C. § 1983, which was to vindicate federal civil rights.

170. See Tribe, supra note 154, § 6-26 at 485. See also Jones, 430 U.S. at 540-43. In Jones, the Court held that federal Fair Packaging and Labeling Act preempted California regulation because it would frustrate the purpose of the federal law, which was to facilitate value comparisons among similar products. This purpose was frustrated because the state law in question had the effect of discriminating against national distributors in favor of local distributors by requiring national distributors to over-pack.

171. See Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (noting that the Court had traditionally interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily
‘delicate balance’ created by Congress in areas that are largely, though not exclusively, regulated by the federal government, such as labor relations, securities, and environmental laws. So long as there is a conflict with federal policies, it is not necessary that the federal law explicitly state that it preempts conflicting state law.

Unlike conflict preemption, obstacle preemption allows state laws to be preempted if they have the effect of burdening federal rights. State laws can burden federal rights in several ways. First, a state law may act as a precondition to the exercise of a federal right. Second, state laws can discourage individuals from vindicating their federal rights by depriving claimants of governmental benefits. Finally, state laws may

preempting, contrary state law... In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted”). See also Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 158 (1982) (holding state laws prohibiting S&Ls from including a “due-on-sale” clause in mortgage agreements were preempted. “By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created ‘an obstacle to the accomplishment and execution of the full purposes and objectives’ of the due-on-sale regulation.”). 172. See Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 140 n.4 (1976) (holding the National Labor Relations Act set up a “balance of protection, prohibition, and laissez-faire in respect to... labor disputes...” State law attempted to regulate an area that Congress had determined should not be regulated at all.); Edgar v. MITE Corp., 457 U.S. 624 (1982) (finding the federal Williams Act governing tender offers was designed to protect investors by putting incumbent management and bidders on equal footing. State law upset this balance by favoring incumbent management.); Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (“In this case the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.”). 173. See Felder, 487 U.S. at 144 (finding federal statute, 42 U.S.C. § 1983, lacked pre-emption provision). Furthermore, if federal statute has Savings Clause, which expressly preserves particular types of state laws, the court may infer that state laws not covered by Savings Clause that conflict with purposes of federal law are preempted. See Gade v. Nat’l Solid Wastes Mgmt Ass’n, 505 U.S. 88, 97 (1992); Int’l Paper Co., 479 U.S. at 492–93 (1987). 174. See Felder, 487 U.S. at 141. (holding state notice-of-claim statute preempted because “it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability” and because “the notice provision discriminates against the federal right”). 175. See Nash v. Florida Industrial Comm’n, 389 U.S. 235, 239 (1967). In Nash, the Court found that a Florida law that deprived persons of unemployment insurance who made complaints to NLRB of unfair employment practices frustrated the purpose of federal law. The federal law sought to protect whistleblowers against coercion by private parties and unions, and this purpose would be thwarted if a state were allowed to take similar coercive actions to deter whistle blowing.
withdraw federal remedies.\textsuperscript{176} Another example of the difference between the two types of preemption is the state laws that require individuals or entities to get permission from state regulatory agencies to engage in activities regulated by federal law. Where the state law gives a state agency the authority to veto activities permitted by federal law or agencies, the state law is preempted as an obstacle to federal law.\textsuperscript{177}

Field preemption is much broader than obstacle preemption. When the federal government has either explicitly or implicitly reserved a field for federal regulation, all existing and future state legislation in that field is rendered invalid.\textsuperscript{178} States are deprived of their power to act at all in a given area, whether or not state laws conflict with federal laws\textsuperscript{179} or with any substantive federal policies.\textsuperscript{180} Because field preemption causes such a dramatic redistribution of regulatory power from the states to the federal government, courts require Congress to give a "clear statement" of its intent to preempt, either in the text or the legislative history.\textsuperscript{181} In \textit{Rice v. Santa Fe Elevator Corp.},\textsuperscript{182} the Court announced that there is a strong presumption against preemption of fields traditionally regulated by the States,\textsuperscript{183} such as services, consumer safety, and health.

Where a clear statement to preempt is lacking, however, the federal government may implicitly occupy a given field in two ways. First, courts may infer a congressional intent to occupy the field in areas of peculiarly federal concern or where the federal government has exclusive

\textsuperscript{176} See Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (preempting state workers' compensation law's exclusivity provision, which operated as 'reverse preemption' clause withdrawing federal rights).

\textsuperscript{177} See Edgar 457 U.S. at 639 (holding that Illinois statute governing tender offers preempted because, among other things, it allowed Illinois Secretary of State to pass on substantive fairness of offer and thereby veto the transaction permitted under federal law).

\textsuperscript{178} See Tribe, supra note 154, § 6-27, at 497.

\textsuperscript{179} See Gardbaum, supra note 156, at 771.

\textsuperscript{180} See Tribe, supra note 154, § 6-27, at 497.

\textsuperscript{181} See Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp., 108 S. Ct. 1350, 1354 (1988) ("Without a text that can, in light of [legislative history], plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law;"(alteration added)); New York State Dep't of Soc. Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)

[If] Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a state statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

\textit{Id.}

\textsuperscript{182} 331 U.S. 218 (1947).

\textsuperscript{183} See Rice, 331 U.S. at 230 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). As discussed in the introduction, the WTO Agreement covers many such areas, including financial services, consumer safety, health, and government procurement. See supra note 8.
jurisdiction, for example, foreign affairs, copyright, or immigration and naturalization.\textsuperscript{184} Even within these fields, however, exclusive federal power does not "translate into broad, sweeping preemption of all state measures that might affect a vital federal interest."\textsuperscript{185}

Second, courts may infer from the presence of federal regulatory scheme, enforced by federal regulatory agencies or licensing requirements, that Congress intended to occupy the field in question.\textsuperscript{186} Field preemption may be inferred when the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."\textsuperscript{187} The less comprehensive the regulatory scheme, the less likely it is that courts will find congressional intent to occupy the field, because of the danger of creating a regulatory vacuum.\textsuperscript{188}

Finally, the inference that Congress implicitly intended to occupy the field is less likely to be made when the field is one that states have traditionally regulated, because of the \textit{Rice} presumption against preemption.\textsuperscript{189} But if Congress has given a clear statement of its intent and is acting within the constitutional limits of its jurisdiction, it may expressly pre-

\begin{itemize}
\item \textsuperscript{184} \textit{See}, e.g., \textit{Hines v. Davidowitz}, 312 U.S. 52, 68 (1941) (striking down state law requiring aliens to register with state authorities, because "this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.").
\item \textsuperscript{186} \textit{See}, e.g., \textit{City of Burbank v. Lockheed Air Terminal}, 411 U.S. 624, 634–635 (1973) (holding that federal statutes, the Federal Aviation Act and the Noise Control Act, did not expressly preempt state noise control regulations, but Court found city ordinance preempted because, first, cases decided prior to passage of Noise Control Act in 1972 had held that the federal scheme regulating aviation was pervasive, and, second, portions of legislative history stated that passage of Noise Control Act would "expand the Federal Government's role in a field already preempted."); \textit{Schneidewind v. ANR Pipeline Co.}, 485 U.S. 293, 307 (1988) (holding that state law requiring natural gas companies to get approval from state regulatory agency was preempted because it amounted to a "regulation of rates and facilities, a field occupied by federal regulation").
\item \textsuperscript{187} \textit{Rice}, 331 U.S. at 230. The comprehensiveness of the regulatory scheme is judged by the comprehensiveness of the governing statute, rather than that of the regulations. \textit{See} \textit{Hillsborough County v. Automated Med. Lab., Inc.}, 471 U.S. 707, 717 (1985) ("We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. . . . To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulation will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.").
\item \textsuperscript{188} \textit{See} \textit{Tribe}, supra note 154, § 6-27, at 497.
\item \textsuperscript{189} \textit{See} \textit{Rice}, 331 U.S. at 230.
\end{itemize}
empt any field. The Tenth Amendment is no more of a restraint on Congress' power to preempt state law by occupying a given field than it is on its power to legislate.

2. Implicit and Express Preemption Analysis

The object of all preemption analysis, whether express or implied, is to ascertain congressional intent. What distinguishes the two forms of analysis is the type of evidence a court will consider in determining congressional intent. When applying implied preemption analysis, courts are more willing to look to the "structure and purpose of the statute as a whole," than they are when applying express preemption analysis, which focuses on the text and legislative history.

In recent cases, the Supreme Court has indicated that in some circumstances it is appropriate to use implied preemption analysis to determine the preemptive scope of an express preemption clause such as section 102(b)(2)(A). The best illustration of this approach is *Medtronic v. Lohr.* The issue in this case was whether state common-law tort claims were state law "requirements" preempted by the Medical Devices Amendment (MDA). Lohr was the recipient of a pacemaker manufactured by Medtronic, which Lohr claimed was defective. Medtronic

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190. *See Tribe,* supra note 154, § 6-25, at 481 ("Since congressional purposes can be either substantive or jurisdictional, a state action may be struck down as an invalid interference with the federal design either because it is in actual conflict with the substantive operation of the federal program, or because, whatever its substantive impact, it intrudes upon a field that Congress has validly reserved to the federal sphere.").

191. *See id.* § 6-27, at 500 ("[A]n unambiguous declaration by Congress that it intends to occupy a particular field must be treated as dispositive regardless of the nature of the subject; state action in such cases is invariably preempted, providing Congress has acted constitutionally.").


195. The Medical Devices Amendment, 21 U.S.C. § 360k(a) (1994), contained the following preemption provision:

§ 360k(a). State and local requirements respecting devices.

(a) General Rule. Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

argued that all state tort claims for products liability were preempted by the MDA because they constituted prohibited "requirements."

The Court rejected Medtronic's preemption claim on three grounds. First, because the federal statute regulated consumer safety, an area traditionally regulated by States, the Rice presumption against preemption applies absent a clear congressional intent to preempt. Second, and most importantly, the Court applied implied preemption analysis to discern congressional intent from the structure of the statute.

Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it. Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.\(^\text{196}\)

The Court found Medtronic's construction of the statute inconsistent with its purpose, because it would have "the perverse effect of granting complete immunity from design defect liability" to an industry that Congress had determined required stringent regulation to protect the safety of consumers.\(^\text{197}\) Finally, the Court relied on the fact that the FDA had rejected Medtronic's construction, because the FDA was the agency to which Congress had delegated the authority to implement the statute and was therefore "uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"\(^\text{198}\)

B. Obstacle Preemption is Most Consistent with the Structure and Purpose of the URAA

Because neither section 102(b)(2)(A) nor its accompanying legislative history specify the scope of state laws preempted by the URAA, its preemptive scope must be inferred from its structure and purpose. Of the three possible preemptive scopes, obstacle preemption is most consistent with the allocation of interpretive authority between the USTR and the

\(^{196}\) Medtronic, 518 U.S. at 486 (citations omitted).

\(^{197}\) Id. at 487.

\(^{198}\) Id. at 496 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Though the Medtronic Court cited Chevron as support for agency deference, it also cited Hillsborough, 471 U.S. at 714. The Court gave the FDA deference with respect to the interpretation of its own regulations. Medtronic was asserting that the regulations had preemptive effect, even though the FDA was arguing that the regulations in question did not preempt state tort law and were not intended to. The Court was not deferring to the FDA's interpretation of the scope of authority delegated to it by Congress.
federal Judiciary established by Congress in section 102(b). Obstacle preemption allows the USTR and the federal Judiciary to flexibly interpret and implement the URAA, whereas actual conflict and field preemption do not permit courts or the USTR to exercise discretion or to base their decisions on policy considerations.

If a conflict standard were to be used, states would be free to impose additional regulatory requirements, tort liability, or other costs. States would also be able to permit what the URAA prohibits, and to prohibit what the URAA permits. Commentators have pointed out a number of such state laws—including state corporate tax laws, labeling requirements, and state sanctions against Burma—that are probably inconsistent with the WTO Agreement and the URAA, but do not actually conflict with them.

Conflict preemption is contrary to both the structure and purpose of the statute. First of all, if Congress had intended only to preempt state laws that actually conflicted with the URAA, then section 102(b) would be superfluous. Conflict preemption is the default level—state laws that actually conflict with federal laws are preempted by the automatic operation of the Supremacy Clause, unless Congress expresses the contrary intent, for example, through a Savings Clause. By including a preemption provision, Congress declared its intent that a broader form of preemption was intended. Secondly, and more importantly, this standard deprives both courts and the USTR of any discretion to factor into its preemption decision the effect of the state law on federal policies. Where state law conflicts with federal law, the court must find that state law is preempted anyway. Where such a conflict is lacking, courts cannot preempt the state law, no matter how detrimental it may be to U.S. international trade policy.

For the same reasons, field preemption is not consistent with the structure and purpose of the URAA. The WTO Agreement has provisions governing a wide range of fields traditionally regulated by the

states such as trade in goods, government procurement, consumer health and safety, and services such as securities, banking, and insurance. But nowhere in the URAA does Congress make the clear statement of its intent to invalidate all state regulation in these fields that Rice requires. In fact, the SAA specifically provides that the consultation provisions cover all areas "in which the states exercise concurrent or exclusive legislative, regulatory, or enforcement authority." These consultation provisions constitute a tacit acknowledgement by Congress that states will continue to regulate in these fields. Furthermore, federal occupation of the field would create a regulatory vacuum. Alternately, it could be argued that Congress has expressed its intent to occupy these fields implicitly, by creating a pervasive scheme of federal regulation. However, the URAA does not comprehensively regulate the broad areas it covers, so there is no reason to infer that Congress intended to occupy all of these fields.

Finally, field preemption leaves no room for courts or the USTR to exercise discretion. Obstacle preemption on the other hand will allow courts and the USTR to work together to flexibly interpret the URAA and to advance its underlying purpose of liberalizing international trade and removing non-tariff barriers. Furthermore, it allows them to exercise their statutorily delegated discretion in a manner consistent with their respective institutional competences.

The obstacle standard allows the USTR to bring its policy expertise and its national and international perspective to the table. Congress delegated to the USTR the authority to develop, coordinate, and implement U.S. international trade policy. The USTR thus has both the authority and the expertise to set the course for U.S. international trade policy and to determine how best to coordinate and implement the various, and

207. See generally Friedman, supra note 5, at 1448-58.
208. See Multilateral Agreements on Trade in Goods, supra note 8.
209. See Agreement on Government Procurement, supra note 6.
211. See GATS, supra note 8 (covering banking, insurance and securities, as well as professional services, such as accounting, engineering, and construction).
212. See TRIBE, supra note 154, § 6-25.
213. The above analysis assumes that Congress has not already expressly occupied the field in question. Congress is free to occupy fields covered by the URAA with future legislation, but they have not yet done so.
sometimes conflicting, policies set by the President and Congress. Furthermore, the USTR has a broader perspective on the impact that retaliation by other Member States would have on the nation as a whole and on the United States' relationship with its trading partners.

But section 102(b) also commands courts to independently determine whether the state law conflicts with federal law. The obstacle standard allows the court to perform this independent function—Courts need not second-guess the USTR's policy judgments or findings that state law impacts federal policy, but it can independently determine whether state law actually frustrates federal policies, or if, instead, the state law is neutral with respect to federal policy or even promotes it.

C. Judiciary Not Delegated Authority to Weigh Risk of Retaliation by other Member States

Before concluding, one objection to my interpretation of section 102 should be addressed. Perhaps the primary policy issue that the USTR may have to resolve is the conflict between URAA section 102's requirement that it respect and accommodate a state's interest in retaining its law and the threat to the United States' interests and trading relationships from retaliation by other Member States. In Barclays Bank v. Franchise Tax Bd. and Container Corp. of America v. Franchise Tax Bd., the Supreme Court held that the courts are not the proper branch of government to weigh this sort of risk. In the context of a legal challenge from the USTR, this would seem to leave courts no alternative but to defer to the USTR in these matters, in contradiction to my arguments above.

In Barclays Bank, the Supreme Court held that neither the Executive nor the Judiciary is authorized to weigh the risk of foreign retaliation when deciding whether a state law, in this case a California corporate tax law, should be preempted. Barclays Bank, a foreign corporation, contended that California's law discriminated against foreign business and therefore violated the Commerce Clause. The U.S. Attorney General argued that the United States could face retaliation from foreign governments if the state tax were not invalidated. The Court first declared that it was not competent to make such a policy decision. "The 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

215. 512 U.S. 298, 328 (1994). Before addressing the issue of preemption, the Court dismissed the claim that the state tax in question violated the Foreign Commerce Clause by discriminating against foreign corporations.
whole to let the States tax as they please." The Court also denied this authority to the Executive Branch, which had filed an amicus brief supporting the plaintiff foreign corporation. The Court gave this no weight, stating that "neither he nor we were to make that decision, but only... Congress."

The primary difference between the legal proceedings pursuant to section 102(b)(2)(A) and the above case, is that the URAA has been enacted and the WTO Agreement has been ratified. In terms of the rationale of Barclay's Bank, Congress has made the decision to delegate the authority to the federal judiciary and the Executive, specifically the USTR, to balance the risk of retaliation by other Member States against state interests. Though the Court specifically withdrew this issue from the Judiciary in Container Corp. and Barclays Bank, the legal and factual contexts of these cases were different. There was much greater uncertainty about the likely responses of our trading partners. The WTO Agreement, however, was designed to reduce uncertainty and to provide a predictable, rule-based multilateral trading regime with an impartial dispute settlement process not dominated by any one Member State. Unlike the prior regime, the WTO authorizes Member States to retaliate against other Member States whose laws have been determined by the DSB to conflict with the WTO Agreement and who have not

217. Barclay's Bank, 512 U.S. at 328 (citing Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)).

218. See id. at 329-30. The Court did not reject, as a general matter, that the Executive Branch was entitled to interpretive authority, but rather its holding only applied to circumstances similar to those in the case. The Court rejected the argument that a series of Executive Branch actions, statements, and amicus filings constituted a 'clear federal directive' to preempt state law. The President in the past had proposed legislation and negotiated a treaty that would have prohibited this form of taxation, both of which the Senate had rejected. Because Congress had rejected the proposed legislation and treaty, the Court held that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." Id. at 330.

219. Id. at 329.

220. See Container Corp., 463 U.S. at 194. The Court stated that it had little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding 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. The best that we can do, in the absence of explicit action by Congress, is to develop objective standards that reflect very general observations about the imperatives of international trade and international regulations.

Id.

221. See supra notes 12-13 and accompanying text.
withdrawn the offending measures within the time frame laid out in the DSU.\textsuperscript{222} Though not dispositive, these changes in the legal environment may allow for a judicial role in evaluating the risk of retaliation by our trading partners when determining whether state law is preempted. Because the possibility of retaliation is likely to be present in all USTR legal challenges to state laws, it would be inconsistent with the clear commandment of judicial independence in section 102(b) for federal courts to always find that the challenged state law is preempted whenever there is the threat of retaliation, no matter how small its potential amount.

\textbf{Conclusion}

A number of commentators have sought to assess the effects of the WTO Agreement and Uruguay Round Agreements Act on U.S. and state sovereignty at a general level.\textsuperscript{223} Others have addressed the more narrow issue of whether particular state laws, or types of state laws, conflict with particular provisions of the WTO Agreement.\textsuperscript{224} This Note takes a middle road between these two approaches—evaluating the impact of the WTO Agreement and its implementing legislation on state sovereignty from the perspective of one crucial provision, section 102(b). Though the analysis presented in this Note is not meant to be a guideline for determining whether a particular state law or type of regulation would be preempted, hopefully it will enable some significant and relevant legal conclusions about what section 102(b) means—and more importantly what it does not mean—to be drawn.

Though section 102(b) sets out in great detail the procedures that must be followed in the event that the DSB adopts a Panel or Appellate Body report finding that a state law conflicts with the WTO Agreement, it is ambiguous as to the level of deference courts must give the USTR and the preemptive scope of the URAA itself. How these two provisions are interpreted may, in the future, have a large impact on state sovereignty, the ability of the USTR and other federal agencies to implement U.S. international trade policy, and the federal-state balance in fields that the WTO Agreement covers. This Note offers an interpretation of the

\textsuperscript{222} See supra notes 24–29 and accompanying text.
\textsuperscript{223} See, e.g., Aceves, supra note 5; Friedman, supra note 5; Jackson, supra note 5; Straight, supra note 5; Tangney, supra note 5; Wilson, supra note 5.
\textsuperscript{224} See, e.g., Loeb-Cederwall, supra note 206 (regarding Massachusetts’ Act Regulating State Contracts with companies doing Business with Burma); Long, supra note 204 (regarding state corporate tax laws); O’Reilly, supra note 205 (regarding California product labeling requirements).
provisions of section 102(b) that recognizes the USTR's expertise in the field of international trade policy, while ensuring that the courts make their own independent determination of whether or not the state law should be preempted.

When Congress enacted the URAA, it was aware that there would be some tension between concurrent state and federal regulation of fields covered by the URAA, particularly when state laws that conflict with the United States' international obligations are allowed to stand. Rather than automatically preempting state laws or giving the USTR the discretion to preempt state laws on its own initiative, Congress responded to this tension by enacting section 102(b). This provision embodies Congress' policy choice to tolerate this tension between state sovereignty and the United States' international obligations, and to give the states as much bargaining power as possible in negotiations with the federal government to resolve the conflict, while still maintaining federal supremacy in the area of international trade policy. Congress emphatically did not intend the legal challenge to be a mere formality on the road to preemption. The challenge for courts in applying section 102(b) in the future will be to preserve this tension, and their own independence.

225. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) ("No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. . . . Congress intended to stand by both concepts and to tolerate whatever tension there was between them.").