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37 Idaho L. Rev. 389 (2001)

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# WHAT HATH CONGRESS WROUGHT: E-SIGN, THE UETA, AND THE QUESTION OF PREEMPTION

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## I. INTRODUCTION

On June 30, 2000, the Electronic Signatures in Global and National Commerce Act (E-sign) was signed into law by President

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Clinton.<sup>1</sup> E-sign's electronic transactions provisions took effect October 1, 2000.<sup>2</sup> The apparent purposes of E-sign include fostering electronic commerce, validating electronic signatures and records, encouraging technology neutrality, and promoting uniformity of law regarding electronic signatures and electronic records among the states. In the last four to five years, many states have enacted legislation validating electronic records and signatures.<sup>3</sup> The perceived non-uniformity of this state legislation was a driving force for enactment of federal electronic signature legislation. Accordingly, section 102 of E-sign expressly preempts non-exempted state laws touching on the subject of electronic records and signatures.

While Congress' intent to preempt a variety of state laws clearly appears in the text and legislative history of E-sign, the extent of preemption remains unclear.<sup>4</sup> As a consequence, the uniformity sought by E-sign remains in doubt. This Article discusses the impact of E-sign's preemption provision on the Uniform Electronic Transactions Act (UETA).<sup>5</sup> First, this Article outlines generally the doctrine of preemption. Then this Article goes on to discuss the two separate preemption provisions found in E-sign and then compares the basic provisions of E-sign with those of the UETA.<sup>6</sup> As a consequence of the ambiguity in E-sign's preemption provision, the ultimate construction of E-sign

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1. See Mark Felsenthal, *President Signs Digital Signatures Law; Measure Shields Consumers, Officials Say*, 5 BNA ELEC. COM. & L. REP. 716, 716 (2000); Robert A. Wittie & Jane K. Winn, *E-sign of the Times* (2000) at <http://www.kl.com /PracticeAreas/Technology/pubs/page20.stm>.

2. See *E-Sign Eases Evolution to E-Health Even as it Raises New Legal Questions*, 5 BNA ELEC. COM. & L. REP. 984, 984 (2000). E-sign's provisions regarding transferable records became effective March 1, 2001, and state agencies may even delay this until June 1, 2001. See *id.*

3. See, e.g., UTAH CODE ANN. § 46 (1996); MINN. STAT. ANN. § 325 (West 1998); WASH. REV. CODE ANN. § 19.34 (1998). For a discussion of digital signature laws enacted prior to E-sign and the UETA, see Amelia H. Boss, *The Internet and the Law: Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 583, 600-603 (1999).

4. See generally Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under Federal E-SIGN Legislation and the UETA*, BUS. LAW., v. 56 (Nov. 2000) [hereinafter *Electronic Records*]; Wittie & Winn, *supra* note 1, at 1 (discussing the ambiguity of the E-sign preemption provision and comparing the UETA's provisions to those of E-sign); Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, Introductions & Adoptions of Unif. Acts (2000) at [http://nccusl.org/uniformact\\_articles/uniformacts-article-ueta.htm](http://nccusl.org/uniformact_articles/uniformacts-article-ueta.htm).

5. The UETA is a model law regarding electronic records and signatures drafted for and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). See generally UETA (1999). While the UETA contains various provisions related to electronic transactions, the basic thrust of the Act is that where the law requires a writing or signature, such writing or signature should not be denied effect solely because it is in electronic form. *Id.* § 7.

6. It should be noted that many states have digital signature legislation and other laws that E-sign may preempt that lie beyond the scope of this Article.

may not best promote the Act's purposes. Therefore, Congress may need to reexamine E-sign's preemption provisions. In the alternative, states may need to reconsider electronic signature legislation on a state-by-state basis with particular attention to adopting the UETA as reported by the NCCUSL in 1999 in its pristine form.

## II. PREEMPTION GENERALLY

Federal power to preempt state law, thereby invalidating it or making it unenforceable, stands as a fundamental tenet of our constitutional system.<sup>7</sup> The federal power of preemption derives simply from the application of the Supremacy Clause of the U.S. Constitution to congressional legislation, enacted pursuant to the powers granted Congress, that conflicts with state laws.<sup>8</sup> Preemption may be express or implied.<sup>9</sup> Express preemption occurs when Congress explicitly pro-

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7. See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2293 (2000) (discussing preemption as a "fundamental principle of the Constitution"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (noting that federal preemption of state law constitutes a "well settled" principle of the U.S. federal system). The Court first considered the question of preemption in the 1824 case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). From the time of the *Gibbons* decision in 1824 until the 1970s, questions regarding preemption of state law by federal law rarely arose. See U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, 5 (1992) [hereinafter ACIR Report]; Kenneth Starr, et. al, *The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association* 1 (1991). Since the 1970s, the issue of preemption has arisen with greater regularity. See ACIR Report at 6-7.

Numerous statutes provide for express preemption. See 2 U.S.C.A. § 453 (West 2000); 5 U.S.C.A. § 8709(d)(1) (West 2000); 5 U.S.C.A. § 9005 (West 2000); 15 U.S.C.A. § 3364(g) (West 2000); 17 U.S.C.A. § 912(c) (West 2000); 18 U.S.C.A. § 2710(f) (West 2000); 21 U.S.C.A. § 360k(a) (West 2000); 28 U.S.C.A. § 3003(d) (West 2000); 29 U.S.C.A. § 1144(a) (West 2000); 42 U.S.C.A. § 5403(d) (West 2000); 42 U.S.C.A. § 14502(a) (West 2000); 47 U.S.C.A. § 276(c) (West 2000); 49 U.S.C.A. § 10501(b)(2) (West 2000); 49 U.S.C.A. §§ 14501(a)(1), (2) (West 2000); 50 U.S.C.A. § 2407(c) (West 2000). See also *infra* note 48.

8. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.

U.S. CONST. Art. VI, cl. 2. Congress must legislate under a power granted to it in the Constitution, such as commerce, property or treaty power, before its enactments preempt state law. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In *Gregory*, the Court stated that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.*

9. See *Cipollone*, 505 U.S. at 516; *Geier v. Am. Honda Motor Co. Inc.*, 120 S. Ct. 1913, 1926 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Morales v.*

vides in a statute that federal law will supercede, limit, alter, or otherwise override state laws.<sup>10</sup> Implied preemption may arise through congressional occupation of a field of law or through conflict between state and federal law.<sup>11</sup> Implied preemption through occupation of a field may be found when federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>12</sup> If Congress has neither expressly preempted state law nor occupied the field of legislation, courts will find state law preempted to the extent that state and federal law conflict.<sup>13</sup> Conflict may be found either where compliance with both federal and state law constitutes an impossibility, or where state law frustrates the purpose of a federal enactment.<sup>14</sup> Both theoretically and in practice, "the categories of preemption are not 'rigidly distinct.'"<sup>15</sup>

Whether express or implied, when determining whether federal law preempts a particular state law, congressional intent serves as the "ultimate touchstone" of preemption analysis.<sup>16</sup> However, courts

Trans World Airlines, 504 U.S. 374, 382 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987); *Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983); *Fidelity Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 152 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

10. See *Morales*, 504 U.S. at 383; *Cipollone*, 505 U.S. at 517; *Pacific Gas & Elec. Co.*, 461 U.S. at 203.

11. See *Freightliner Corp.*, 514 U.S. at 287. The Court has "recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law." *Id.* See also *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). The Court in *English* stated that "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." *Id.*

12. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

13. See *Crosby*, 120 S. Ct. at 2294 (citing *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)); *Freightliner Corp.*, 514 U.S. at 287.

14. *Freightliner Corp.*, 514 U.S. at 287.

15. See *Crosby*, 120 S. Ct. at 2294 n.6 (quoting *English*, 496 U.S. at 79 n.5).

While express and implied preemption may be best understood separately, in some instances they may coexist. See *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913, 1917-1922 (2000) (applying an express preemption analysis and finding state law action not expressly preempted, but nonetheless finding state law preempted because it conflicted with federal law). See also *Freightliner Corp.*, 514 U.S. at 287.

16. *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 516 (1992) (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). See also *English*, 496 U.S. at 78-79. While it is generally true that congressional intent provides the foundation for a preemption analysis, where an administrative agency's regulation preempts state law the analysis focuses on two issues: (1) whether the regulatory agency intended to preempt state law; and (2) whether Congress delegated sufficient authority to permit such an administrative preemption. See *Fidelity*

will "assume Congress does not exercise [its power to preempt] lightly."<sup>17</sup> In fields of law traditionally regulated by the states, there is a presumption against preemption unless Congress's intent is unclear or unambiguous.<sup>18</sup> When Congress intends to preempt areas of law historically occupied by the states, such as employment law, or organization of state government,<sup>19</sup> or warehouse and grain storage regulation,<sup>20</sup> its intentions must be "clear and manifest."<sup>21</sup> In those fields traditionally occupied by the federal government, such as international relations, courts show far more deference to federal prerogative than in those areas in which states and the federal government possess concurrent authority.<sup>22</sup>

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Fed. Sav. & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 154 (1982). Nonetheless, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Id.* at 153.

17. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

18. *See Cipollone*, 505 U.S. at 518.

19. *See, e.g., Gregory*, 501 U.S. 452 at 460 (determining whether the Age Discrimination Employment Act applies to Missouri state judges).

20. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (deciding whether the United States Warehouse Act preempts state regulation of grain elevators).

21. *Gregory*, 501 U.S. at 461 (quoting *Rice*, 331 U.S. at 230). The "plain statement rule" acknowledges "that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* Notably, however, when enforcing laws stemming from the Civil War Amendments "the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated" because the Civil War Amendments were an expansion of federal power and a limitation of state sovereignty. *Id.* at 468.

When discussing the clear statement rule and the presumption against preemption, courts often refer to states' "police powers." *Cipollone*, 505 U.S. at 518; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice*, 331 U.S. at 230. Police powers are generally thought to refer to issues of health and safety. *See Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985). At least in the context of preemption, the Court has employed the term "police powers" to refer more broadly to powers traditionally exercised by the states that may not directly involve public health and safety, such as the commercial concerns of warehousing regulation, weights and measures of packaged foods, and organization of state governments. *See Rice*, 331 U.S. at 230 (applying the presumption against preemption provided by the clear statement rule to warehousing regulation); *Jones*, 430 U.S. at 525 (applying clear statement rule and presumption against preemption to laws governing weights and measures of packaged food); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (applying the presumption against preemption to state regulation of power production and transmission). In the context of preemption, "police power" refers to the powers traditionally exercised by states, whether directly related to health and safety or to other fields such as commerce and organization of state governments. *See Gregory*, 501 U.S. at 461. The Court in *Gregory* states "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

22. *See Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). In *Hines*, the Court addresses federal preemption of a state alien registration law. *See id.* at 56. The Court notes:

Express preemption occurs when Congress states explicitly in a statute its intent to preempt state law.

When congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.<sup>23</sup>

There are no magic words which will establish express preemption. When congress includes an express preemption provision the congressional intent may be determined through a close reading of the language used in the statute.<sup>24</sup> Courts "need not go beyond [the statutory] language to determine whether congress intended . . . to preempt at least some state law."<sup>25</sup> The existence of an express preemption provision also "implies that matters beyond that reach are not pre-empted."<sup>26</sup>

Even where congress expressly preempts state law, the court must "identify the domain expressly pre-empted' by [the statutory] language."<sup>27</sup> A court should not read a federal statute or regulation to preempt a particular state law unless Congress has made it clear that that law should be preempted. To interpret the express language of the statute, courts first employ "traditional rules of statutory construction."<sup>28</sup> One primary rule used by courts in determining the scope of preemption is that language should be given its ordinary mean-

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it is of importance that 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. Any concurrent state power that may exist is restricted to the narrowest of limits.

*Id.* at 68.

23. *Cipollone*, 505 U.S. at 517 (internal quotations and citations omitted).

24. *See Morales*, 504 U.S. at 383-84. *See also* *Weber v. Heaney*, 995 F.2d 872, 875 (1993). The court in *Weber* considered the preemptive effect of the Federal Election Campaign Act beginning at 2 U.S.C. § 431. *See id.* at 873. The Act contains a classic express preemption provision providing that "[t]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." *See id.* at 875 (quoting 2 U.S.C. § 453). In its preemption analysis, the court concluded that "the preemptive scope of a federal law is governed by the express language." *Id.*

25. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

26. *Cipollone*, 505 U.S. at 517.

27. *Medtronic*, 518 U.S. at 485 (quoting *Cipollone*, 505 U.S. at 517).

28. *Grunbeck v. Dime Savings Bank of New York*, F.S.B., 74 F.3d 331, 336 (1st Cir. 1996).

ing.<sup>29</sup> Where Congress unambiguously expresses its intent, courts are bound to give effect to that expressed intent.<sup>30</sup>

Where the express language used in the statute is insufficient to determine the scope of the preemption provision, courts next look to the statutory language in the context of the statute as a whole.<sup>31</sup>

Where a preemption provision cannot be interpreted using the plain language of the statute or the language in the context of the statute as a whole, considering its structure and purpose, cause exists for stretching beyond the plain meaning of the provision.<sup>32</sup> If the express language of a preemption provision, viewed in the context of the statute as a whole, proves ambiguous or produces absurd results, some courts will "consult relevant legislative history . . . to confirm an interpretation indicated by the plain language."<sup>33</sup>

Whether the scope of the express preemption provision is clear or whether the court must resort to extrinsic evidence of congressional intent regarding the scope of preemption, the provision should be construed "in light of the presumption against the pre-emption of state police power regulations."<sup>34</sup> When Congress preempts an area of the law traditionally regulated by the states, Congress' intent must be clear and manifest.<sup>35</sup> Any preemption analysis requires construing ambiguity in federal law in favor of the validity of state law.<sup>36</sup>

29. See *Morales*, 504 U.S. at 383.

30. See *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 303 (9th Cir. 1995) (citing *Chevron USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842-843 (1984)).

31. See *Medtronic*, 518 U.S. at 485 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy concurring in part and concurring in the judgment)). "Congress' intent must be divined from the language, structure, and purpose of the statute as a whole." *Gade*, 505 U.S. at 111 (Kennedy concurring in part and concurring in the judgment). See also *Cipollone*, 505 U.S. at 517. The court in *Cipollone* stated with regard to the Federal Cigarette Labeling and Advertising Act that "[i]n our opinion, the preemptive scope of the . . . [a]ct is governed entirely by the express language." *Id.*

32. See *Cipollone*, 505 U.S. at 518 (refusing to look beyond the words of the statute because the language of the statute provided no cause to look further). See also *National Boiler Council v. Voss*, 44 F.3d 740, 746 (9th Cir. 1994) (requiring a showing of a "sound basis" before the court will look beyond the express language of a preemption provision).

33. *Grunbeck*, 74 F.3d at 336 (citations omitted).

34. *Cipollone*, 505 U.S. at 518.

35. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); see also *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also 2 U.S.C.A. 658b(e). This section provides as follows:

When a committee of authorization of the Senate or House of Representatives reports a bill or joint resolution of public character, the committee report accompanying the bill or joint resolution shall contain, if relevant to the bill or joint resolution, an explicit statement on the extent to which the bill or joint resolution is intended to preempt any State, local, or tribal law, and, if so, an explanation of the effect of such preemption.



In addition to express preemption, federal law preempts state law where congress intends to occupy a field of law or area of regulation<sup>37</sup> or where state and federal law conflict.<sup>38</sup> While express preempt-

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*Id.*

36. See *Gregory*, 501 U.S. at 464-467 (1991) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)) (refusing to include state judges under the ADEA because the court "will not read the ADEA to cover state judges unless congress has made it clear that judges are *included*"). The Court quotes Tribe's statement that "[t]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking." *Id.* See also *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993) (finding that under any reasonable reading the Federal Election Campaign Act preempts state law controlling spending on federal campaigns).

37. Where field preemption is implied, courts infer congressional intent from the purpose and structure of the statute. See *Cipollone*, 505 U.S. at 516; *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992); *Fidelity Fed. Sav. & Loan v. de la Cuesta*, 458 U.S. 141, 152 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Congressional intent to preempt an entire field arises when federal law is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230. The fact that a federal law is sufficiently comprehensive to regulate a field is not, by itself, enough for a finding of occupation of the field, rather one "must look for special features warranting pre-emption." *Hillsborough County, Florida v. Automated Med. Lab., Inc.*, 471 U.S. 707, 717-19 (1985). In determining whether Congress intended to occupy a field, the entire statutory scheme must be considered. See *Hines v. Davidowitz*, 312 U.S. 52, 67 n. 20 (1941). When deciding whether Congress intended to occupy a field of legislation no "rigid formula or rule . . . can be used . . . to determine the meaning and purpose of every act of Congress." *Id.* at 67. Courts have considered such factors as the pervasiveness of congressional authority in the field of legislation generally, its objective, and the character of the obligations imposed thereunder. See *id.* at 68. "The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." *Id.* at 70. See also *International Paper Co. v. Ouellette*, 479 U.S. 481, 492, 496 (1987). Ultimately, in seeking to find whether Congress has impliedly occupied a field, a court must weigh the totality of the circumstances surrounding the federal legislation. See *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Courts will not necessarily consider the absence of an express preemption provision in the federal law as evidence of implicit permission for state law to regulate the same subject matter concurrently. See *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000). "A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply . . ." *Id.*

Where Congress has occupied an entire field of regulation, the test for preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the Federal Act." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (quoting *Rice*, 331 U.S. at 236). In determining whether a state law concerns an area already regulated by the federal government, one must first look to the language and effect of the state law. See *Crosby*, 120 S. Ct. at 2296. In cases where the language and effect of the federal law does not clearly show that federal law should preempt state law, a court will consider whether the purpose of the state law is similar to, or the same as, the federal law. See *Pacific Gas & Elec. Co.*, 461 U.S. at 213-

tion and implied preemption are not necessarily mutually exclusive, E-sign is an example of a statute containing an express provision regarding preemption.

### III. DISCUSSION

E-sign's preemption provision, entitled "Exemptions to Preemption," constitutes an express preemption clause, though its structure resembles a savings clause more than a traditional preemption provision.<sup>39</sup> Despite its structure and title, section 102 constitutes an ex-

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216. Despite the fact that the purpose of a law as stated by the state legislature differs from, or has aspects in addition to, the federal law in question, it may still be preempted. Ultimately, a court may look to the practical impact of the law to determine preemption. See *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 106 (1992).

38. See *Cipollone*, 505 U.S. at 518; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Int'l Paper Co.*, 479 U.S. at 491; *Hillsborough County*, 471 U.S. at 713; *Pacific Gas & Elec. Co.*, 461 U.S. at 203; *Fidelity Fed. Savings & Loan v. de la Cuesta*, 458 U.S. 141, 152 (1982); *Jones*, 430 U.S. at 525; *Rice*, 331 U.S. at 230. Notably, Congress may occupy a field expressly or under a conflict preemption analysis when state law on the same subject would frustrate the purpose of federal legislation. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1177 (3d ed. 2000).

Unlike express preemption or occupation of a field, conflict preemption occurs whenever state law actually conflicts with federal law. See *Cipollone*, 505 U.S. at 516; *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Int'l Paper Co.*, 479 U.S. at 491; *Hillsborough County*, 471 U.S. at 713; *Jones*, 430 U.S. at 525. A conflict analysis may be required even when a court decides that a state law falls outside of a federal law's express preemption provision. See *Jones*, 430 U.S. at 540. Conflicts arise in at least two fashions. First, a conflict occurs when compliance with both state and federal regulation is an impossibility. See *Crosby*, 120 S. Ct. at 2294 (2000) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). See also *English*, 496 U.S. at 79; *Hillsborough County*, 471 U.S. at 713; *Pacific Gas & Elec. Co.*, 461 U.S. at 204; *Fidelity Fed. Sav. & Loan*, 458 U.S. at 153. Second, one may find conflict when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. See *Crosby*, 120 S. Ct. at 2294; *English*, 496 U.S. at 79; *Int'l Paper Co.*, 479 U.S. at 491; *Hillsborough County*, 471 U.S. at 713; *Fidelity Fed. Sav. & Loan*, 458 U.S. at 153. To determine whether a conflict exists, a court must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones*, 430 U.S. at 526. Where state and federal law impose different remedies for the same activity "[c]onflict is eminent." *Crosby*, 120 S. Ct. at 2298 (quoting *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986) (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953))). Courts may, however, find that no conflict exists when compliance with both state and federal law is a theoretical possibility, and the state law does not thwart the purposes of the federal enactment. See, e.g., *California Fed. Sav. & Loan Ass'n, v. Guerra*, 479 U.S. 272, 290-91 (1987). Where a court finds a conflict, "[t]he rule [is] that a federal court should not extend its invalidation of a statute further than necessary to dispose of a case before it." *Dalton v. Little Rock Family Planning Svcs.*, 516 U.S. 474, 476 (1996) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)). Where severability is plausible the general rule is that "partial, rather than facial invalidation is the required course." *Brockett*, 472 U.S. at 504.

39. See *Electronic Signatures in Global and National Commerce Act*, Pub. L. 106-229, § 102(a), 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-7007, 7021, 7031)

press preemption provision because clearly "Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue . . . [and] that provision provides a reliable indicium of congressional intent with respect to state authority."<sup>40</sup> Consequently, "there is no need to infer congressional intent to preempt state laws from the substantive provisions of" E-sign.<sup>41</sup> Notwithstanding Congress' expressed intent to preempt state law, courts still will have to "identify the domain expressly preempted by [the statutory] language."<sup>42</sup>

E-sign section 102(a) provides that state law may "modify, limit, or supercede" the substantive provisions of E-sign section 101 if the state law either: (1) is an enactment of the UETA as approved by the NCCUSL in 1999; or (2) is consistent with E-sign, technology neutral, and, if adopted after E-sign, makes specific reference to E-sign.<sup>43</sup> If a state's enactment of the UETA does not fall under the first prong of E-

[hereinafter E-sign] (references to E-sign in the text will refer to sections of the public law whereas citation references will be to the U.S.C.).

40. *Cipollone*, 505 U.S. at 517 (internal quotations and citations omitted).

41. *Id.*

42. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (quoting *Cipollone*, 505 U.S. at 517).

43. See E-sign 15 U.S.C. § 7002(a). The full text of § 102(a) states:

(a) IN GENERAL—A State statute, regulation, or other rule of law may modify, limit, or supercede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or title II, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this title and title II; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after the date of enactment of this Act, makes specific reference to this Act.

*Id.*

sign's exemptions to preemption provision, then a consistency analysis must be applied to each provision of the UETA under the second prong of the exemptions to preemption provision of section 102(a)(2).<sup>44</sup> Three primary questions arise in ascertaining the scope of preemption under E-sign as it relates to the UETA. First, under section 102(a)(1), what constitutes an effective adoption of the UETA?<sup>45</sup> Second, when there is an effective adoption of the UETA for purposes of section 102(a)(1), what portions of E-sign are modified, limited or superseded by the UETA?<sup>46</sup> Third, when a state's enactment of the UETA does not qualify for the exemption to preemption in section 102(a)(1), what portions of the UETA are consistent with E-sign for purposes of section 102(a)(2)?<sup>47</sup> These three distinct issues require separate analysis.

A sound basis exists for looking at the legislative history for guidance in determining how the express preemption provision in E-sign should be construed because this provision is "complex and somewhat ambiguous."<sup>48</sup> In this case, however, the legislative history is more confusing and ambiguous than the statutory language of the

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44. See 15 U.S.C. § 7002(a).

45. See *id.* § 7002(a)(1).

46. See *id.*

47. See *id.* § 7002(a)(2).

48. See *Nat'l Boiler Council v. Voss*, 44 F.3d 740, 746 (9th Cir. 1994) (requiring a showing of a "sound basis" before the court will look beyond the express language of a preemption provision). See also *Cipollone*, 505 U.S. at 518 (refusing to look beyond the words of the statute because the language of the statute provided no cause to look further). See also, Wittie & Winn, *supra* note 1, at 1-2 (discussing the complexities and ambiguities of E-sign's preemption provisions); *Electronic Records*, *supra* note 4, at 293 (stating that "[i]f E-SIGN eliminates old uncertainties . . . it also creates new ones . . . principally with respect to interpreting and applying . . . E-SIGN's unusual preemption provisions").

The United States Code contains a number of preemption provisions that are, on their face, substantially more clear than the exemptions to preemption found in E-Sign. See, e.g., 2 U.S.C.A. § 453 (West 2000) ("The provisions of this Act, and rules prescribed under this Act, supercede and preempt any provisions of state law with respect to the election to Federal office."); 5 U.S.C.A. § 8709(d)(1) (West 2000) ("The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits . . . shall supercede and preempt any law of any State or political subdivision thereof . . ."); 5 U.S.C.A. § 9005 (West 2000) ("The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits . . . shall supercede and preempt any State or local law, or any regulation issued thereunder, which relates to long-term care insurance or contracts."); 29 U.S.C.A. § 1144(a) (West 2000) ("[T]his chapter shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."); 42 U.S.C.A. § 5403(d) (West 2000) ("Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal . . . standard.").

E-sign preemption provision.<sup>49</sup> Normally, a conference committee provides, with the conference report, a "joint explanatory statement of managers."<sup>50</sup> In the case of E-sign, however, the conference committee made a calculated decision not to produce a statement of managers.<sup>51</sup> This decision was made because "[t]he negotiations that led to the final legislative document were very difficult and contentious."<sup>52</sup> The legislative history from the floor debates contains conflicting remarks from various senators and representatives that do not provide a coherent explanation of the legislation. An example of such conflicts in the legislative history is shown by a comparison of the remarks of different congressmen on the same subject. Senators Hollings, Wyden, and Sarbanes suggested that even in a state that adopts the pristine UETA, E-sign's consumer protection provisions would still apply.<sup>53</sup> On the other hand, Senator Abraham and Representative Bliley, two of E-sign's sponsors, stated that adoption of UETA allows a state to "opt-out of the federal regime" entirely.<sup>54</sup> Thus, in construing the preemption provision of E-sign, the best source remains the language of the statute itself.<sup>55</sup>

#### A. Construing Section 102(A)(1)

E-sign section 102(a)(1) provides, in pertinent part, that:

[a] State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 . . . only if such statute, regulation, or rule of law . . . constitutes an enactment or adoption of the [UETA] as approved and recommended for enactment in all the States by the [NCCUSL] in 1999. . . .<sup>56</sup>

The issue arising out of this section of E-sign is what constitutes a qualifying "enactment or adoption of the [UETA] as approved and recommended for enactment?"<sup>57</sup> Two plausible readings arise from the

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49. See Adam Wasch, *Senate Approves E-Sign Conference Report, Clears the Way for Presidents Signature*, 5 BNA ELEC. COM. & L. REP. 664, 664 (2000).

50. See 146 CONG. REC. E1078-01 (June 22, 2000) (extension of remarks by Rep. Markey); 146 CONG. REC. E1071-01 (June 21, 2000) (extension of remarks by Rep. Dingle); 146 CONG. REC. S5281-06 (June 16, 2000) (statement by Sen. Abraham); 146 CONG. REC. S5215-02 (June 15, 2000) (remarks of Sen. Wyden).

51. 146 CONG. REC. S5215-02 (June 15, 2000) (remarks of Sen. Wyden).

52. *Id.*

53. See *id.* (statements by Sens. Hollings, Wyden, and Sarbanes).

54. 146 CONG. REC. H4346-07 (June 14, 2000) (statement by Rep. Bliley). See 146 CONG. REC. S5281-06 (June 16, 2000) (statement by Sen. Abraham).

55. 146 CONG. REC. S5215-02 (June 15, 2000) (remarks of Sen. Wyden).

56. 15 U.S.C. § 7002(a)(1).

57. *Id.*

plain language of the section.<sup>58</sup> First, this section can be read to require that a state adopt the entire UETA without amendments or additions (pristine UETA) to avoid preemption under section 102(a)(1).<sup>59</sup> In the alternative, the language may mean that those portions of the UETA enacted by a state that constitute unchanged provisions of the UETA as promulgated by NCCUSL may modify, limit, or supercede E-sign.<sup>60</sup> Under the reading of section 102(a)(1) that requires enactment of the pristine UETA, if a state has adopted the pristine UETA, it would be exempt from preemption.<sup>61</sup> At first glance, this reading appears reasonable considering the plain language of section 102(a)(1).<sup>62</sup> However, absurdities arise when the language is construed in this fashion and “entire and without amendment” is read into E-sign section 102(a)(1) as a modifier of “the Uniform Electronic Transactions Act” so that a state must adopt the pristine UETA to avoid preemption under section 102(a)(1).

Consider the state of Idaho that adopted the pristine UETA with the exception of one additional clause.<sup>63</sup> The UETA states that “[i]nformation” means data, text, images, sounds, codes, computer programs, software, databases, or the like.<sup>64</sup> The Idaho definition of information is the same as the pristine UETA, except that Idaho added the restriction “but shall not include the electronic transfer of funds to or from the state.”<sup>65</sup> With the exception of this restriction on the term “information,” a change that in no material fashion alters the operation of the Act,<sup>66</sup> Idaho has adopted the pristine UETA.<sup>67</sup> If E-sign section 102(a)(1) is read to mean that a state must adopt the pristine UETA, then Idaho’s enactment of the UETA would not be exempt from preemption under section 102(a)(1).<sup>68</sup> Rather, determining

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58. See Wittie & Winn, *supra* note 1, at 7-8.

59. *Electronic Records*, *supra* note 4, at 324 (supporting the position that a state must enact the pristine UETA to be exempt from preemption under E-sign section 102(a)(1)).

60. See Fry, *supra* note 4, at 2-3 (supporting the position that in a state with an amended or changed UETA, only those provisions that differ from the pristine UETA necessitate a consistency analysis under E-sign section 102(a)(2)).

61. See discussion *infra* Part III.B. (analyzing what it means for the UETA to modify, limit, or supercede E-sign). A possibility remains that portions of E-sign without analogous provisions in the UETA may supplement the UETA with regard to some aspects of a transaction such as consumer protection. *Id.*

62. Wittie & Winn, *supra* note 1, at 8. “Applying the E-Sign consistency standard to each provision of a state’s non-conforming version of the UETA better comports with the literal language of E-Sign 102 . . .” *Id.*

63. Compare UETA § 2(10), with IDAHO CODE § 28-50-102(10) (2000).

64. UETA § 2(10).

65. IDAHO CODE § 28-50-102(10).

66. Compare UETA § 2(10), with IDAHO CODE § 28-50-102(10).

67. Compare generally UETA, with IDAHO CODE §§ 28-50-101 – 120.

68. See 15 U.S.C. § 7002(a)(1).

whether a given provision of Idaho's enactment of the UETA was valid would require a consistency analysis under E-sign section 102(a)(2).<sup>69</sup> Such would be the case even though, with the exception of one additional clause, the provisions of Idaho's UETA are identical to the pristine UETA.<sup>70</sup>

South Dakota's enactment of the UETA provides another example of a minor change to the UETA that would fail the test of section 102(a)(1) under a reading requiring adoption of the pristine UETA.<sup>71</sup> South Dakota's act adds secured transactions under Article 9 of the UCC to the scope of the UETA.<sup>72</sup> The UETA's drafting committee excluded secured transactions from the operation of the UETA because the revised UCC Article 9 addresses the use of electronic records and signatures.<sup>73</sup> While this change is substantive, it promotes electronic commerce by including more transactions within the scope of the UETA without changing any operative provision of the UETA.<sup>74</sup> Nonetheless, if E-sign section 102(a)(1) requires adoption of the pristine UETA, additions to the Act would subject the entire enactment to a consistency analysis of each section.<sup>75</sup>

Delaware, in contrast to Idaho and South Dakota, made its sole change to the UETA under section 3(b)(4).<sup>76</sup> Unlike South Dakota that added to the scope of the official UETA in section 3(b)(2),<sup>77</sup> Delaware

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69. See *id.* § 7002(a)(2).

70. Compare generally UETA, with IDAHO CODE §§ 28-50-101 – 120.

71. See 15 U.S.C. § 7002(a)(1).

72. See S.D. CODIFIED LAWS § 53-12-3(2) (Michie 2000) (enacted). South Dakota's version of the UETA also includes a section not found in the UETA as drafted regarding use of electronic records in transactions with the Board of Regents and the institutions administered by it. See *id.* § 53-12-48.

73. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UETA Draft for Approval, Unif. Elec. Transactions Act with Prefatory Note and Reporter's Notes, § 3(b)(2) reporter's note (1999).

74. Compare S.D. CODIFIED LAWS § 53-12-3(2), with UETA § 3.

75. South Dakota also excluded from the operation of its version of the UETA "transactions involving the Unified Judicial System." S.D. CODIFIED LAWS § 53-12-3(3) (Michie) (enacted). This type of exclusion was invited under UETA § 3(b)(4) that acknowledged that some states might want to exclude transactions from the UETA that were not expressly excluded by the drafters. See UETA § 3(b)(4). E-sign section 102(a)(1) expressly requires a consistency analysis for exceptions enacted by states under UETA § 3(b)(4). 15 U.S.C. § 7002(a)(1). Section 7002(a)(1) states in part that "any exception to the [UETA] enacted by a state under section 3(b)(4) of [the UETA] shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II." *Id.*

76. See DEL. CODE ANN. tit. 6, § 12A-103(a)(4) (2000). UETA section 3(b) excludes from the scope of the UETA transactions governed by certain laws such as those governing the "creation and execution of wills, codicils, or testamentary trusts." UETA § 3(b)(1). Section 3(b)(4) allowed a state to identify transactions governed by other laws, if any, that the state determined should not be included in the scope of its UETA. *Id.* § 3(b)(4).

77. Compare S.D. CODIFIED LAWS § 53-12-3(2), with UETA § 3(b)(2).

subtracted from the UETA's scope by excluding, under section 3(b)(4), transactions governed by:

[t]he General Corporation Law of the State of Delaware, the Delaware Professional Services Corporation Act, the Delaware Revised Uniform Partnership Act, the Delaware Revised Uniform Limited Partnership Act, the Delaware Limited Liability Company Act, the Delaware Uniform Partnership Law, and the Delaware Business Trust Act.<sup>78</sup>

Foreseeing the possibility that states might exclude some transactions from an enactment of the UETA under section 3(b)(4), Congress included a special provision in E-sign section 102(a)(1) regarding section 3(b)(4) exclusions.<sup>79</sup>

E-sign section 102(a)(1) allows states to limit, supercede, or modify E-sign if they have adopted the UETA, "except that any such exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent that such exception is inconsistent with this title or title II."<sup>80</sup> This provision of E-sign makes clear that states can exclude additional transactions from the UETA without losing the broad, general exemption to preemption in section 102(a)(1) which otherwise might result from "amending" the UETA.<sup>81</sup> In this context, only the additional transactions excluded by section 3(b)(4) would have to be analyzed for consistency with E-sign.<sup>82</sup> Consequently, even under a reading of section 102(a)(1) requiring adoption of the pristine UETA, Delaware's enactment of the UETA likely remains exempt from preemption under section 102(a)(1), though its exception to the scope of the UETA will require a consistency analysis.<sup>83</sup> South Dakota's addition to the UETA did not come under section 3(b)(4), but rather section 3(b)(2).<sup>84</sup> Therefore, under a reading of section 102(a)(1) requiring adoption of the pristine UETA, South Dakota's addition to the scope of the UETA would disqualify it from the exemption to preemption under section 102(a)(1).<sup>85</sup> This would be the case even though South Dakota's addition to the UETA serves the purposes and policies underlying E-sign, while Delaware's exclusion of transactions governed by business entity laws would contravene such purposes and policies.

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78. DEL. CODE ANN. tit. 6, § 12A-103(a)(4).

79. See 15 U.S.C. § 7002(a)(1).

80. *Id.* § 7002(a)(1).

81. See *id.*

82. See *id.*

83. See *id.*

84. Compare UETA § 3, with S.D. CODIFIED LAWS § 53-12-3(2), and DEL. CODE ANN. tit. 6, § 12A-103(a)(4) (2000).

85. See 15 U.S.C. 7002(a)(1).



The alternative construction of E-sign section 102(a)(1)—that these provisions of state law that constitute the UETA as adopted and recommended for enactment by NCCUSL in 1999 would not be preempted by federal law, but those provisions that differ from the text reported by NCCUSL would require a consistency analysis under section 102(a)(2)—would greatly simplify the preemption analysis under E-sign. Reading E-sign this way avoids the potentially absurd results caused by reading E-sign to require adoption of the pristine UETA.

In the case of Idaho, under the alternative construction of E-sign section 102(a)(1), the only portion of the UETA that would require a consistency analysis under section 102(a)(2) would be Idaho Code section 50-28-202(10).<sup>86</sup> In the case of South Dakota, one could perform a discreet analysis to determine whether South Dakota's inclusion of UCC Article 9 secured transactions under the UETA is consistent with E-sign. Either including secured transactions under the UETA is consistent with E-sign, or, if not, E-sign section 103(a)(3) would appear to govern and secured transactions would not be included.<sup>87</sup> In either case, the analysis is limited to the issue of whether UCC Article 9 and other provisions of UETA are clearly applicable. Similarly, this analysis of South Dakota's addition to the UETA would be similar to the analysis of Delaware's exclusion of transactions governed by business entity laws under UETA section 3(b)(4).<sup>88</sup> In the case of Delaware, because of the specific provision in E-sign section 102(a)(1) relating to state specific exceptions to the UETA under section 3(b)(4),<sup>89</sup> its enactment of the UETA should qualify for section 102(a)(1) exemption to preemption even though its exclusion of transactions governed by business entity laws will require a consistency analysis.

The reading of E-sign that requires a state to enact the pristine UETA at first glance comports with the language of E-sign section 102(a)(1).<sup>90</sup> However, reading E-sign section 102(a)(1) to approve of any state law that constitutes a provision of the UETA as promulgated reflects Congress' approval of the UETA; receives support from the presumption against preemption by exposing less of the statute to a section-by-section consistency analysis;<sup>91</sup> and acknowledges inclusion of a severability clause in the UETA.<sup>92</sup> One may infer Congress'

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86. See 15 U.S.C. § 7002(a)(1); IDAHO CODE § 28-50-202(10).

87. See 15 U.S.C. § 7003(a)(3).

88. See discussion *supra* Part III.A.

89. 15 U.S.C. § 7002(a)(1).

90. See *id.* § 7002(a)(1).

91. See *supra* Part III. for a discussion of the presumption against preemption. See also *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

92. See UETA § 20 (1999). Section 20 states that:

approval of the UETA and its constituent provisions from the express exemption to preemption for the UETA as drafted.<sup>93</sup> The presumption against preemption indicates that a court should invalidate as little of a state's law as possible to achieve the aims of Congress' intent. Finally, the UETA's severability clause indicates that the drafters of the UETA believed that portions of the act stood on their own.<sup>94</sup> Where severability is plausible, as in the case of the UETA, courts should follow the course of partial rather than facial invalidation of a state's statutory provisions.<sup>95</sup>

Litigation will be necessary to decide which reading of E-sign establishes the scope of preemption under the Act. The construction requiring enactment of the pristine UETA will cause greater confusion because it will mandate a provision-by-provision consistency analysis of electronic signature law in each state without the pristine UETA, except, possibly, in those states where the only modifications to the UETA were made under section 3(b)(4).<sup>96</sup> On the other hand, the alternative reading of the UETA avoids this issue by allowing discreet portions of the UETA to supplement E-sign.

#### B. When a State is Exempt From Preemption Under E-sign Section 102(A)(1), What Provisions of E-sign are Modified, Limited or Superseded by The UETA?

If a state's enactment of the UETA qualifies for the exemption to preemption in E-sign section 102(a)(1), it raises the issue of what portions of E-sign are "modif[ied], limit[ed], or supercede[d]," by the UETA.<sup>97</sup> In the case of a state's enactment of the UETA exempted from preemption under E-sign section 102(a)(1), there is no general

[i]f any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

*Id.*

93. See 15 U.S.C. § 7002(a)(1). The legislative history also supports congressional approval of the provisions of the UETA. See 146 CONG. REC. S5215-02, 5223 (June 15, 2000) (statement by Sen. Abraham). "The National Conference of Commissioners on Uniform State Laws has developed a uniform system for the use of electronic signatures. Their product, the . . . UETA, is an excellent piece of work and I look forward to its enactment in all fifty states." *Id.*

94. See UETA § 20.

95. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

96. See *supra* Part III.A. (discussing Delaware's exclusion to the UETA under section 3(b)(4)).

97. 15 U.S.C. § 7002(a). This section enables a state to "modify, limit, or supersede" E-sign if it is exempt from preemption under section 7002(a)(1) or section 7002(a)(2). *Id.*

requirement of consistency with E-sign as there would be if the state's exemption to preemption arose under section 102(a)(2).<sup>98</sup> Therefore, it appears relatively clear that where the UETA has provisions with no analog in E-sign or where E-sign and the UETA provide rules related to the same issue, the UETA will apply. The problematic issue arises in the instances where E-sign contains a provision with no analog in the UETA.

The principal area in which this issue arises is in the context of consumer protection provisions. E-sign contains a variety of consumer protections in section 101(c).<sup>99</sup> While the UETA, in contrast, does have provisions regarding consent to conduct transactions electronically in section 5 and provisions related to retention and formatting of notices sent electronically contained in section 8, it has no specific consumer protections.<sup>100</sup> If UETA sections 5 and 8 are construed in tandem, they could be considered an analog to E-sign section 101(c) because both provide some safeguards for consumers who receive notices electronically during the course of a transaction. Nonetheless, unlike E-sign's consumer protections, the provisions in the UETA are not consumer specific and apply to businesses and consumers alike.<sup>101</sup> Also, it is clear that the UETA drafting committee considered adding specific consumer protections to the UETA and made a calculated decision to leave the issue of consumer protection to other applicable law.<sup>102</sup>

If UETA sections 5 and 8 are considered to be an analog to E-sign section 101(c), then the UETA provisions would clearly modify or limit E-sign section 101(c) because the UETA provisions are materially different and less burdensome than the provisions of section 101(c).<sup>103</sup> Even if sections 5 and 8 of the UETA are not considered analogous to E-sign section 101(c), one may argue that the calculated exclusion of consumer protection provisions from the UETA should modify or limit section 101(c) when a state is exempt from preemption under section 102(a)(1).<sup>104</sup> In contrast, it is arguable that the UETA has no provision analogous to E-sign section 101(c).<sup>105</sup> If this is the case, then it is diffi-

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98. Compare 15 U.S.C. § 7002(a)(1), with § 7002(a)(2).

99. 15 U.S.C. § 7001(c).

100. UETA §§ 5, 8. For a further discussion of the similarities and differences between E-sign section 101(c) and UETA sections 5 and 8 see *infra* section Part III.C.ii.

101. UETA §§ 5, 8.

102. See Shea C. Meehan, Comment, *Consumer Protection Law and the Uniform Electronic Transactions Act (UETA): Why States Should Adopt the UETA as Drafted*, 36 IDAHO L. REV. 563, 565-66 (2000).

103. Compare UETA §§ 5, 8, with 15 U.S.C. § 7001(c).

104. The opposite result arises if a state is exempt from preemption under E-sign section 102(a)(2). See *infra* Part III.C.ii.

105. Compare UETA §§ 5, 8, with 15 U.S.C. § 7001(c).

cult to see how the UETA modifies, limits, or supercedes E-sign's consumer protection provisions.

Like the plain language of E-sign, the legislative history underlying the Act is ambiguous regarding the issue of whether the UETA modifies, limits, or supercedes E-sign's consumer protection provision or whether, in a state exempt from preemption under section 102(a)(1), section 101(c) is still applicable.<sup>106</sup> As previously mentioned, some senators suggested that in a state that has adopted the UETA and qualifies for the exemption to preemption under E-sign section 102(a)(1), E-sign's consumer protection provisions nonetheless remain completely applicable.<sup>107</sup> On the other hand, Senator Abraham and Representative Bliley, two of E-sign's sponsors, indicated that a state's adoption of the UETA qualifying for the exemption to preemption under E-sign section 102(a)(1) prevents application of E-sign's consumer protection provisions.<sup>108</sup> The result is that, even if a state has enacted a version of the UETA qualifying for the exemption to preemption under E-sign section 102(a)(1), in certain instances, such as consumer protection, it will remain unclear whether E-sign may remain applicable.

### C. Consistency Analysis of Constituent Provisions of the UETA Under E-sign Section 102(a)(2)

If a state's enactment of the UETA is not exempt from preemption under E-sign section 102(a)(1), then section 102(a)(2) will apply.<sup>109</sup> Section 102(a)(2) provides an exemption to preemption for state laws regarding electronic records and signatures that meet three requirements.<sup>110</sup> First, the law must be consistent with E-sign titles I and II.<sup>111</sup> Second, the law must follow the principle of technology neutrality.<sup>112</sup> Third, if a state adopts the law after the enactment of E-sign, the law must make specific reference to E-sign.<sup>113</sup> With regard to constituent provisions of the UETA, application of the requirements of technology neutrality and reference to E-sign are straightforward because all provisions of the UETA are technology neutral and it is simple to discern whether a state's enactment of provisions of the UETA

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106. See 15 U.S.C. § 7002(a)(1).

107. See 146 CONG. REC. S5215-02 (June 15, 2000) (statement by Sens. Hollings, Wyden, and Sarbanes).

108. See 146 CONG. REC. H4346-07 (June 14, 2000) (statement by Rep. Bliley); 146 CONG. REC. S5281-06 (June 16, 2000) (statement by Sen. Abraham).

109. 15 U.S.C. § 7002(a)(1)-(2).

110. See *id.* § 7002(a)(2).

111. *Id.* § 7002(a)(2)(A)(i).

112. *Id.* § 7002(a)(2)(A)(ii).

113. *Id.* § 7002(a)(2)(B).

includes reference to E-sign if the state enacts it after the date of E-sign's enactment. The consistency requirement, on the other hand, requires further examination.

E-sign section 102(a)(2)(A)(i) states that "alternative [state law] procedures or requirements [may modify, limit, or supercede E-sign if] consistent with this title and title II."<sup>114</sup> *Webster's* defines "consistent," in pertinent part, as "[h]aving agreement with itself or with something else; having harmony among its parts; accordant; congruous; compatible; not contradictory."<sup>115</sup> Consistency does not necessarily require exact correspondence in language, rather it requires compatibility or congruity in the operation of the law.<sup>116</sup> Many of the provisions in the UETA appear to be consistent with analogous provisions found in E-sign based on the language or purpose of the provisions.<sup>117</sup> The primary consistency analysis issues arise when: (1) the UETA contains provisions that have no analog in E-sign; (2) E-sign contains provisions having no analog in the UETA; and (3) where both E-sign and the UETA touch on the same issue but provide for the issue differently. It is relatively clear that where E-sign contains provisions with no analog in the UETA, E-sign will govern because the UETA

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114. *Id.* § 7002(a)(2)(A)(i).

115. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 596 (2d ed. 1950).

116. *See* *Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 82 F.3d 451, 457 (D.C. Cir. 1996) (discussing consistency in the context of the Clean Air Act).

117. While some differences in language exist between the following provisions of E-sign and the UETA, and courts ultimately will decide whether the provisions are consistent, it appears that many provisions of the UETA and E-sign are consistent. E-sign section 103(a)(1) and UETA section 3(b)(1) both exclude wills, codicils, and testamentary trusts from the scope of these statutes. Section 3(b)(2) of the UETA performs the same role as E-sign section 103(a)(1) because both exclude the UCC from the operation of the statutes except for sections 1-107, 2-206, and Articles 2 and 2A. Both UETA section 5(a) and E-sign section 101(b)(2) indicate that individuals cannot be forced to transact business electronically. Implicit in E-sign section 101(b)(2) is that the rules regarding electronic transactions may be varied by agreement, which is consistent with the provision found in UETA section (5)(d). Both E-sign section 101(a)(1) and UETA section 7(a) state that electronic records and signatures should not be denied validity solely because of their electronic form. Likewise, UETA section 7(b) and E-sign section 101(d)(2) assert that a contract may not be denied validity solely because of its formation by electronic means. E-sign section 101(e) and UETA sections 8(a) and (c) have similar rules for provision, retention, and enforceability of notices required to be sent by other law. Section 8(b) of the UETA provides rules regarding information required to be posted under other applicable law that has the same effect as E-sign sections 101(b)(1) and 101(f) when these provisions are read in conjunction. Both E-sign section 101(g) and UETA section 11 enable notarization of electronic records. Both UETA section 12 and E-sign sections 101(d)(1)-(4) provide similar rules governing the retention of original electronic records. Automated transactions using electronic agents are provided for under E-sign section 101(h) and UETA section 14. The efficacy of transferable records is provided for under both E-sign title II, section 201, and UETA section 16.

does not in this case attempt to limit, modify, or supercede E-sign. When analyzing the two instances of concern regarding the consistency analysis — when E-sign and the UETA have provisions regarding the same subject or where the UETA has a provision with no analog in E-sign — a distinction must also be made between operative provisions and provisions governing the scope of the acts.<sup>118</sup>

i. Consistency Analysis of Provisions Found in the UETA with no Analog in E-sign

There are numerous provisions contained in the UETA that do not have analogous provisions in E-sign.<sup>119</sup> Additionally, some states, such as South Dakota, have amended their enactments of the UETA to include provisions that were not included in the UETA as approved for enactment by NCCUSL.<sup>120</sup> Operative provisions found in the UETA that have no analog in E-sign should be considered consistent with E-sign and modify, limit, or supercede the Act for two reasons. First, these provisions do not directly contradict E-sign. Second, provisions without an analog in E-sign merely provide rules that modify and supplement E-sign, while furthering its goals by increasing certainty in electronic transactions.

Provisions regarding the scope of the UETA with no analog in E-sign should be considered consistent with E-sign so long as the provision expands the types of transactions validated by the UETA. South Dakota's inclusion of UCC Article 9 within the scope of the UETA provides a good example. While South Dakota included Article 9 within the scope of its enactment of the UETA,<sup>121</sup> E-sign expressly excludes Article 9 from its scope.<sup>122</sup> South Dakota's inclusion of Article 9 should be considered consistent with E-sign and supercede or modify

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118. The need to discuss the scope provisions separately from the operative provisions stems from the fact that the operative provisions of E-sign and the UETA both generally speak in positive terms of what the provisions regulate. The scope provisions of the UETA and E-sign, however, were drafted in a negative fashion, describing those transactions that are excluded from the statutes rather than those that should be included under the operation of the statutes. Also, under E-sign section 102(a)(1) the operative provisions of the UETA are dealt with differently than state-specific exceptions to the scope of the act enacted under UETA section 3(b)(4). 15 U.S.C. § 7002(a)(1).

119. Operative provisions of the UETA that have no analog in E-sign include sections 4 (stating the rule of prospective application); 7(c) and (d) (expressing that where the law requires a writing or signature, an electronic record or signature satisfies the law); 9 (providing for attribution of electronic signatures); 10 (describing the effect of change or error in an electronic record); 13 (providing that evidence of a record or signature should not be denied admissibility solely because it is electronic form); and 15 (governing time and place of sending and receipt).

120. See S.D. CODIFIED LAWS § 53-12-3(2) (2000) (enacted).

121. See *id.*

122. See 15 U.S.C. § 7003(a)(3).

E-sign's exclusions for two reasons. First, E-sign's express exclusion of Article 9 shows congressional intent not to impact Article 9 transactions through E-sign.<sup>123</sup> Since E-sign takes a hands-off approach to Article 9 and leaves this area of the law to the states, it should not be considered inconsistent with E-sign when a state legislates or regulates with regard to electronic records and signatures in the context of Article 9. Second, South Dakota's inclusion of Article 9 in its enactment of the UETA promotes the use of, and provides certainty for, electronic records and signatures in the context of Article 9, thereby furthering the purposes of E-sign and the UETA.

ii. Consistency Analysis in Cases Where Both the UETA and E-sign Speak on the Same Subject

There are two situations in which the UETA and E-sign may speak on the same subject matter. First, the two acts may have provisions regarding the same subject matter where E-sign has more stringent or materially different requirements than the UETA.<sup>124</sup> Second, the UETA, or a specific state's enactment of the UETA may provide rules on the same topic, but may go beyond the requirements set forth in E-sign. In the first case, where E-sign has more stringent or materially different requirements than the UETA, the UETA is inconsistent with E-sign and the provisions of E-sign should govern. In the second case, where the UETA's requirements impose burdens in addition to those in E-sign, the case is less clear. Nevertheless, those requirements of the UETA, or a state's enactment thereof, should be consistent and therefore modify and supercede the provisions of E-sign.

One case in which E-sign and the UETA arguably provide for the same subject and E-sign's provisions are materially different or more stringent than the requirements of the UETA is found in the context of notices to consumers required by other applicable law.<sup>125</sup> Under the UETA, if a consumer has consented to transacting business electronically, then effective notices related to the transaction may be provided electronically so long as the consumer can retain a copy at the time of receipt<sup>126</sup> and, if other applicable law so requires: (1) the record is posted or displayed in the manner specified in the other law;<sup>127</sup> (2) the record is communicated in the manner specified in the other law;<sup>128</sup> (3)

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123. *See id.*

124. *Compare, e.g.,* 15 U.S.C. § 7001(c), *with* UETA §§ 5, 8.

125. *Compare, e.g.,* 15 U.S.C. § 7001(c), *with* UETA §§ 5, 8. *See also supra* Part III.B (discussing whether UETA § 8 may be considered an analog to 15 U.S.C. § 7001(c)).

126. UETA § 8(a).

127. *Id.* § 8(b)(1).

128. *Id.* § 8(b)(2).

the notice is formatted in the manner specified in the other law,<sup>129</sup> and (4) the ability of the recipient to store or print the electronic record is not inhibited.<sup>130</sup>

Under E-sign, such notices to consumers would be governed by section 101(c), entitled "Consumer Disclosures."<sup>131</sup> First, this section requires affirmative consent of the consumer to receive notices in electronic form.<sup>132</sup> Second, the consumer must be provided with a "clear and conspicuous" statement regarding: (1) any option to receive notice in non-electronic form; (2) the consumer's right to withdraw consent; (3) any conditions, consequences, or costs of withdrawing consent; (4) whether the consent applies only to a particular transaction or identifies categories of notices that may be provided electronically during the parties' relationship; (5) the procedures for withdrawing consent and updating electronic contact information; and (6) how paper copies of electronic records may be obtained after withdrawal of consent and any costs associated with obtaining paper copies.<sup>133</sup> Third, the consumer must: (1) be provided with hardware and software requirements necessary to access and retain electronic notices; and (2) consent or confirm consent electronically in a manner demonstrating that the consumer will be able to access and retain electronic notices.<sup>134</sup>

In the case of notices provided to consumers electronically, it is clear that the requirements of the UETA are not commensurate with the requirements of E-sign.<sup>135</sup> One could meet the requirements of the UETA without meeting many of the requirements under E-sign. The UETA contradicts E-sign in this case because meeting the requirements of the UETA would not meet the requirements of E-sign and would, therefore, thwart E-sign's intent to provide consumers more extensive protections than those provided by the UETA. Conse-

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129. *Id.* § 8(b)(3).

130. *Id.* § 8(c).

131. 15 U.S.C. § 7001(c).

132. *Id.* § 7001(c)(1)(A).

133. *Id.* § 7001(c)(1)(b)(i)-(iv).

134. *Id.* § 7001(c)(1)(C)(i)-(ii). While the main requirements are listed in the main text, E-sign provisions regarding notices sent to consumers under other applicable law stretch even further. If the hardware or software requirements change after the consumer consents to provision of electronic notices, and there is a material risk that this change will materially impact the consumer's ability to retain or access such notices, the consumer must be provided with a statement of: (1) the revised hardware and software requirements; and (2) the right to withdraw consent without the imposition of any fee, condition or consequence not already disclosed. *Id.* § 7001(c)(1)(D)(i)(I)-(II). Furthermore, the consumer must again consent or confirm consent electronically. *Id.* § 7001(c)(1)(D)(ii). Another provision contained in this section is that oral communications that would qualify as electronic records under the UETA do not qualify as electronic records under E-sign in cases where other applicable law requires that a notice be provided to a consumer. *Id.* § 7001(c)(6).

135. Compare UETA §§ 5, 8, with 15 U.S.C. § 7001(c).



quently, the requirements of E-sign regarding notices to consumers should apply in states where the UETA has been enacted in a form not qualifying for the exemption to preemption under E-sign section 102(a)(1).<sup>136</sup>

While UETA section 8 would be preempted in the consumer context in a state where the enacted UETA did not meet the requirements for exemption to preemption under E-sign section 102(a)(1), UETA section 8 may modify or supercede E-sign in the non-consumer context. In the non-consumer, business context, the E-sign analog to UETA section 8 seems less stringent than section 8.<sup>137</sup> This raises the issue of whether a provision may be consistent with E-sign titles I and II, yet impose additional burdens or requirements on parties to an electronic transaction.<sup>138</sup>

Courts should consider this preemption related question in light of E-sign as a whole.<sup>139</sup> Looking to the language of E-sign section 102(a)(2)(A)(i) in the context of the statute as a whole would suggest that a state law, such as UETA section 8 in the business context, that imposes additional burdens on parties involved in a transaction, should still meet the consistency requirements of section 102(a)(2)(A)(i).<sup>140</sup> Like E-sign section 102(a)(2)(A)(i), E-sign section 104(b)(2)(A) discusses consistency.<sup>141</sup> Section 104(b)(2)(A) imposes limits on state and federal rule-making authority by providing that any "regulation, order, or guidance [must be] consistent with section 101."<sup>142</sup> The next clause, however, imposes the limitation that a "regulation, order, or guidance [must] not add to the requirements of such section."<sup>143</sup> Consequently, in the context of E-sign, "additional requirements" and "consistent" are distinct terms. Such a reading also

136. See 15 U.S.C. § 7002(a)(2).

137. Compare 15 U.S.C. §§ 7001(d),(f), with UETA § 8.

138. A similar case would arise if a state imposed consumer protection provisions in its electronic signature legislation that were more stringent than those found in E-sign section 101(c).

139. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

140. 15 U.S.C. §§ 7004(b)(2)(A),(B).

141. *Id.* §§ 7002(a)(2)(A)(i), 7004(b). Section 7004(b) states in pertinent part that:

a Federal [or state] regulatory agency shall not adopt any regulation, order or guidance . . . unless

(A) such regulation, order, or guidance is consistent with section 101;

(B) such regulation, order, or guidance does not add to the requirements of such section . . . .

*Id.* § 7004(b)

142. 15 U.S.C. § 7004(b)(2)(A).

143. *Id.* § 7004(b)(2)(B).

receives support from the presumption against preemption in cases where Congress' expressed intent is ambiguous.<sup>144</sup>

In the case of UETA section 8, a rather confusing problem arises. In the context of business affairs, it appears that UETA section 8 should be considered consistent with E-sign. In contrast, in the consumer context, UETA section 8 is inconsistent with E-sign. If this is the case, in states with an enactment of the UETA not meeting the requirements for the exemption to preemption under section 102(a)(1), UETA section 8 may be preempted in the consumer context, but not preempted in the context of business transactions.

#### IV. CONCLUSION

Congress hath wrought a number of problems by including an ambiguous and confusing preemption provision in E-sign. The preemption provisions of E-sign will undermine the search for uniformity and certainty in the law of electronic commerce for the foreseeable future. If a state law is not exempt from preemption under section 102(a)(1), determining E-sign's preemptive effect will require a consistency analysis.<sup>145</sup> While attorneys may attempt to determine consistency, ultimately this presents an issue for the courts. Moreover, it remains unclear how courts will apply E-sign's preemption provision and whether courts will develop conflicting constructions of E-sign's preemption provision. This uncertainty will not be reconciled until cases reach the highest levels of the appeals process. Requiring such litigation to determine which law applies to a particular portion of an electronic transaction will defeat the uniformity and certainty sought through E-sign.

At this point it is impossible to know whether E-sign or the UETA will govern any discreet portion of any given transaction in a state where the enactment of the UETA is not exempt from preemption under E-sign section 102(a)(1).<sup>146</sup> The same issue will also, to a lesser degree, plague states which have enacted a pristine UETA because of the ambiguity of the terms "modify, limit, or supercede."<sup>147</sup> The issue that seems to loom largest—whether E-sign's consumer protection provisions apply in a given state—will likely not affect businesses with national markets. Undoubtedly, these businesses will ad-

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144. See *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (refusing to include state judges under the ADEA because the Court "will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*"); *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993) (finding that under any reasonable reading, the Federal Election Campaign Act preempts state law controlling spending on federal campaigns).

145. See 15 U.S.C. §§ 7001(a)(1)-(2).

146. See *id.* § 7002(a)(2).

147. See *id.* § 7002(a)(1).

here to the consumer protection provisions of E-sign.<sup>148</sup> On the other hand, small regional businesses without the legal resources available to national firms may find themselves embroiled in unexpected litigation over which law — or portion thereof — applies to a given transaction.

Ideally, Congress should revisit the preemption provisions of E-sign to clarify its intent. First, the language of E-sign section 102(a)(1) should state clearly the consequences of a state adopting the pristine UETA or any provision of the UETA. These consequences may range from the UETA controlling in toto to the exclusion of E-sign, to both acts applying. The former consequence would be clearer and should not frustrate the purposes of E-sign because Congress has approved of the UETA and in national markets, businesses will comply with the strictest applicable regime. Also, the language of section 102(a)(2) should be changed to state clearly that state electronic signature law will not be preempted so long as it does not *conflict* with E-sign. This would provide greater clarity because the tenets of conflict preemption analysis are defined more clearly in case law than the consistency analysis required by the current language of E-sign section 102(a)(2).<sup>149</sup>

Until Congress revisits E-sign's exemptions to preemption, the surest way to ensure uniformity of electronic signature law among the states will be for each state to adopt the pristine UETA. Even if this is done, it will remain unclear whether some provisions of E-sign may also apply. If states desire to add consumer protection provisions or make additions to the UETA, these provisions should be passed as companion legislation rather than as part of the enactment of the UETA in the state. The companion legislation will undoubtedly be subject to a consistency analysis under E-sign section 102(a)(2).<sup>150</sup> At the very least, this approach should ensure that the UETA's provisions are fully effective under the exemption to preemption in E-sign section 102(a)(1) without the need for a section-by-section consistency analysis to determine those portions of a transaction to which the UETA will apply. This approach will further the goals of uniformity and certainty, but will also give states some discretion to tailor their laws regarding electronic records and signatures to their needs. Ultimately, however, Congress needs to revisit E-sign and solve the problems that it hath wrought.

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148. Businesses involved in electronic commerce will comply with E-sign's consumer protection provisions because they market nationally and will already have sunk costs to comply with E-sign's consumer protection provisions in non-UETA states in the near term.

149. See 15 U.S.C. § 7002(a)(2); discussion *supra* note 38.

150. See 15 U.S.C. § 7002(a).