

Preemption Choice

The Theory, Law, and Reality of
Federalism's Core Question

EDITED BY WILLIAM W. BUZBEE

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WILLIAM W. BUZBEE

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Acknowledgments

William W. Buzbee

This book is the product of the shared efforts of numerous individuals and organizations. The idea for this book arose out of a number of papers first presented in discussion form at a November 2006 conference at Duke Law School, “Federalism in the Overlapping Territory.” That conference was sponsored by the Duke Law School Program in Public Law, the Center for Progressive Reform, and the American Constitution Society. Key organizers and facilitators for that gathering were Professors Christopher Schroeder, Robert Glicksman, Robert Verchick, and Trevor Morrison. A February 2007 Thrower Symposium conference at Emory Law School, “The New Federalism: Plural Governance in a Decentered World,” also involved several participants in this book who have further developed ideas presented at Emory. That gathering was sponsored by the family of Randolph Thrower, the *Emory Law Journal*, and the Emory Center for Federalism and Intersystemic Governance, with substantial faculty input by Professors Robert Ahdich, Robert Schapiro, and William Buzbee. The book also involves chapters by scholars offering completely new work that was not shared at either conference.

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Introduction

William W. Buzbee

Debates over the federal government's preemption power rage in the courts, in Congress, before agencies, and in the world of scholarship. Much of this debate has been prompted by unusually aggressive assertions of preemption power by federal agencies starting about 2006, but several major legislative battles have also involved preemption choice. The Supreme Court has also been on a preemption roll, hearing an unusually large number of preemption cases.

Little debate is possible over the basic parameters of federal preemption power – under the U.S. Constitution's Supremacy Clause, federal law reigns supreme and hence preempts any conflicting law or law that federal legislation deems preempted. A few Supreme Court cases in the 1990s reasserted judicial scrutiny of federal assertions of legislative power, while others strengthened state claims of sovereign immunity and protection from federal meddling. Nevertheless, seldom will preemption debates turn on underlying constitutional questions of federal power.

Instead, preemption debates tend to concern three basic questions. The first is political: should the federal government act to preempt, and thereby displace or nullify, regulatory turf that might otherwise be shared with state or local law, be it statutory or common law in origin? The second is interpretive: has a federal act actually preempted the laws or legal activities of these other actors? A fairly vast literature focuses on the third facet of preemption debates, parsing the vagaries of the Supreme Court's doctrinal expositions regarding preemption. This scholarship is critical and invaluable, given the Supreme Court's increasingly frequent acceptance of cases involving preemption issues. The Court's sometimes befuddling disjuncture between stated doctrine and actually applied frameworks further explains the need for scholarship examining Supreme Court preemption doctrine. This book contains several chapters that further illuminate this body of ever-developing law.

This book, however, is unusual in its rich focus on the antecedent political and regulatory choice of whether to preempt. The Supreme Court's preemption cases follow often-heated political battles about preemption choice, typically arising in both legislative and regulatory settings. Political preemption choice thus involves legislators and federal agencies, as well as interpretations and policy goals manifested by state actors asserting their own views about retained regulatory power. And in cases where the antecedent political choice is unclear, or facts about the existence of a regulatory conflict are close, courts and sometimes agencies too must make preemption choices.

The question of preemption thus fundamentally involves a question of regulatory design and institutional choice. Should a social challenge be handled exclusively by federal law, perhaps by a single regulator? Or would that regulatory challenge be better addressed by leaving it to state and local law, be it statutory or common law, or allowing federal, state, and local regulation? Despite the often "state versus federal" nature of federalism and preemption discourse, the actual political preemption choice seldom requires preemption. Instead, regulatory schemes typically embrace overlapping, shared, and often-intertwined jurisdiction. Federal, state, and local governments all retain roles, as do courts at all three levels. Furthermore, both positive law (in the form of statutes and regulations) and common law turfs are typically preserved by federal law. Outright federal legislative preemption displacing state and local jurisdiction is a rarity, and explicit displacement of common law regimes is an almost nonexistent statutory choice if federal law does not create its own substitute compensatory regime.

Despite the prevalence of political embrace of federal-state overlap, courts and litigators, and partisans in legislative and regulatory venues, often argue for the elimination of this overlap. They oppose the inherently multilayered law that is the political norm. Perhaps surprisingly, despite the dominant political choice not to preempt, normative arguments in favor of preemption are far more developed than countervailing views justifying the prevalent nonpreemption choice. The arguments for preemption are most often rooted in a preference for less law and regulation, or at least more uniform, certain, and stable law, and frequently a linked goal of facilitating thriving markets and industry. Certainly pro-preemption arguments before legislatures, agencies, and courts are overwhelmingly articulated by industry. In contrast, those protected by regulation or advocating protection of the environment or a low-risk world tend to argue for the partial preemption of minimal federal protections, or floors. With federal floors, states retain latitude to enact non-conflicting positive law and litigants can continue to seek relief in court

through common law regimes. State law merely has to be at least as protective as federal law.

This book looks at preemption choice from all perspectives but is especially valuable in filling a gap in the normative arguments regarding preemption. Virtually all chapters in this book contribute to the development of normative arguments against preemption by using theoretical, legal, and historical analysis to explore the logic behind the long dominant choice of retention of federal, state, local, and common law regulatory power. These normative arguments against preemption should be given greater weight, not only in legislative and regulatory settings but also when courts have to resolve tough statutory interpretation puzzles or need to assess whether some result of state law poses an insuperable conflict or obstacle to federal law. If a desire for uniformity and stability are the only values weighed on the scale, then preemption may too readily be found. Actual statutory texts usually do not favor preemption. Some laws do not command preemption but leave open the possibility of more particularized claims or conflicts requiring federal preemption. In those uncertain preemption settings, normative arguments for and against preemption are of great importance.

This book offers a diverse array of scholarly perspectives on preemption by many of this nation's foremost legal scholars of regulation and constitutional law. Their views and lenses vary, so distilling their arguments and insights is difficult. Nevertheless, they enrich preemption discourse by providing a more balanced perspective on preemption choice. No one disputes that certainty, uniformity, and stability are values worth consideration. Several chapters explore and enrich those common pro-preemption arguments. But those chapters, and most others, move on to develop far too neglected countervailing arguments and values. Some are rooted in durable strains of federalism theory, seeing retention of state domains and limited federal government as strong values evident in our Constitution's language and structure. Others look closely at the Constitution's structures and mandated procedures as requiring the formality of legislation before preemption should be found. Others explore the contrasting benefits and risks of a unitary federal response with benefits of allowing a multiplicity of regulatory actors, venues, and legal modalities. Histories of regulatory challenges and acts further illuminate the preemption choice issues, revealing how retention of diverse actors and parallel common law regimes can further public-regarding goals, while strong assertions of preemption can threaten to freeze the law or lead to neglect of changing discoveries about an underlying social ill. Contested assertions about the relative performance of federal and state actors are also reexamined. Other chapters develop arguments by analogy, drawing on other disciplines'

insights about the retention of multiple versus single or homogenous institutional responses.

This book's chapters are offered at a level of legal rigor that will provide insights to lawyers, legal scholars, and law students, but it is also written to be accessible to other disciplines, especially students and scholars of government, political science, business and regulation, economics, and history. Students and scholars interested in regulation of industry, risk regulation, environmental policy, and law, will find most of this book of direct relevance. This book's subject lies at the heart of the federalism policy and debates, a subject of interest to a wide array of disciplines.

THE BOOK'S STRUCTURE AND CHAPTERS

This book is broken into four parts, each offering chapters developing the part's focus. The chapters obviously share a basic focus on preemption and necessarily address many of preemption's central debates, but are nevertheless distinct. The chapters are also all modest in length in order to facilitate readability.

Part I introduces readers to "Federalism Theory, History, and Preemption Variables." These three chapters introduce theoretical and historical underpinnings of preemption discourse, setting the stage for later chapters that tend to be more specific and applied in their focus. Professors Nina Mendelson and Robert Verchick start the book with a broadly encompassing chapter that begins by placing preemption in the context of federalism theories and discourse. Preemption choice, after all, is fundamentally a choice that implicates the heart of federalism debates over appropriate and necessary roles for federal and state governments. As they also discuss, preemption choice also implicates related theory about the benefits of centralized and decentralized responses to policy challenges. They then turn to an overview of how federalism themes and theories play out in legislative, regulatory, and judicial venues. They especially focus on interpretive questions and judicial preemption doctrine, providing an overview of issues and themes that later court-focused chapters develop in greater depth.

In Chapter 2, "From Dualism to Polyphony," Professor Robert Schapiro develops a language and analytical framework to think about the relative benefits of separate state and federal law and of legal regimes that allow the two to coexist and overlap. He does this in part by tracing U.S. constitutional law history. He reviews the formally abandoned but perhaps renascent "dual federalism" phase in doctrine that kept state and federal regulatory domains distinct. He then contrasts that era with today's dominant political choice of