

# Preemption Choice

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

EDITED BY WILLIAM W. BUZBEE

## CONTRIBUTORS

William W. Buzbee • David E. Adelman • William L. Andreen

Bradford R. Clark • Kirsten H. Engel • William Funk

Robert L. Glicksman • Thomas O. McGarity • Nina Mendelson

Trevor W. Morrison • Robert A. Schapiro • Christopher H. Schroeder

Robert R.M. Verchick • David C. Vladeck • Sandi Zellmer



CAMBRIDGE

# Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question

Edited by

**WILLIAM W. BUZBEE**

Emory University School of Law



**CAMBRIDGE**  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,  
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107402324](http://www.cambridge.org/9781107402324)

© Cambridge University Press 2009

This publication is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without the written  
permission of Cambridge University Press.

First published 2009

First paperback edition 2011

*A catalog record for this publication is available from the British Library*

*Library of Congress Cataloging in Publication data*

Preemption choice : the theory, law, and reality of federalism's core question / edited by William  
W. Buzbee.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88805-9 (hardback)

1. Exclusive and concurrent legislative powers – United States. I. Buzbee, William W., 1960–
- II. Title. III. Series.

KF4600.P73 2008

342.73'041–dc22

2008042112

ISBN 978-0-521-88805-9 Hardback

ISBN 978-1-107-40232-4 Paperback

Cambridge University Press has no responsibility for the persistence or  
accuracy of URLs for external or third-party internet websites referred to in  
this publication, and does not guarantee that any content on such websites is,  
or will remain, accurate or appropriate.

## PREEMPTION CHOICE

This book examines the theory, law, and reality of preemption choice. The Constitution's federalist structures protect states' sovereignty but also create a powerful federal government that can preempt and thereby displace the authority of state and local governments and courts to respond to a social challenge. Despite this preemptive power, Congress and agencies have seldom preempted state power. Instead, they typically have embraced concurrent, overlapping power. Recent legislative, agency, and court actions, however, reveal a newly aggressive use of federal preemption, sometimes even preempting more protective state law.

Preemption choice fundamentally involves issues of institutional choice and regulatory design: should federal actors displace or work in conjunction with other legal institutions? This book moves logically through each preemption choice step, ranging from underlying theory to constitutional history, to preemption doctrine, to assessment of when preemptive regimes make sense and when state regulation and common law should retain latitude for dynamism and innovation.

**William W. Buzbee** is a Professor of Law at Emory University School of Law and Director of the Emory Environmental and Natural Resources Law Program. He is a co-author of *Environmental Protection: Law and Policy*, fifth edition (2007). He has published widely on issues of regulatory federalism, environmental law, and administrative law, and three of his articles have appeared in collections of the ten best articles published in their year regarding environmental or land-use law. He has also testified before congressional committees regarding issues of federalism and environmental regulation. Prior to becoming an academic, he practiced public-interest and private-sector law in New York City.

## Contributors

**William W. Buzbee** is a Professor of Law and the Director of the Emory Environmental and Natural Resources Law Program. He has also been a Visiting Professor of Law at Columbia, Cornell, and Illinois Law Schools. He is a graduate of Amherst College and Columbia Law School, where he served as a Notes and Comments Editor for the *Columbia Law Review*. Before joining Emory's faculty, he clerked for federal judge José A. Cabranes and worked with the Natural Resources Defense Council and then for Patterson Belknap, Webb and Tyler in New York City. Professor Buzbee's scholarship tends to focus on environmental law, administrative law, and other public law topics, with his most recent publications focusing on regulatory federalism, urban sprawl and governance, citizen litigation, and regulatory design issues. His publications have appeared in *New York University Law Review*, *University of Pennsylvania Law Review*, *Michigan Law Review*, *Stanford Law Review* (co-authored), *Cornell Law Review* (co-authored), *Iowa Law Review*, *The Journal of Law and Politics*, and an array of other journals and edited volumes. Three of his articles have been named and republished as being among the ten best environmental or land-use law articles of that year. He is also a co-author of the fifth edition of Aspen's *Environmental Protection: Law and Policy*. Professor Buzbee is a founding Member Scholar of the Center for Progressive Reform, a Washington, D.C.-based regulatory think tank.

**David E. Adelman** is an Associate Professor and the Director of Law and Science Initiatives at the University of Arizona's James E. Rogers College of Law, where he has taught since the fall of 2001. Professor Adelman's research focuses on the many interfaces between law and science. His articles have addressed topics ranging from the implications of emerging genomics technologies for environmental regulation, to the parallels between legal

and scientific judgment, to the influence of the rapid rise in patenting during the 1990s on biotechnology innovation. Prior to entering academia, he was an associate with Covington and Burling in Washington, D.C., where he litigated patent disputes and provided counsel on environmental regulatory matters, and a Senior Attorney with the Natural Resources Defense Council in its Nuclear and Public Health programs. Following his graduation from Stanford Law School, Professor Adelman clerked for the Honorable Samuel Conti of the U.S. District Court for the Northern District of California. He has been a member of the U.S. Department of Energy's Environmental Management Advisory Board and has served on two National Academy of Sciences committees.

**William L. Andreen** is the Edgar L. Clarkson Professor of Law at the University of Alabama School of Law and an Adjunct Professor of Law at The Australian National University College of Law. He is a graduate of the College of Wooster and Columbia University School of Law. Before joining the law faculty at the University of Alabama, Professor Andreen served as Assistant Regional Counsel for the U.S. Environmental Protection Agency, Region 4. In more recent years, he has served as an environmental advisor to the Tanzanian government, a Research Fellow at the Mekelle University Law School in Ethiopia, and a Fulbright Senior Specialist with the National Europe Centre at The Australian National University. His articles on environmental law have appeared in numerous journals. His 2004 *Alabama Law Review* article, "Water Quality Today: Has the Clean Water Act Been a Success?" and his 1989 *Indiana Law Journal* article, "In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy," were both chosen as among the top ten environmental and land-use law articles of those years and were republished in the *Land Use and Environment Law Review*.

**Bradford R. Clark** is the William Cranch Research Professor of Law at George Washington University Law School in Washington, D.C., where he teaches and writes in the areas of constitutional law, federalism, and federal courts. During the 2007–08 academic year, he was a Visiting Professor of Law at Harvard Law School. He has published numerous articles on constitutional federalism and the Supremacy Clause. Before entering teaching, Professor Clark served as a law clerk to Judge Robert H. Bork on the U.S. Court of Appeals for the D.C. Circuit and to Justice Antonin Scalia on the Supreme Court of the United States. In addition, Professor Clark worked as an Attorney Advisor in the Office of Legal Counsel in the U.S. Department of Justice,

where he provided advice to the President, the Attorney General, and the heads of executive departments on a variety of legal and constitutional questions.

**Kirsten H. Engel** joined the James E. Rogers College of Law at the University of Arizona in 2005 with a broad background in environmental law and policy that spans academia and public-sector practice. Engel is widely published on various topics in her field, including environmental federalism and the potential for cooperative regional efforts to counteract the federal government's stance on global climate change, solid waste landfill regulation, and the deregulation of the electricity industry. Engel previously served as senior counsel for the Public Protection Bureau and acting chief of the Environmental Protection Division of the Massachusetts Office of the Attorney General. She also has worked as a staff attorney for the Sierra Club Legal Defense Fund as well as for the U.S. Environmental Protection Agency. She has held the positions of Associate Professor of Law at Tulane Law School and Visiting Associate Professor at Harvard and Vanderbilt Law Schools. She recently served as a member of Governor Janet Napolitano's Climate Change Advisory Group and sits on the board of directors of the Tulane Environmental Law Clinic.

**William Funk**, of Lewis and Clark Law School, is particularly well qualified to address his topic of agency claims of preemptive power. A professor of administrative and constitutional law and an author of numerous articles on administrative and constitutional law subjects, as well as of a leading casebook on administrative law, he has chaired the American Bar Association's (ABA) Administrative Law and Regulatory Practice Section and is currently co-chair of an ABA-wide task force addressing federal agency preemption of state tort and consumer protection law. Professor Funk's scholarship is informed by nearly ten years of practice in the federal government, including service as an Assistant General Counsel at the Department of Energy, Legislative Counsel for a committee of the House of Representatives, and an attorney for the Office of Legal Counsel in the Department of Justice.

**Robert L. Glicksman** is the Robert W. Wagstaff Professor of Law at the University of Kansas. A graduate of the Cornell Law School, Glicksman has taught and written about environmental and natural resources law for more than twenty-five years. He is a co-author of a leading environmental law casebook and a multivolume treatise on natural resources law, and his

articles on federalism and environmental law have been published in journals that include the *University of Pennsylvania Law Review*, the *Wake Forest Law Review*, the *Washington University Journal of Urban and Contemporary Law*, and the *Environmental Law Reporter*. His work has been cited by the U.S. Supreme Court. He is also the co-author (with Sidney Shapiro) of the recent book, *Risk Regulation at Risk: Restoring a Pragmatic Approach* (Stanford University Press, 2003).

**Thomas O. McGarity** holds the W. James Kronzer Chair in Trial and Appellate Advocacy at the University of Texas School of Law. He has taught environmental law, administrative law, and torts at the University of Texas School of Law since 1980. In addition to a casebook on environmental law, he has written two books on federal regulation. *Reinventing Rationality* (1991) describes and critiques the implementation of regulatory analysis and regulatory review requirements that were put into place during the Carter and Reagan administrations. *Workers at Risk* (1993) (co-authored with Sidney Shapiro of Wake Forest) describes and critiques the implementation of the Occupational Safety and Health Act during its first twenty years. He has written dozens of law review articles and chapters on federal regulation, administrative law, and tort law. Professor McGarity has served on committees of the National Academy of Sciences and was a longtime consultant to the Administrative Conference of the United States and the Office of Technology Assessment. He has testified on numerous occasions before congressional committees. He has also delivered several endowed lectures, including the annual Order of the Coif lecture. In recent years, he has made several presentations on the topic of federal agency preemption of state common law claims. From 2001–07 Professor McGarity was the President of the Center for Progressive Reform, a nonprofit organization consisting of scholars who are committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment. He remains a Member Scholar and board member.

**Nina Mendelson** is a Professor of Law at the University of Michigan. Professor Mendelson is a summa cum laude graduate of Harvard University and a graduate of the Yale Law School, where she served on the *Yale Law Journal*. She served as a law clerk to Judges Pierre Leval (then of the Southern District of New York) and John M. Walker Jr. (of the Second Circuit) and has worked for the U.S. Senate and the U.S. Department of Justice. She currently serves as one of three American Special Legal



Advisors to the NAFTA Commission on Environmental Cooperation. Professor Mendelson's research on administrative law and preemption issues has been published by the nation's top law reviews, including the *Columbia Law Review*, the *New York University Law Review*, the *Cornell Law Review*, and the *Michigan Law Review*. She is also the author of "Some Legal Reforms to Increase Government Contractor Accountability," in Jody Freeman and Martha Minow, eds., *Outsourcing the U.S.* (Harvard University Press, forthcoming).

**Trevor W. Morrison** is a Professor of Law at Columbia Law School. Prior to 2008, he was an Associate Professor at Cornell Law School. He has also been a Visiting Professor of Law at New York University Law School. Professor Morrison teaches and writes about the federal courts and the structural dimensions of the Constitution. His scholarship has appeared in numerous outlets, including the *Cornell Law Review*, the *Columbia Law Review*, the *Michigan Law Review*, and the *Yale Law Journal*. Prior to entering academia, he clerked for Judge Betty Binns Fletcher of the U.S. Court of Appeals for the Ninth Circuit and for Supreme Court Justice Ruth Bader Ginsburg. He also served in the U.S. Department of Justice, first in the Office of the Solicitor General and later in the Office of Legal Counsel.

**Robert A. Schapiro** is Professor of Law at Emory University School of Law. Schapiro graduated from Yale Law School, where he was editor-in-chief of the *Yale Law Journal*. He served as a clerk for Judge Pierre N. Leval, then of the U.S. District Court for the Southern District of New York, and for Justice John Paul Stevens of the U.S. Supreme Court. Schapiro's research focuses on federalism, and his book manuscript, *Polyphonic Federalism: How a Federal System Protects Fundamental Rights*, is under contract with the University of Chicago Press. His publications include "Justice Stevens' Theory of Interactive Federalism," *Fordham Law Review* (2006); "Toward a Theory of Interactive Federalism," *Iowa Law Review* (2006); "Interjurisdictional Enforcement of Rights in a Post-Erie World," *William and Mary Law Review* (2005); "Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication," *Cornell Law Review* (2003, with William Buzbee); "Legislative Record Review," *Stanford Law Review* (2001, with William Buzbee); "Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law," *Cornell Law Review* (2000); "Polyphonic Federalism: State Constitutions in the Federal Courts," *California Law Review* (1999); and "Identity and Interpretation in State Constitutional Law," *Virginia Law Review* (1998).

**Christopher H. Schroeder** is the Charles S. Murphy Professor of Law, Professor of Public Policy Studies, and Director of the Program in Public Law at Duke University. He also serves as counsel to the law firm O'Melveny and Myers. Schroeder served as deputy assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice, and in 1996–7 was the acting assistant attorney general in charge of that office. Previously, he worked for the Senate Judiciary Committee, serving as its chief counsel in 1992–3. He is a member of the Center for Progressive Reform and sits on its board of directors. He is co-chair of the Separation of Powers and Federalism issue group for the American Constitution Society's Project on the Constitution in the 21st Century. Schroeder's scholarship includes work on constitutional law, democratic theory, and Congress. He is currently researching a book on presidential powers.

**Robert R.M. Verchick** holds the Gauthier–St. Martin Chair in Environmental Law at Loyola University, New Orleans. He is a graduate of Stanford University and of Harvard Law School and is a board member of the Center for Progressive Reform. An expert on environmental regulation and local government, Professor Verchick has represented local government interests in friend-of-the-court briefs before the U.S. Supreme Court and as a Major Group Delegate at the 2004 “Earth Summit” in Johannesburg, South Africa. His research on environmental law and constitutional law has appeared in (among other places) the *California Law Review*, the *Southern California Law Review*, and the *Harvard Environmental Law Review*. He is also the co-author of a book on feminist theory and the author of an upcoming book on Hurricane Katrina and environmental policy.

**David C. Vladeck** is a Professor of Law and Director of the Center on Regulation and Governance, O'Neill Institute, Georgetown University Law Center. Professor Vladeck teaches courses on federal courts, civil procedure, government processes, and civil litigation. Prior to joining the Georgetown faculty, Professor Vladeck served as an attorney with, and then was the director of, the Public Citizen Litigation Group, a nationally prominent public-interest law firm. Professor Vladeck has argued several cases before the U.S. Supreme Court and more than sixty cases in federal courts of appeals. A number of the cases Professor Vladeck handled involved preemption questions. Professor Vladeck's scholarship focuses on constitutional and regulatory issues, and he has written extensively on preemption. His recent writings include a 2008 article on FDA preemption in the *Cornell Law Review*; a 2007 article in the *Georgetown Law Journal*, “A Critical

Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims," co-authored with David A. Kessler, M.D., who is dean and vice chancellor of the University of California San Francisco Medical School and formerly served as the Commissioner of the Food and Drug Administration; and a 2005 article in the *Pepperdine Law Review* entitled "Preemption and Regulatory Failure." Professor Vladeck also testifies frequently before Congress and testified on preemption in September 2007 before the Senate Judiciary Committee. Professor Vladeck is a founding Member Scholar of the Center for Progressive Reform and formerly served as a Public Member of the Administrative Conference of the United States.

**Sandi Zellmer** is the Hevelone Research Chair and Professor of Law at the University of Nebraska. She is also a co-director of the University's Water Resources Research Initiative, an interdisciplinary educational and research effort. She has been designated a Senior Specialist (Roster Candidate) by the J. William Fulbright Foreign Scholarship Board, and she is a Member Scholar of the Center for Progressive Reform as well as the Commission on Environmental Law of the World Conservation Union, a trustee of the Rocky Mountain Mineral Law Foundation, and an associate member of the Resilience Alliance, a multidisciplinary research group exploring the dynamics of complex adaptive systems. Zellmer has published numerous articles, book chapters, and commentary on biodiversity, constitutional law, water conservation and quality, and natural resources. Prior to teaching, she was an attorney for the U.S. Department of Justice Environment and Natural Resources Division, litigating resource management and regulatory issues for the National Park Service, National Forest Service, and other federal agencies.

## 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 Ahdieh, Robert Schapiro, and William Buzbee. The book also involves chapters by scholars offering completely new work that was not shared at either conference.

I also thank my administrative assistant, Brenda Huffman, and Terry Gordon of the Emory Law School Library for their prompt and skillful assistance. Research assistants Annie Mackay, Daniel Adams, Chandani Patel, and Michael Eber provided assistance with this book and several related projects. I especially thank the remarkable scholars and staff associated with the Center for Progressive Reform (CPR), a regulatory think tank comprising experts in the fields of law, economics, philosophy, and science. Discussions of this book and strategies to strengthen it at several CPR meetings proved invaluable. The engaged, wise, and supportive people associated with Cambridge University Press, especially John Berger, copy editor Christine Dunn, and indexer Robert Swanson, immeasurably improved the book. Lastly, I personally thank my wife, Lisa E. Chang, and daughters, Tian and Seana Buzbee, for their support.

## Contents

Contributors	page vii
Acknowledgments	xv
Introduction	1
<i>William W. Buzbee</i>	
PART I. FEDERALISM THEORY, HISTORY, AND PREEMPTION VARIABLES	
1. Preemption and Theories of Federalism	13
<i>Robert R.M. Verchick and Nina Mendelson</i>	
2. From Dualism to Polyphony	33
<i>Robert A. Schapiro</i>	
3. Preemption and Regulatory Failure Risks	54
<i>David C. Vladeck</i>	
PART II. THE LAYERED GOVERNMENT NORM	
4. The State Attorney General and Preemption	81
<i>Trevor W. Morrison</i>	
5. Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity	98
<i>William W. Buzbee</i>	
PART III. JUDICIAL TREATMENT AND INTERPRETIVE CHOICE	
6. Supreme Court Preemption Doctrine	119
<i>Christopher H. Schroeder</i>	
7. When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception	144
<i>Sandi Zellmer</i>	

8. Federal Preemption by Inaction <i>Robert L. Glicksman</i>	167
9. Process-Based Preemption <i>Bradford R. Clark</i>	192
10. Preemption by Federal Agency Action <i>William Funk</i>	214
PART IV. PREEMPTION TALES FROM THE FIELD	
11. The Regulation–Common Law Feedback Loop in Nonpreemptive Regimes <i>Thomas O. McGarity</i>	235
12. Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control <i>William L. Andreen</i>	257
13. Adaptive Environmental Federalism <i>David E. Adelman and Kirsten H. Engel</i>	277
Conclusion: The Menu of Preemption Choice Variables <i>William W. Buzbee</i>	301
Index	305

## 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'