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978-0-521-88805-9 - Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question

Edited by William W. Buzbee

Excerpt

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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.

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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

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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'

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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 renescent "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

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state and local regulatory overlap with federal law. Adopting and enriching from other scholarly and musical realms the concept of “polyphony,” his chapter develops arguments for the benefits of polyphonic federalism, under which multiple legal actors’ voices can blend. As he argues, multiple, interactive exercises of regulatory authority are both the dominant political choice and one that furthers values of plurality, dialogue, and redundancy. Rather than see preemption debates as about state versus federal turf, he suggests that the sounder and more necessary project is developing principles to manage this overlap, not seek to eliminate it.

Professor David Vladeck’s Chapter 3, “Preemption and Regulatory Failure Risks,” adopts a different perspective, melding narratives about product risks and related regulatory histories with a large body of scholarship exploring how and why regulation can fail to provide promised protections. Using these historical narratives and distillation of regulatory failure scholarship, he raises fundamental questions about the wisdom of precluding the coexistence of federal and state law, especially the ongoing existence of state common law regimes. These common law regimes, with their emphasis on proven harms and breaches of duties to sell a safe product, do not rely on overworked and sometimes uninterested regulators. Instead, the desire for compensation and private litigation incentives can reveal inadequacies of past regulatory acts. Common law actions can further the goals of federal regulatory regimes by creating incentives for reduced risk, even if common law litigation can sometimes prove embarrassing to federal agencies and upset stability and preclusion of liability favored by industry.

Part II turns away from the broader theoretical and historical perspective of Part I to two chapters exploring “The Layered Government Norm.” Professor Trevor Morrison, in Chapter 4, explores “The State Attorney General and Preemption.” One of the most distinctive legal changes over the past decade has been increasingly active and sometimes zealous investigations and litigation by state attorneys general. In many states, attorneys general are not appointed, but are elected. Acting to enforce state law, investigate violations of federal law, and sometimes act in *parens patriae* capacity to protect a state’s citizens, state attorneys general have over the last decade often been more zealous in policing illegality than far larger federal agencies and prosecutors. Professor Morrison argues that due to state attorney generals’ democratic accountability and their capacity to police illegality, preemption doctrine and legislative drafters should specially accommodate and protect their role.

In Chapter 5, “Federal Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity,” Professor William Buzbee provides both a historical and theoretical perspective on recent, unusual aggressive assertions of federal

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preemptive power by federal agencies and in legislation. Instead of the long-dominant choice of federal law serving as a “floor” that preempts only more lax state regulation and thereby preserves state positive and common law, recent actions seek to impose a federal “ceiling.” A ceiling, however, actually works to displace regulatory schemes retaining multiple regulators and the different actors and modalities of common law litigation with a unitary federal choice. For a time, a unitary federal ceiling can benefit all with certainty, but it heightens pervasive risks of regulatory failure. The benefits of legal dynamism preserved with the institutional diversity of no preemption or a federal floor provide a sound counterweight to normative arguments for a single, displacing federal ceiling.

Part III focuses on “Judicial Treatment and Interpretive Choice.” These four chapters turn away from political preemption choice to explore how judicial doctrine, mostly in Supreme Court decisions, addresses the preemption choice question. These chapters examine different facets of preemption doctrine, but in common find a frequent disjuncture between stated and applied doctrine. In particular, they all find that the Supreme Court’s doctrine and normative frameworks tend to give short shrift to constitutional requirements and values. In addition, much recent preemption case law gives little attention to benefits of the diversity of legal voices typically preserved under our federalist forms of government. In short, a judicial conclusion in favor of preemption may too readily be found due to an imbalanced doctrinal perspective.

For example, in Chapter 6, “Supreme Court Preemption Doctrine,” Professor Chris Schroeder provides a lucid window into the many strains and vacillations in the Supreme Court’s preemption doctrine. His perspective is both historical and theoretical. He traces the fundamentals of preemption doctrine, illuminating the numerous different branches of preemption doctrine, among them analysis of congressional intent and of frameworks applied to determine whether the Court should find express or implied preemption. Despite the Supreme Court’s often-stated “presumption against preemption,” his analysis reveals the Court’s erratic actual application of that claimed presumption. He provides close but concise analysis of the Supreme Court’s most important preemption cases. He concludes by looking at recent and future controversies, warning against the risks of concentrating regulatory authority exclusively in a federal agency’s hands.

Professor Sandi Zellmer, in Chapter 7, analyzes “When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception.” Many regulatory statutes are not silent on the question of preemption but affirmatively state an intention to “save” state law, often in terms specifically allowing state law to

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provide greater protections than federal law. In some laws, these savings clauses are accompanied by other preemptive provisions. In addition, even with a savings clause, conflicts between federal and state law can arise. As Professor Zellmer illustrates, the Supreme Court has been erratic in the weight it gives to savings clauses in preemption cases. Despite the lack of provisions explicitly preempting state common law and the existence of savings clauses, the Court at times barely gives savings clauses any interpretive weight. The chapter identifies harms flowing from this erratic judicial treatment and suggests responsive statutory drafting strategies.

In Chapter 8, “Federal Preemption by Inaction,” Professor Robert Glicksman addresses a counterintuitive wrinkle in preemption law and policy. Preemption arguments can arise in settings where federal inaction is claimed to preempt state regulation or common law. The risks of this unusual preemption twist are illustrated with close attention to debates over global climate change, where the federal government has been inactive, but state and local governments have begun to regulate. After reviewing relevant case law, state and local regulatory initiatives, and relevant strains in preemption doctrine, Professor Glicksman offers recommendations for Congress and for the courts. He does not rule out a role for preemption, but suggests it should be required or found only in rare circumstances.

Professor Bradford Clark, in Chapter 9, argues for a “Process-Based Preemption” doctrine. His analysis is rooted in constitutional text and structure, especially in close analysis of the Supremacy Clause. The Constitution creates a cumbersome process for creating any federal law that can be deemed “supreme” and therefore preemptive of state law. These procedural hurdles serve to preserve state law and are part of our constitutional system. Professor Clark therefore embraces as playing a “useful role in implementing the Constitution’s political and procedural safeguards of federalism” both the oft-stated but sometimes neglected “presumption against preemption,” and a clear statement requirement before an intent to preempt should be found. He further analyzes how such a presumption and clear statement requirement should influence agency assertions of preemptive power. He concludes that courts should not defer to such agency preemption claims absent clear statutory authorization. He closes by observing how enforcing such a process-based preemption doctrine would provide latitude for state law to be innovative in protecting public health, safety, and the environment.

Chapter 10 picks up on strains in the previous chapter, with Professor William Funk focusing on “Preemption by Federal Agency Action.” Most preemption disputes today involve federal agencies in some way. Especially since 2005, numerous agencies have aggressively asserted power to preempt

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state regulatory and common law. Despite the prevalence of this preemption wrinkle, the Supreme Court has yet to articulate directly what kind of deference, if any, should be given to such agency claims of preemptive power. After reviewing different settings in which preemption claims can arise with agencies, Professor Funk offers both a distillation of relevant cases and a federal executive order. Of special importance, he provides close analysis of how statutes differ in the grants of authority to agencies. Some provide such authority clearly, while others do not, or provide both savings and preemption clauses. Like Professor Clark, but relying on close analysis of statutory law and recent regulatory actions, Professor Funk argues for a statutory clear statement authorizing agency assertions of preemptive power before it should be upheld by courts.

Part IV, "Preemption Tales from the Field," turns away from judicial treatment of preemption claims and related doctrine. The book's final three chapters provide analysis rooted in regulatory history, substantially influenced by underlying theory and past scholarship regarding effective regulation. Professor Thomas McGarity, in Chapter 11, observes a "Regulation–Common Law Feedback Loop in Non-Preemptive Regimes." This chapter provides a rich analysis of the strengths and weaknesses of the legal modalities of agency regulation and common law tort litigation. Whereas Professor Vladeck, in Chapter 3, analyzed regulatory failure risks and why tort regimes remained important, Professor McGarity argues for how both regulation and tort regimes are strengthened by their interactive learning, or what he calls their "feedback loop." Drawing on theory and recent high-visibility product risks initially poorly addressed through regulation, McGarity splits his chapter into two substantial sections: he first analyzes how agencies provide feedback and information used in courts, and then he turns to settings where information ferreted out in common law tort settings has led agencies to reexamine and revise earlier regulatory choices. Critical to this valuable feedback loop are the different incentives and distinct institutional strengths of each legal setting. He provides a succinct but detailed recounting of how industry and agencies initially failed to address risks of the nonstick coating chemical perfluorooctanoic acid (PFOA) but then did so after discoveries elicited in civil tort litigation. Broad agency preemption of common law regimes could destroy the benefits of this mutual regulatory feedback.

In Chapter 12, "Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control," Professor William Andreen continues the focus on history. He responds to recent legal historical scholarship questioning the need for substantial federal environmental laws starting around 1970. Of most direct relevance to this book was federal assertion in

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1972 of a preemptive regulatory floor that precluded more lax state water pollution protections. Professor Andreen's chapter provides a nuanced analysis of the Clean Water Act's delegated program structure. These provisions are a prime example of the prevailing political choice to enact laws utilizing overlapping and intertwined federal and state roles. He also reviews states' actual environmental performance, including many states' decision to preclude any more protections than provided by federal law. He then looks closely at historical data on water quality before and after the modern Clean Water Act was enacted, finding strong support for the traditional view that federal law quickly improved the quality of widely degraded rivers. By providing a federal floor, funding municipal treatment works, and allowing states to innovate and provide additional protections, water quality has improved from where it stood during the period of state primacy.

In Part IV's final chapter, Chapter 13, Professors David Adelman and Kirsten Engel examine the strength of what they call "Adaptive Environmental Federalism." This chapter weaves legal theory, history, and analogies to ecosystems, to suggest that static regulatory systems in the form of broadly preemptive federal regulation would undercut benefits of adaptive legal regimes and the legal dynamism that they can create. They suggest that the risk of dysfunctional preemption is especially high in the field of environmental law. They first dispute assumptions of static models of environmental federalism, explaining how environmental ills tend to be multilayered and multijurisdictional in cause and effect, complicating reliance on any single regulator. They also explain why legal schemes must allow for adjustment and tailoring to local and changing conditions. Dynamic environmental change requires legal regimes that are dynamic. Drawing on work in earlier chapters and other work by authors contributing to this book, Professors Adelman and Engel note a broad array of scholars developing an argument for dynamic, interactive, contextual, and polyphonic forms of federalism. Enriching this growing body of scholarship, they explore the science and benefits of "complex adaptive systems," using the concept both descriptively and normatively. As they show, adaptive systems can cope and flourish in settings that are complex and unpredictable, as are environmental challenges and legal institutions' responses to those challenges. They close by applying their framework to the challenge of climate change.

A brief concluding chapter draws together strains and arguments from the earlier chapters to derive a menu of "preemption choice variables." As is inevitable under our constitutional structure, preemption will at times be necessary and make sense. This book refines earlier scholarship and jurisprudence by identifying with greater precision when the choice to preempt is

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legally justified and appropriate. Most distinctively, this book's chapters collectively enrich federalism discourse by drawing on theory, history, and legal precedents to articulate normative rationales for the nonpreemptive regimes that remain the dominant political choice.