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.
Contents

Contributors page vii
Acknowledgments xv

Introduction 1
William W. Buzbee

PART I. FEDERALISM THEORY, HISTORY,
AND PREEMPTION VARIABLES 1

1. Preemption and Theories of Federalism 13
   Robert R.M. Verchick and Nina Mendelson

2. From Dualism to Polyphony 33
   Robert A. Schapiro

3. Preemption and Regulatory Failure Risks 54
   David C. Vladeck

PART II. THE LAYERED GOVERNMENT NORM 81

4. The State Attorney General and Preemption 81
   Trevor W. Morrison

5. Federal Floors, Ceilings, and the Benefits of 98
   Federalism's Institutional Diversity
   William W. Buzbee

PART III. JUDICIAL TREATMENT AND
INTERPRETATIVE CHOICE 119

6. Supreme Court Preemption Doctrine 119
   Christopher H. Schroeder

7. When Congress Goes Unheard: Savings Clauses’ 144
   Rocky Judicial Reception
   Sandi Zellmer

v
<table>
<thead>
<tr>
<th>Section</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Federal Preemption by Inaction</td>
<td>Robert L. Glicksman</td>
<td>167</td>
</tr>
<tr>
<td>PART IV. PREEMPTION TALES FROM THE FIELD</td>
<td></td>
<td></td>
</tr>
<tr>
<td>History of Water Pollution Control</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conclusion: The Menu of Preemption Choice Variables</td>
<td>William W. Buzbee</td>
<td>301</td>
</tr>
<tr>
<td>Index</td>
<td></td>
<td>305</td>
</tr>
</tbody>
</table>
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 contributors.
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.

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.