

2010

Preemption Choice in Context

Michael S. Greve

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Greve, Michael S., "Preemption Choice in Context" (2010). *Constitutional Commentary*. 780.
<https://scholarship.law.umn.edu/concomm/780>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Review

PREEMPTION CHOICE IN CONTEXT

PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION.

William W. Buzbee, ed.¹ New York, Cambridge University Press. 2009. Pp. xv + 319. \$90.00 (Cloth).

*Michael S. Greve*²

INTRODUCTION

Preemption law, not so long ago a province of legal technicians and policy specialists, has become the subject of an increasingly voluble and contentious debate. Intense political and interest group fights over the preemptive scope of federal law, in areas from global warming to financial regulation to consumer products, have been covered in the popular press. Preemption cases form a core part of the Roberts Court's docket of "business cases," itself a matter of considerable controversy and commentary.³ Scholarly books and articles on preemption have proliferated in recent years.⁴

1. Professor and Director of the Environmental and Natural Resources Law Program, Emory University School of Law.

2. Ph.D. (Cornell University, 1987); John G. Searle Scholar, American Enterprise Institute.

3. For press coverage of preemption, see, e.g., Alicia Mundy & Brent Kendall, *Shift Toward State Rules on Product Liability*, WALL ST. J., May 21, 2009, at A3. For the Roberts Court's "business docket" see, e.g., Jeffrey Rosen, *Supreme Court, Inc.*, N. Y. TIMES MAG., Mar. 16, 2008, at 38. Law review articles include: Robin Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997 (2009) and Jonathan Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009). See also Doug Kendall, *Big Business's Big Term*, SLATE (Mar. 5, 2008), <http://www.slate.com/id/2185844/>; David C. Vladek, *Safety Last*, THE NATION (Oct. 16, 2008), <http://www.thenation.com/article/safety-last>; David G. Savage, *High Court Is Good For Business*, L.A. TIMES, June 21, 2007, at A1; Alicia Mundy & Shirley S. Wang, *In Drug Case, Justices to Weigh Right to Sue*, WALL ST. J., Oct. 27, 2008, at B1; Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18.

4. See, e.g., THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* (2008); Symposium, *Ordering State-Federal*

Preemption Choice, a collection of essays expertly organized and edited by William W. Buzbee, promises to add to the debate and the burgeoning literature by contributing “to the development of normative arguments against preemption” (p. 3). “Development” is a bit of an exaggeration. Most of the authors have elaborated their positions against preemption elsewhere, often, and in much greater detail; the book’s virtue lies in compiling concise, accessible summaries of their views. “Normative” and “against,” in contrast, are apt characterizations. *Preemption Choice* contains summaries of the Supreme Court’s jurisprudence (Christopher H. Schroeder) and of preemption doctrine and its interplay with federalism theory (Robert R.M. Verchick & Nina Mendelson); these economical and characteristically competent essays go easy on polemics and normative prescriptions. It also contains an essay by Bradford R. Clark, arguing that the Supremacy Clause, correctly understood, not only grounds but also limits the federal government’s preemptive authority. With these exceptions, though, the volume is given over to advocates of “polyphonic,” “dynamic,” “interactive,” “adaptive,” or “empowerment” federalism. The varying adjectives—for purposes at hand, I will stick with “polyphonic”—aim to capture supposedly salutary features of a federalism conception that embodies a deep skepticism about the federal preemption of state law. Congress, the contributors agree, should use its powers to set a regulatory “floor” underneath the states. In the absence of federal minimum requirements (for example, for product safety or environmental quality), states are likely to “race to the bottom.”⁵ Above the floor, however, states should be left free to adopt more stringent, protective regulations. Concurrent state and federal regulation—and, for producers in interstate commerce, a polyphony of at least fifty-one regulators for any given product or transaction⁶—

Relations through Federal Preemption Doctrine, 102 NW. U. L. REV. 503 (2007); Symposium, *Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices*, 33 PEPP. L. REV. 1 (2005); FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007).

5. Buzbee, pp. 8–9, 98–104, calls federal minimum standards “floor preemption.” The usage is a bit idiosyncratic. True preemption, called “ceiling preemption” by Buzbee, deprives state law above the ceiling of any force and effect. In contrast, “floor preemption” has no legal displacement effect. For example, a \$9 federal minimum wage leaves state minima above and below that floor in force: if a state has a minimum wage of \$8, an employer who pays \$7 can still be prosecuted for violating both federal and state law. As a practical matter, of course, it is true that “floor preemption” wipes out the lower-minimum states’ policy choice.

6. “At least,” because several contributors place special emphasis on the salutary

ought to be the general rule. In essay after essay, the authors expound on the virtues of federalism, so conceived: it will facilitate state experimentation, compensate for federal agencies' failures, create information-producing feedback loops among regulators, and allow for the dynamic adaptation of regulatory regimes in response to changed circumstances or new information.

The notion that polyphonic, concurrent regulation might also have significant drawbacks—that state officials, and jurors, as well as federal regulators, may have warped incentives, that concurrent powers might produce cacophony rather than polyphony, that public purposes might get lost in an intergovernmental shuffle, or that compounding legal obligations might result in excessive regulation—does not unduly trouble the contributors. Occasional acknowledgments of “common pro-preemption arguments” (p. 3) based on considerations of uniformity, finality, democratic accountability, or economies of scale are quickly waved aside. The most explicit recognition of polyphony's potential “pitfalls” (Robert A. Shapiro's, pp. 44–46) terminates in the confident conclusion that “[t]he management of dynamic overlap is a task best performed by branches of government other than the courts.” (p. 46).

Agreement on the normative priors allows the editor and contributors to trace the implications of their view through a wide range of subtle yet salient questions—for example, the preemption of state tort law (David C. Vladeck), the role of statutory “savings clauses” in favor of state law (Sandi Zellmer), federal preemption by inaction rather than affirmative prohibition (Robert L. Glicksman), and preemption by agency choice rather than explicit legislative mandate (William Funk). However and alas, the inordinate emphasis on ideological and thematic coherence limits both the informational value of *Preemption Choice* and the plausibility of its federalism vision.

POLYPHONY IN CONTEXT

For readers who are unfamiliar with the preemption debate of the past half-decade, *Preemption Choice* may seem disorienting. One question arises from the avowedly liberal-progressive thrust of the federalism project embraced in this

role of non-preempted state courts and juries. In that world, the upper bound of regulators is defined not by the number of states but by plaintiffs' lawyers' forum choices.

volume. If memory serves, federalism used to be the conservative Rehnquist Court's agenda, about which progressives had little positive to say. Have they changed their minds, or do they mean something very different by "federalism"? A second question is how and why the once-obscure preemption question (a *statutory* question, is it not?) has mutated into "Federalism's Core Question" (a *constitutional* issue—no?).⁷ *Preemption Choice* does not directly engage these questions. The closest it comes to addressing them is Robert A. Shapiro's essay on the law's path "From Dualism to Polyphony."

Shapiro rightly suggests that the federalism embraced in *Preemption Choice* has a pedigree in the Progressive Era and the New Deal—which, notwithstanding its nationalist impulses, always embodied a potent pro-state streak, famously captured in Justice Brandeis' celebration of states as "laboratories of democracy."⁸ Progressive-polyphonic federalism's foe and foil is the "dual" federalism of the nineteenth century, which operated against a baseline of separate and exclusive spheres of federal and state jurisdiction. Dual federalism was dislodged by the New Deal. Contrary to a widespread misunderstanding, however, the New Deal did not simply trump federalism and the states with "nationalist" policies, institutions, and legal doctrines. Rather, Shapiro notes (citing Stephen Gardbaum's important writings on the subject), the New Deal unleashed both the national government *and the states* from the strictures of the "old" Constitution (pp. 37–41).⁹ An integral part of that transformation was a state-protective shift in preemption doctrine. The pre-New Deal Court usually operated with a doctrine of "latent exclusivity": once Congress had entered a regulatory arena, state regulation in the field was deemed preempted regardless of any direct conflict with federal law, and regardless of whether or not Congress had intended that result.¹⁰ In the post-New Deal era, in contrast, preemption law turns on

7. The extent to which constitutional presumptions should drive statutory preemption analysis has been a matter of some controversy among the Justices. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

8. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

9. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 CHI. L. REV. 483 (1997) [hereinafter, Gardbaum, *New Deal*].

10. Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption during the Lochner Era*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 48 (Richard A. Epstein & Michael S. Greve eds., 2007) [hereinafter Gardbaum, *Breadth vs. Depth*].

the intent of Congress. Barring an outright conflict between federal and state law, state law continues to operate, concurrent with federal law, unless Congress preempts the states either expressly or by “clear and manifest” implication.¹¹

At one level, progressive federalism has changed little over the past century. “Dynamism,” “adaptation,” and “polyphony” are simply new monikers for the perceived advantages of the “cooperative” federalism championed by Felix Frankfurter and Louis Brandeis. However, the context of those arguments has changed in two highly salient ways. First, the federalism debate of the Progressive era covered a much wider range of legal questions. Federal preemption was *a* federalism question back then¹²—but not “Federalism’s Core Question” by any stretch. In part, this has to do with the lower density of federal legislation at the time. In much larger part, it has to do with the fact that the pre-New Deal Court viewed the protection of the commerce of the United States against state exploitation as its foremost constitutional obligation. To that end, the Court administered a raft of constitutional and jurisdictional doctrines. Among them was the dormant Commerce Clause, which loomed much larger then than it does now, both in terms of its doctrinal breadth and by the sheer number of Supreme Court decisions.¹³ There was the federal courts’ diversity jurisdiction and the federal general common law of *Swift v. Tyson*,¹⁴ which gave parties in interstate commerce an escape from what we now call state “hellhole jurisdictions.” There was the substantive due process doctrine of *Lochner* notoriety, which restricted state legislation and regulation in many of the domains where polyphonists would dearly love to see it exercised. (Justice Brandeis’ paean to state experimentation, of course, originated in this context.)¹⁵ To these familiar doctrines, one could add others—for example, the Full Faith and Credit Clause, restrictive doctrines of personal jurisdiction, or the then-potent “extraterritoriality” prong of the Due Process Clause, all of which curbed the reach of state law over interstate commerce.

Virtually all of these doctrines disappeared in the wake of the New Deal.¹⁶ The brief historical detour, then, answers the

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

12. For a concise summary, see Gardbaum, *Breadth vs. Depth*, *supra* note 10.

13. Shapiro notes its reduced scope after New Deal: p. 40.

14. 41 U. S. 1 (1842).

15. *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

16. For a survey of the doctrines and their demise, see Gardbaum, *New Deal*, *supra*

initial question of why preemption has become federalism's "core" question: with the arguable exception of a softened and embattled dormant Commerce Clause,¹⁷ it is the *only* still-extant state-restrictive doctrine of any practical consequence. This point has doctrinal and practical significance. If the once-narrow preemption debate now teems with constitutional presumptions and macro-theoretical federalism arguments, that is because the humble doctrine has come to do all the work of the long-discarded constitutional doctrines. And if preemption has become ground zero in a grim trench war between producer interests and their adversaries, that is because both sides recognize preemption as the last legal obstacle to an environment in which state regulators operate without any meaningful legal restraint.

Polyphonists have emphatically made their preemption choice. That is fine and good, and, as noted, seeing the troops in close array has its advantages. Candor on the point, however, would have been more becoming than the false air of deliberation that hovers over this volume, beginning with its title.¹⁸ Better yet would be a recognition and acknowledgment that the fight over contemporary preemption law, viewed against a broader federalism background and trajectory, is over the last inches of territory.

A CHEER FOR THE NEW DEAL CONSTITUTION

Polyphonists, as just seen, are heirs to the New Deal tradition; but they would also radicalize that tradition. The New Deal's commitment to enhancing state authority over interstate

note 9.

17. "Embattled," in that conservative Justices (as well as some scholars) have repeatedly criticized the doctrine as an illegitimate judicial invention and called for its sharp curtailment or even its demise. *See, e.g.,* Tyler Pipe Indus. v. Wash. Dep't of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 595 (1997) (Scalia, J., dissenting); *see also* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) (Roberts, C. J.). Shapiro, p. 47, criticizes the Roberts Court's "aggressive use of the dormant Commerce Clause." That characterization, highly doubtful even when written, has become untenable in light of subsequent decisions. *See* Norman R. Williams & Brandon P. Denning, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247 (2009).

18. *Cf.* THE FEDERALIST NO. 1 (Alexander Hamilton) ("I will not amuse you with an appearance of deliberation when I have decided."). Buzbee, p. 3, endeavors to convey an impression of over-all "balance" and promises that "[s]everal chapters explore and enrich . . . common pro-preemption arguments." I have been unable to find those chapters.

commerce and corporations was still checked by countervailing, “nationalist” impulses. The dominant form of New Deal regulation was the management of industry sectors by expert administrative agencies. That model requires protection against collateral attack and state interference—including preemption-protective judicial doctrines, some of them quite robust.¹⁹ The over-all ambivalence between state empowerment and nationalism is embodied in the still-canonical preemption formula of *Rice v. Santa Fe Elevator Corp.*²⁰ *Rice* captures the nationalist side in a judicial willingness to imply federal preemption where Congress has failed to express it. The state-friendly, polyphonic side is captured in an (erratically enforced) “presumption against preemption.”²¹

The New Deal regulatory model fell out of favor a half-century ago. Critics Left and Right concluded that supposed expert agencies were often “captured” by regulated industries and that “regulation” often amounted to little more than the national organization of labor, industrial, and agricultural cartels. This critique looms large in the preemption and federalism theory of *Preemption Choice*. Concurrent state regulation, the theory holds, will compensate for the manifest failures of federal regulatory agencies—their capture, ossification, lack of resources, and information deficits. It is difficult to quarrel with the implicit critique of New Deal regulation. It is equally difficult to defend the preemption formula of the New Deal Constitution, the source of a universally lamented “muddle” in preemption law.²² It is still harder, however, to endorse the proposed, polyphonic remedy.

For all its flaws, the New Deal model, or rather its nationalist streak, sought to protect legitimate interests in administrative expertise and coherent public administration.

19. The National Labor Relations Board’s near-exclusive authority, for example, was and is to this day protected by decidedly monophonic preemption doctrines. See *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976); *S.D. Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957). If polyphonists were to consider these doctrines (which they do not), they might come to question the facile assumption that firm (ceiling) preemption automatically embodies pro-corporate, anti-consumer preferences.

20. 331 U.S. 218 (1947).

21. For more on this tension, see Richard A. Epstein & Michael S. Greve, *Conclusion*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 309, 317–18 (2007).

22. Nary an article on the subject fails to note the consensus that preemption law is a “muddle.” See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 233 (2000) (noting the point and providing references).

And for all the inanity of its economic theories,²³ the New Deal model still reflected production values: it sought to stabilize economic markets, not to destroy them. The federalism theory on display in *Preemption Choice* does not so much disavow those orientations; it fails to even contemplate them. David C. Vladeck, for example, inveighs against preempting state tort lawsuits over “mislabeled” or unduly dangerous pharmaceutical products. The obvious objection that lay juries lack expertise is met with the reply that tort suits will bring new information to light (pp. 69–71). That may be so—but at what price to product availability and incentives for innovation? Similarly, Trevor Morrison would expose financial and other industries to increased oversight, investigation, and expansive conduct remedies by state attorneys general. He is unperturbed that attorneys general—unlike (say) the Securities and Exchange Commission or the Comptroller of the Currency—have little working knowledge of the industries and no official responsibility for their effective operation.

That blithe indifference to production values is common to all the normatively oriented essays in *Preemption Choice*. Polyphonists look to consumer interests in more protection and compensation, to the virtual exclusion of producer-firms’ and their employees’. Nor do they believe in expertise or in coherent public policy. Their case rests on an exceedingly confident assumption to the effect that more regulation is *ipso facto* better regulation.

LIMITS? TRADE-OFFS?

None of the authors states the absurd more-is-better premise *in haec verba*. However, it is difficult to make sense of polyphony on any other assumption. Apart from perfunctory acknowledgments of pro-preemption concerns, the polyphony on display in *Preemption Choice* recognizes neither limits nor trade-offs. One scours the volume in vain for a single real-world example of a federal preemptive statute, or a Supreme Court finding of preemption, that would find favor with the author. Three examples further illustrate the point.

23. See Richard A. Posner, *Brandeis and Holmes, Business and Economics, Then and Now*, 1 REV. L. & ECON. 1, 5 (2005) (noting that Justice Brandeis supported many New Deal programs, such as maximum hour and minimum wage laws, the goal of the latter being “(to put it bluntly) . . . to force up wages by monopolizing the labor supply”).

Subject-Matter. The contributions to *Preemption Choice* are devoted almost exclusively to two regulatory areas: health and safety regulation, especially the federal Food and Drug Administration's (FDA) approval of prescription drugs and medical devices; and environmental regulation, especially the regulation of global warming and greenhouse gases. These are important areas, and they have occupied a great deal of judicial attention. They are also prime fields of federal preemption over state *tort* law (as distinct from legislative or administrative measures), a question that has proven particularly contentious.²⁴ Even so, a broader inquiry would have illuminated both the trade-offs involved in preemption choice, and, moreover, polyphonic federalism's intended scope and content.

Consider, even if *Preemption Choice* does not, the regulation of common carriers such as airlines, truckers, and railroads: federal preemptive statutes categorically prohibit states from any regulation "relating to" the rates, routes, or services of such enterprises.²⁵ These provisions are the centerpieces of common carrier regulation (one cannot deregulate airlines without affirmatively prohibiting the states from re-regulating them), and the Supreme Court has consistently defended them against state evasion.²⁶ Is that preemption choice right, or wrong? One can imagine a polyphonic answer either way.

Environmental, health, and safety regulation involves highly complex, technically challenging decisions about managing risk under conditions of great uncertainty. That context may be thought to produce a *prima facie* case for adaptation, dynamism, feedback, and other polyphonic virtues. But that is not so, a sensible polyphonist might concede, with conventional price and entry regulations. The subject-matter is low-tech; the economic theory is well understood; and experiments are pointless when we *know* them to be inefficient, as with price and entry regulation.

The argument sounds plausible, and it would give content and contours to polyphony. But I made it up, and on the evidence of *Preemption Choice*, it is impossible to know whether

24. For empirical evidence, see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Assessment*, 14 SUP. CT. ECON. REV. 43, 52 (2006) (showing that tort preemption cases are more contested).

25. 49 U.S.C. § 14501(b)(1) (2006). For airlines, see 49 U.S.C. § 41713(b)(1) (2006).

26. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

any polyphonist would credit it.²⁷ Does the regulatory context matter? Or is it that health and safety regulation, unlike price and entry regulation, often implicates claims for individual compensation, which warrant special consideration? Or should polyphony reign across the board, such that the federal deregulation statutes were misguided and the Supreme Court decision interpreting them erroneous? In failing to address questions of this sort, *Preemption Choice* fails to give the reader a sense of polyphony's intended limits, if any.

Risk and Expertise. Even within the area of health, safety, and environmental regulation, polyphony's intended scope remains murky.²⁸ The central legal issue in this arena is the question of whether federal standards should be understood—in the absence of an express preemption provision—as a federal minimum or “floor” that lets states experiment with more restrictive requirements, as polyphony would have it; or whether such standards should be understood as establishing a preemptive “ceiling” as well as a floor. The Supreme Court has wavered between these two approaches. Ceiling-and-floor decisions (most prominently, Justice Breyer's majority opinion in *Geier v. Honda Motor Co.*)²⁹ often interpret federal standards as embodying a deliberate effort to establish a regulatory “optimum.” Several contributors harshly criticize this position. It presupposes, Thomas O. McGarity writes, “that the [federal] agencies are doing such an effective job of protecting the public *ex ante* that the added incentives provided by the common law are unnecessary and the amount of residual damage caused by

27. The firm preemption provisions at issue serve none of the pro-preemption values acknowledged, however cavalierly, in *Preemption Choice* (uniformity, finality, accountability, economies of scale). Their principal purpose and effect is to wipe out the states' (as well as the carriers') regulatory rents—in contrast to other, more “polyphonic” regimes (for example, telecommunications) that protect those rents to the detriment of consumers. See, e.g., Robert Crandall, *Local and Long Distance Competition: Replacing Regulation with Competition*, in COMMUNICATIONS DEREGULATION AND FCC REFORM 53 (Randolph J. May & Jeffrey A. Eisenach eds., 2001); Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?* 56 FED. COMM. L.J. 155 (2003). Whether the contributors to *Preemption Choice* are pro- or anti-rent, I cannot say.

28. E.g., p. 295: “Clearly, where a proliferating polyglot of state-level regulations becomes *enormously* disruptive to the economy, federal preemption *may* be warranted.” (emphasis added). A sentence that starts on “clearly” and ends in evasion might have been given some content by means of reference to, or discussion of, an actual case. See, e.g., *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (“As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA and the MDA.”). Is that consideration sufficiently “enormously disruptive”?

29. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864 (2000).

the regulated products or activities is acceptably low.” (p. 255). This confident averment, however, grossly misstates the “optimum” position both with respect to the compensatory and the deterrence function of state common law.³⁰

As for “damage,” everyone agrees that federal statutes establish incomplete regulatory regimes that deal with prevention, to the exclusion of compensatory mechanisms. Almost everyone agrees that the erratic, high-transaction-cost tort system is a lousy way of providing compensation. (The best reply is that the tort system will have to do so long as no other compensation device is reliably available.) The question, then, is how to combine two imperfect systems without unduly compromising the function of either. A large, subtle, sophisticated literature deals with that difficult trade-off and exercise in institutional coordination.³¹ Not one of the major contributions merits a citation, let alone discussion, in *Preemption Choice*.

As for the “effectiveness” of federal law, the case for understanding federal agency standards as a preemptive optimum rather than a mere floor does not rest on any cheerful assumption about the competence of federal agencies but on a rough institutional calculus. Health and safety regulation typically presents risks on either side. Every life-saving drug will have dangers, and every label will create dangers of over- as well as under-warning. While there are reasons to think that federal health and safety agencies will at times under-protect public health, there are equally potent reasons to think that they will often suffer from an excess of caution.³² Polyphony offers no remedy for that systemic failure; it only cuts one way. A good

30. The Supreme Court’s preemption cases have vacillated in their emphasis on the compensation and deterrence functions of tort law. See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 450, 459 (2008) [hereinafter Sharkey, *Products Liability*].

31. For examples in one single regulatory arena (the approval and labeling of pharmaceutical drugs and devices) see, e.g., Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 237–43 (2007); Sharkey, *Products Liability*, supra note 30, at 459; Richard Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. 4 (2006); Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463 (2009). For a post-*Preemption Choice* discussion see Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 445 (2009). All articles contain further extensive citations and references.

32. See, e.g., Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677, 707 (1975); Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 418 (1990).

case can be made for institutional redundancy as an error-correcting or feedback mechanism. Barring an unsustainable “more is always better” presumption, however, there is every reason to distrust a *one-directional* mechanism. That caution applies with special force to “error correction” by inexpert juries with massive hindsight bias.³³

Incentives. The contributors to *Preemption Choice* are effusive on the good things that concurrent state regulation “can” or “will” contribute to a world governed by poorly incentivized federal regulators. They are close to mum on the incentives that might induce state regulators to do just the opposite.

In an intriguing contribution, Trevor W. Morrison argues that courts should direct their preemption inquiry, not so much to subject-matter but rather to “the identity of the actor enforcing the state law” (p. 81). State attorneys general, he argues, ought to receive special deference in preemption cases, both on the part of federal regulators and by courts. With few exceptions, state attorneys general—unlike regulators—are directly elected by their respective state electorates. Deference would therefore promote federalism values of accountability and democratic self-governance.³⁴ Moreover, it would “recognize[] the enormous potential value of state attorneys general to the enforcement of both state and federal law” (p. 94). Morrison discusses only a single objection to his proposal—to wit, the apprehension that state attorney general proceedings against predominantly out-of-state corporations might have troublesome extraterritorial consequences and inflict economic costs on shareholders or workers in other states. Having stated the concern, Morrison dismisses it out of hand. Federal

33. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 325 (2008) (“A jury . . . sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.”).

34. Morrison acknowledges the (fairly minor) problem that not all attorneys general are elected. He ignores the far larger problem that attorneys general are not the only elected officials in any given state—and that the prospect of substantial settlement awards may derange democratic separation of powers arrangements at the state level. Many attorneys general are entrusted with fearsome prosecutorial powers. Among the reasons for tolerating those powers is, or was, a system of legislative budget controls—a crude yet vital safeguard against excessive enforcement, especially where enforcement authority is poorly defined. That safeguard is eviscerated when large financial recoveries turn attorneys general into profit centers for cash-strapped legislatures: in-between elections, state attorneys general are effectively liberated to act as entrepreneurial trial lawyers with a badge. There may still be a plausible “accountability” or “democracy” argument in favor of Morrison’s proposal, but it would have to be a great deal more nuanced.

preemption, he writes, compromises state regulatory authority. State attorneys general, in supposed contrast, cannot do so; they can only inflict economic losses. This account grossly understates the extraterritoriality problem and wholly ignores institutional features that render state attorneys general more rather than less problematic.

State officials have no encompassing interest in the collective welfare of the nation as a whole. They are *supposed* to look exclusively to their own constituents' welfare, to the exclusion of anyone else's. They will therefore underestimate or ignore the external costs of their regulations, so long as the regulations confer some in-state benefit. More problematically still, they may attempt to impose costs on out-of-state entities and to transfer the proceeds. The strategy is welfare-maximizing for *all* officeholders, provided the aggression goes undetected.³⁵ It is rational, moreover, for each state's voters to elect candidates who promise to maximize the in-state gains regardless of external costs. Under a legal regime that poses no meaningful impediment to state cost exports, each state's citizens will pay the price of other states' exploitative strategies in any event. The only plausible response is to return the favor.

While the institutional calculus just sketched applies to all state regulators, it applies with special force to state attorneys general. Unlike securities or utility regulators, state attorneys general have no responsibility for the effective functioning of any industry (perhaps excepting the litigation industry). Their ordinary mode of "regulation" is not rulemaking pursuant to a statute that embodies some rough legislative choices; it is investigation and prosecution, often under open-ended, general-purpose civil or criminal fraud statutes. This feature routinely produces a regulatory "process" in which all the heuristics are wrong.³⁶ The attorney general's demands for conduct remedies will be informed by a generalist's perception of the outlier case under investigation, as opposed to an expert regulator's understanding of the practices and organization of a sophisticated industry. The remedies will be shaped, not in an open notice-and-comment rulemaking process but rather by the

35. For some empirical evidence of this calculus and its operation in one regulatory arena, see Michael S. Greve, *Cartel Federalism?: Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005).

36. Richard J. Zeckhauser & Frederick Schauer, *The Trouble With Cases*, in LITIGATION VERSUS REGULATION (Daniel Kessler & Andrei Shleifer eds., forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446897.

parties' settlement incentives and in closed-door negotiations. There is no intelligible reason to trust this process, and ample reason to worry about the potential for collusion and self-dealing.³⁷

Morrison's offhand argument that this arrangement does not violate any state's formal regulatory authority is implausible,³⁸ and, in any event, beside the point. The question is whether we should embrace a preemption regime that is virtually certain to produce aggregate losses all around. Assuming, of course, that we care about them.

POLYPHONY AND PREEMPTION: PROSPECTS

Preemption Choice seeks to integrate the analysis of preemption law with high-level federalism theory. For better or worse, though, the link is tenuous. The high-level theory is too implausible and, frankly, too unserious to gain much traction; in addition, its launch in *Preemption Choice* may suffer from bad timing. In contrast, polyphonic preemption law will likely gain further ground, for reasons having nothing to do with polyphonic theory.

Preemption Choice, as noted, is preoccupied with the regulation of complex, technically challenging problems of national and, indeed, global reach. In these venues, the case for polyphonic federalism teems with complications—extraterritoriality, the need for expertise, public choice and incentive problems, the loss of transparency and accountability that invariably attends “cooperative” federal-state regimes, and so on. Having recognized the difficulties aside, polyphonic (adaptive, dynamic, empowerment) federalism can do no better

37. The most appalling example remains the 1998 “Master Settlement Agreement” (MSA) among 46 states, the major tobacco manufacturers, and plaintiffs’ lawyers. Though nominally designated as a settlement of state lawsuits against the tobacco manufacturers, the agreement had the purpose and effect of creating a tobacco cartel that has produced hundreds of billions of dollars in monopoly profits. The MSA guarantees states and plaintiffs’ lawyers a share of those profits. For accounts of the MSA’s genesis, nature, and effects see, e.g., Ian Ayres, *Using Tort Settlements To Cartelize*, 34 VAL. U. L. REV. 595 (2000); MARTHA DERTHICK, UP IN SMOKE 163–208 (2002); Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 346 (2003).

38. It is implausible because the authority that remains unaffected by attorney general interventions and their extraterritorial effects is the authority to prohibit. Sister-state authority to tolerate or promote certain forms of private conduct is compromised all the time. If a product or service disappears nationwide because of a single state’s law (as with design defect lawsuits), that is the equivalent of what Buzbee calls “floor preemption.” See *supra* note 5.

than to brush them aside. It would gain credibility as a general theory if it started instead with easy, intuitively appealing cases and, having drawn skeptical readers into its orbit, worked through the complications. The most compelling case for polyphony, it seems to me, is “moral” federalism—regulation of the death penalty, abortion, gay marriage, and perhaps the public display of religious symbols. Unlike the states’ experiments on out-of-state producers, their regulation of their own citizens’ mores presents no extraterritoriality concerns worth worrying about. Morals politics is noisy and not always pretty; but it is also entrepreneurial, democratic, and unaffected by the rent-seeking orgies that are the stuff of regulatory policy. In sharp contrast to the fiendishly difficult risk-risk trade-offs in pharmaceutical markets or the daunting scientific complexities of climate change policy, morals issues are low-tech, high-values. On such questions, all the advantages go to a system that leaves room for decentralized decision-making—all the more so because those decisions are usually made at the ballot box or by popular referendum, not by hand-picked jurors with hindsight bias or by state officials with misaligned incentives. In short, in the morals context, what’s not to like about polyphony?

The fact that no polyphonist, in *Preemption Choice* or, to the best of my knowledge, anywhere else, seems to have even thought of arguing from the easy morals case to the hard regulatory cases suggests, to this reader at least, a lack of theoretical seriousness. For all its pretensions, polyphony is not and does not really want to be a general federalism theory at all. It is a theory by progressives, for progressive ends and in defense of a preconceived preference for more regulation. William Eskridge’s dust cover blurb helpfully identifies the polemical targets of *Preemption Choice*—the business-friendly, pro-preemption Bush Administration and the Roberts Court.³⁹

While one of those targets has since become history, post-publication events—the election of a progressive Administration, and a near-unprecedented financial crisis—may appear to have rendered the polyphonic agenda especially timely. It is equally likely, however, that those events have produced, or will in time produce, a mismatch between progressive theory and progressive politics on preemption.

39. “A common theme is that the Bush Administration and the Supreme Court have undermined both federalism and good regulatory policy by heeding business demands for preemption of state common law across whole areas of law.”

Polyphonic federalism imperils not just private corporations in interstate commerce. It threatens any kind of project, private *or public*, that requires central coordination and a coherent weighing of competing public objectives. Thus, for a progressive Administration with very grand objectives, polyphony may not be a natural choice. For example, polyphonic federalism has a clear preemption prescription for design defect lawsuits against General Motors; an Administration that owns GM may have different ideas.⁴⁰ For another example, the Administration has touted its intentions to promote “green” forms of energy, from wind to solar. Those industries cannot be subsidized up to scale; expanding them will, or would, require firm federal preemptions of state law.⁴¹ Similarly, the financial crisis may strengthen the polyphonic case only at first impression. Of course, the crisis has been widely attributed to a woeful lack of oversight and regulation by federal authorities, and the notion that polyphony might have prevented unconscionable risk-taking on Wall Street, depredations in the subprime mortgage market, and reckless profiteering in the financial industries may fall on receptive ears.⁴² However, the federal government needs private financial institutions for any number of purposes—for example, to restructure existing mortgages, to provide credit to an ailing small business sector, and to buy and unload alarming piles of United States debt instruments. Polyphonic federalism could easily frustrate any of these objectives. It is well-suited to appropriating the profits of private financial institutions. It is wholly unsuited to the emerging system of government-sponsored finance capitalism.

For all that, polyphony’s preemption prescriptions may well gain ground. At the legislative level, Buzbee rightly notes (p. 2), non-preemption is the ordinary choice in any event. Polyphonic federalism theory’s chief function is to supply more or less

40. For an overview of the controversy, see Jody Xu, *GM’s Bankruptcy: What Happens to People Who Had Lawsuits Against GM?*, WALL ST. J., June 2, 2009, <http://blogs.wsj.com/deals/2009/06/02/gms-bankruptcy-what-happens-to-people-who-had-lawsuits-against-gm/tab/article/>.

41. For example, see *Renewable Electricity: Hearing before the S. Comm. on Energy and Natural Resources*, 110th Cong. 9–15, 59–65, 84 (2008) (statements of T. Boone Pickens & Donald N. Furman).

42. That is certainly the operative premise behind the recently enacted federal reforms that substantially weaken federal agencies’ exclusive jurisdiction over federally chartered financial institutions and expose those enterprises to visitation, regulation, and litigation by state officials and to private lawsuits under state law. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1041–1046, 124 Stat. 1376, 2011–18 (2010) (codified as amended in scattered sections of 12 U.S.C.).

plausible *post hoc* rationalizations for results that are preordained by political dynamics and dysfunctions. At the judicial level, judicial preemption choices that are consistent *with* polyphonic presumptions are not dependent *on* those presumptions. As Bradford R. Clark's essay in *Preemption Choice* suggests, anti-preemption positions have of late gained favor among conservative, clause-bound originalists, including those on the Supreme Court.⁴³ That tendency is in no way derived from, or even in sympathy with, polyphony and its liberal-progressive intentions; it is driven by such standard conservative tropes as deference to Congress, interpretive textualism, and respect for state sovereignty. While *Preemption Choice* views "common pro-preemption arguments" as dominant and even ascendant (*see e.g.*, pp. 3, 46–51), it appears that those arguments have lost traction in many quarters and across a broad spectrum of political and jurisprudential views. Polyphonic federalism may thus prevail despite its lack of theoretical appeal: it no longer has an enemy.

43. *See, e.g.*, *Wyeth v. Levine*, 129 S. Ct. 1187, 1210 (2009) (Thomas, J., concurring); *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) (Scalia, J.).