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## Preemption in the Rehnquist Court: A Preliminary Empirical Assessment

*Michael S. Greve and Jonathan Klick\**

*The federal preemption of state law has emerged as a prominent field of study for legal scholars and political scientists. This rise to prominence of a technical and often dull field of jurisprudence is due to a number of developments—increasingly frequent federal statutory preemptions; the states' unprecedented aggressiveness in regulating business transactions, the expansion of corporate liability under state common law and the increased resort of corporate defendants to federal preemption defenses; and, not least, the Rehnquist Court's discovery of federalism and states' rights.*

*Unfortunately, the preemption debate has been marred by misperceptions and a lack of reliable data. Extravagant attention has been lavished on a few landmark cases, which may not be a reliable guide to the preemption universe. Studies of judicial behavior in this area have relied on an inadequate empirical foundation.*

*This Article presents an empirical overview and a preliminary analysis of the Rehnquist Court's preemption decisions. Part II describes the case universe and the outcomes. Part III discusses the role of the Supreme Court—more precisely, the Court's perception of its own role—in preemption litigation. Part IV suggests that outcomes in preemption cases may be most readily explained as judicial responses to certain signals*

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or “cues.” Two signals in particular prove significant: the presence of a state as a party to a preemption dispute, and the position of the Solicitor General. State amicus briefs and the partisan affiliation of the Solicitor General (Democrat or Republican) may also affect preemption case outcomes; however, we cannot show either variable to be statistically significant.

Part V examines the justices’ votes in preemption cases and addresses the discontinuity between the Rehnquist Court’s federalism cases and its preemption decisions. The Court’s federalism decisions have, until very recently, worked a major doctrinal shift in federal-state relations, in favor of the states. That shift has been the work of a stable bloc of five conservative justices, who have carried the federalism banner against a bloc of four liberal justices. In preemption cases, in contrast, liberals often vote against preemption (and thus “for the states”), whereas conservative justices often flip-flop in the opposite direction. We find substantial evidence to buttress the impression of preemption cases as a mirror image of pure federalism cases. Unlike federalism law, however, preemption law shows no clear decisional trend. Moreover, we find no firm voting blocs and no swing vote.

The concluding Part VI re-examines the perceived discontinuity between the Rehnquist Court’s federalism and preemption decisions in light of the evidence and argues that a satisfactory explanation of that phenomenon is bound to be more complicated than a simple “attitudinal” model of judicial behavior would suggest.

## I. INTRODUCTION

The United States Supreme Court’s decisions on the federal preemption of state law have emerged as a prominent field of study for legal scholars and political scientists from a broad range of perspectives.<sup>1</sup>

<sup>1</sup> For a small sample of the voluminous literature see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Political Process*, University of Michigan John M. Olin Center for Law & Economics Working Paper Series, Working Paper No. 16, 2003, online at <http://law.bepress.com/umichlwps/olin/art16>; Richard Fallon, *The Conservative Paths of the Rehnquist Court’s Federalism Decisions*, 69 U Chi L Rev 429 (2002); Ernest Young, *Two Cheers for Process Federalism*, 46 Vill L Rev 1349 (2001); Frank B. Cross and Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S Cal L Rev 741 (2000); Viet Dinh, *Reassessing the Law of Preemption*, 88 Georgetown L J 2085 (2000); Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000); Brady Baybeck and William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court*

This rise to prominence of a highly technical and often dull field of jurisprudence is due to a number of developments: increasingly frequent federal statutory preemptions;<sup>2</sup> the states' unprecedented aggressiveness in regulating business transactions,<sup>3</sup> in areas from health care provision<sup>4</sup> to banking<sup>5</sup> to antitrust,<sup>6</sup> that are also covered by federal laws; the expansion of corporate liability under state common law and the increased resort of those defendants to federal preemption defenses;<sup>7</sup> and, not least, the Rehnquist Court's discovery of federalism and states' rights.<sup>8</sup> Preemption cases have enormous conse-

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and *Preemption Cases*, 30:3 Publius 73 (2000); David B. Spence and Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal L Rev 1125 (1999); Ernest Young, *Preemption at Sea*, 67 Geo Wash L Rev 273 (1999); David M. O'Brien, *The Rehnquist Court and Federal Preemption: In Search of a Theory*, 23 Publius 15 (1993); Kenneth Starr, et al, *The Law of Preemption* (American Bar Assoc, 1991); S. Candice Hoke, *Preemption Pathologies and Civic Republican Virtues*, 71 B U L Rev 685 (1991); and Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const L Q 69 (1988). See also sources cited throughout this article.

<sup>2</sup> For (now somewhat dated) evidence see U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (UACIR, 1992).

<sup>3</sup> See generally Christopher Swope, *Made in Sacramento*, Governing 34-38 (July, 2003).

<sup>4</sup> See, e.g., Elaine Gareri Kenney, *For the Sake of Your Health: ERISA's Preemption Provisions, HMO Accountability, and Consumer Access to State Law Remedies*, 38 USF L Rev 361 (2004); and Gregory J. Scandaglia and Therese L. Tully, *Express Preemption and Premarket Approval Under the Medical Device Amendments*, 59 Food & Drug L J (2004).

<sup>5</sup> See, e.g., Robert C. Eager and C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 NC Banking Inst 21 (2004).

<sup>6</sup> See, e.g., Robert W. Hahn and Anne-Layne Farrar, *The Case for Federal Preemption in Antitrust Enforcement*, 18 SPG Antitrust 79 (2004).

<sup>7</sup> See, e.g., Stacey Allan Carroll, *Federal Preemption of State Products Liability Claims*, 36 Ga L Rev 797 (2002); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B U L Rev 559 (1997); Young, 46 Vill L Rev at 1383-1384 (cited in note 1) (noting that state common law has emerged as a central preemption concern); Michael S. Greve, *Federalism's Frontier*, 7 Tex Rev L & Polit 93, 120 (2002) (same); David S. Casey, Jr., *The Preemption Danger*, 40 Trial 9 (2004) (lamenting "unprecedented effort to preempt the civil justice system in the states").

<sup>8</sup> See, e.g., *United States v Lopez*, 514 US 549 (1995); *United States v Morrison*, 529 US 598 (2000) (re-limiting congressional authority under the Commerce Clause); *City of Boerne v Flores*, 521 US 507 (1997) (requiring congruence and proportionality for 14<sup>th</sup> Amendment enforcement legislation); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996) (protection of state sovereign immunity under Article I legislation); *Printz v United States*, 521 US 898 (1997) (barring federal "commandeering" of state executive); *New York v United States*, 505 US 144 (1992) (barring federal "commandeering" of state legislature); *Gregory v Ashcroft*, 501 US 452 (1991) (requiring "clear statement" of congressional intent as prerequisite for regulating states as states).

quences both for private interest groups (such as business and the plaintiffs' bar) and for federal-state relations.

Unfortunately, the preemption debate has been marred by misperceptions and a lack of reliable empirical data. Especially in the law reviews, extravagant attention has been lavished on a handful of landmark cases—which, for all their undeniable significance, may not be a reliable guide to the preemption universe.<sup>9</sup> Studies of judicial behavior in this area, meanwhile, have relied on an inadequate empirical foundation. Even the most complete, up-to-date, and widely-used data set, the *United States Supreme Court Judicial Data Base*,<sup>10</sup> contains only a sample of “preemption” cases—a good number of which do not conform to something a competent lawyer would recognize as preemption.<sup>11</sup> These omissions and errors have probably contributed to misconceptions—prominently, the widespread impression of a sharp discontinuity between the Rehnquist Court’s “pro-state” federalism decisions and its “nationalist” preemption decisions.<sup>12</sup> The empirical evidence, we shall see, is considerably more complicated.

This Article identifies the universe of Rehnquist Court preemption decisions, excluding only the 2004-2005 term. Our study extends exclusively to *statutory* preemption (as opposed to constitutional preemption) and, in defining that universe, follows the lawyers’ understanding of “preemption,” rather than the looser definitions sometimes adopted by political scientists.<sup>13</sup> In addition, we provide some preliminary analysis and findings. Part II describes the case universe and outcomes. Part III discusses the role of the Supreme Court—more precisely, the Court’s perception of its own role—in preemption litigation. Moving further from description to analysis, Part IV suggests that outcomes in preemption cases may be most readily explained as judicial responses to, or interpretations of, certain signals or “cues,” such as the identity of the parties or the posture of a given case.<sup>14</sup> Two sig-

<sup>9</sup> See text at note 35, *infra*.

<sup>10</sup> Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2002 Terms*, (last updated Dec. 11, 2003), online at <http://www.polisci.msu.edu/pljp/sctdata1.html>.

<sup>11</sup> See Appendix B, *infra*.

<sup>12</sup> See, e.g., Baybeck and Lowry, 30:3 *Publius* 73 (cited in note 1); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 420-422 (Cambridge, 2002); and Cross and Tiller, 73 *S Cal L Rev* at 753-754 (cited in note 2).

<sup>13</sup> See, e.g., U.S. Advisory Commission, *Federal Statutory Preemption* (cited in note 2).

<sup>14</sup> The classic exposition of “cue theory” is Joseph Tanenhaus, et al, *The Supreme Court’s Certiorari Jurisdiction: Cue Theory*, in Glendon Schubert, ed, *Judicial Decision Making* 111 (Free Press, 1963). See also S. Sidney Ulmer, William Hintze and Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 7 *L & Soc Rev* 637 (1972); Virginia Armstrong and Charles A. Johnson,

nals in particular prove significant: the presence of a state as a party to a preemption dispute, and the position of the Solicitor General. State *amicus* briefs and the partisan affiliation of the Solicitor General (Democrat or Republican) may also affect preemption case outcomes; however, we cannot show either variable to be statistically significant.

Part V examines the justices' votes in preemption cases and, in particular, the already-mentioned perception of a discontinuity between the Rehnquist Court's federalism cases and its preemption decisions. The Rehnquist Court's federalism decisions have, until very recently, worked a major doctrinal shift in federal-state relations, in favor of the states.<sup>15</sup> That shift has been the work of a stable bloc of five conservative justices, who have carried the federalism banner against a bloc of four liberal justices. In preemption law, in contrast, the justices often seem to "switch sides": liberals almost always vote "against the states" in federalism cases—and often against preemption, and thus "for the states," in preemption cases. Conservative justices often flip-flop in the opposite direction. We do find evidence that explains the impression of preemption cases as a mirror image of pure federalism cases. But that impression is in some ways misleading. In contrast to federalism law, we find no clear decisional trend in preemption law. Moreover, we find no firm voting blocs and no swing vote.

As its title suggests, our study is preliminary. First, a fully satisfactory account of the Rehnquist Court preemption record will require additional empirical evidence. We have collected but not yet evaluated some of that evidence, and we will note the lacunae throughout. Second, our principal purpose is descriptive. We do not develop or test a formal model of judicial decision-making on preemption, federalism, or anything else. The predominant, "attitudinal" model of judicial behavior essentially holds that judges vote their policy preferences.<sup>16</sup> Increasingly popular "strategic actor" models of judicial behavior proceed from the same premise but emphasize that judges must pursue those preferences in a setting of institutional constraints, both internal (notably, the expected behavior of other judges on the same

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*Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?* 15 Polity 141 (1982); and sources cited in note 47, *infra*.

<sup>15</sup> Recent decisions strongly suggest that the Court's federalism enthusiasm may have run its course. See esp. *Gonzales v Raich*, 125 S.Ct. 2195 (2005); *Nevada v Hibbs*, 538 US 721 (2003); and *Tennessee v Lane*, 541 US 509 (2004). Up to that point, however, the Rehnquist Court's jurisprudence was marked by a pronounced shift towards judicially enforceable protections for federalism and states' rights. See generally, Michael S. Greve, *Real Federalism* (Amer Enterprise Inst, 1999).

<sup>16</sup> The standard expositions of the "attitudinal model" of Supreme Court behavior are Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge, 1993); Segal and Spaeth, *Attitudinal Model Revisited* (cited in note 12).



court) and external (such as Congress or administrative agencies).<sup>17</sup> A third, “legal” model of judicial behavior holds that judges will strive to follow the law, as embodied in statutes or precedents. A “cue” or signaling theory does not map easily onto any of these models, at least not in the rudimentary form that we have chosen to employ.<sup>18</sup>

Naturally, we would be gratified if our account were to prompt more rigorous efforts to explain outcomes and judicial behavior in preemption cases. We suspect, though, that only a very sophisticated model will answer to the task. Preemption cases are multi-dimensional in at least two ways. First, they bring one conservative value (pro-business) in conflict with another conservative value (pro-state). The same is of course true of the corresponding liberal values. Second, preemption cases typically involve layers of legal issues—not only the federal-state balance but also statutory interpretation, the standard of review of administrative agency action, the role of economic reasoning in complex regulatory cases, and other matters. Look hard enough at a case that is conveniently subsumed under the general heading of “preemption”: it often becomes difficult to tell what it is a case of.<sup>19</sup> These complexities will confound any simple behavioralist model. In particular, they confound any simplistic effort to explain the discontinuity between the justices’ votes in federalism and preemption cases as a triumph of pro- or anti-business attitudes over opportunistically deployed federalism “principles.”<sup>20</sup> A plausible (and normatively fair) explanation is bound to be much more complicated. The concluding Part VI sketches our thoughts on these questions.

<sup>17</sup> See Gregory A. Caldeira, John R. Wright and Christopher J. W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15:3 J L, Econ, & Org 549 (1999); Lee Epstein and Jack Knight, *The Choices Justices* (Cong Quart, 1998); Forrest Maltzman, et al, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, 2000); William N. Eskridge, Jr., *Reneging on History: Playing the Court/Congress/President Civil Rights Game*, 79 Cal L Rev 613 (1991).

<sup>18</sup> Under any plausible theory, a judge will have to use cues or signals to screen and organize information. But that tells us nothing about the progeny or tendency of the screening devices. Some may be ruthlessly attitudinal (“I will always vote against a big business party”); others may be legal (“I will follow the Solicitor General unless I have a powerful reason to distrust his averments”); still others may be ambiguous (“I will trust states but not private litigants when it comes to federalism arguments”).

<sup>19</sup> Prominently, the justices have disagreed on whether preemption cases have to do with “federalism” or rather should be understood as pure statutory construction cases. In *AT&T Corp v Iowa Utils Bd*, 525 US 366 (1999), for example, Justice Scalia (writing for the majority) expressed his puzzlement about the appearance of “federalism” arguments in Justice Breyer’s dissent. In *Geier v Honda Motor Co*, 529 US 861 (2000), it was Justice Stevens’ turn to invoke federalism arguments against Justice Breyer’s pro-preemption opinion for the Court—which declined to discuss “states’ rights” issues.

<sup>20</sup> See, e.g., Baybeck and Lowry, 30:3 Publius at 74 (cited in note 1) (“Chief Justice Rehnquist and Antonin Scalia, both prominent advocates of states’ rights, abandoned federalism and joined the majority in protecting Honda’s interests” [in *Geier v Honda*, 529 US 861 (1999)]).

## II. PREEMPTION CASES AND OUTCOMES

### A. Case Volume

We identified 105 preemption cases that were decided by written opinion(s), listed in Appendix A by Term, case name, and citation. Our case search and examination are described in Appendix B. Preemption cases range in frequency from two cases in the 1997-98 Term to a high of 13 (1986-87), with an average of slightly under six cases per Term. Figure 1 shows the distribution.

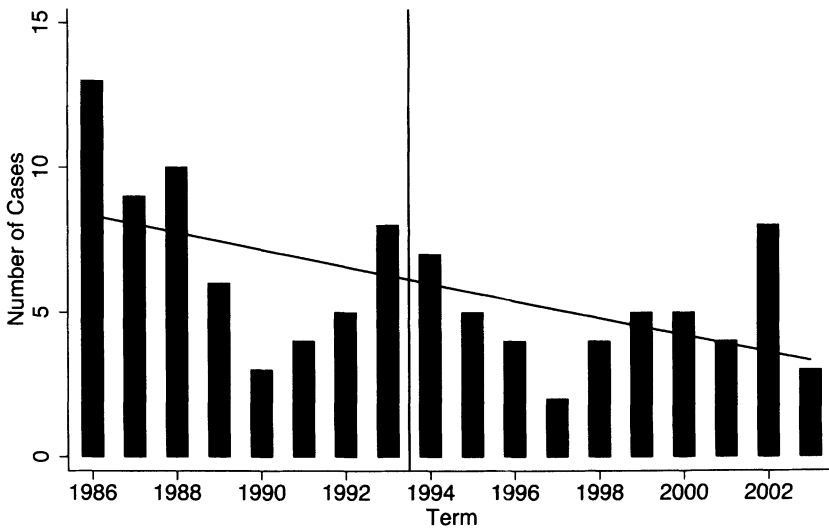


Figure 1. Cases by Term

Following Thomas Merrill,<sup>21</sup> we distinguish between the “First” Rehnquist Court (“FRC”) and the “Second” Rehnquist Court (“SRC”). As indicated by the vertical line in Figure 1, the First Rehnquist Court comprises the eight Terms between 1986-87 and 1993-94. The Second Rehnquist Court encompasses the ten Terms from 1994-95 to 2003-04. For that entire duration, the Court—following Justice Stephen Breyer’s appointment in 1994—has been sitting in its current composition. The distinction has the incidental advantage of cutting

<sup>21</sup> Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *SLU L J* 569 (2003). Merrill’s thought-provoking article argues that the Second Rehnquist Court’s stable composition, by enhancing the justices’ ability to predict each other’s votes, may explain important aspects of the Court’s performance. The extent to which the Court’s *preemption* record is consistent with Merrill’s hypothesis is an intriguing question, but beyond the scope of this study.



the preemption case universe roughly in half. Comparisons between the FRC and SRC may help to detect shifts and changes in preemption law.<sup>22</sup>

The trendline in Figure 1 indicates that preemption cases have declined in frequency. The FRC decided 58 preemption cases, or slightly over seven cases per term. The SRC decided 47 cases, slightly under five cases per term. This drop mirrors the decline of the Rehnquist Court's over-all docket and, more narrowly, its civil docket. For both the FRC and the SRC, preemption cases constituted roughly eight percent of the Court's civil docket.<sup>23</sup>

## B. Subject Matter

We divided the case universe into seven subject-matter categories.<sup>24</sup> The number of cases in each group is shown in parentheses.

- *Labor and Employment* (32), including employment benefits (other than safety regulations). This category contains a very large number of ERISA cases.
- *Economic Regulation* (17), such as the (typically, industry-specific) regulation of banking, insurance, and securities. The category *excludes*
- *Transportation and Infrastructure* (15), which contains industry-specific laws and regulations that govern *network* industries, including telecommunications, railroads, electricity, airlines, and trucking.
- *Health, Safety, and Environmental Regulation* (13) encompasses all laws administered by, and regulations issued by, federal administrative agencies that are entrusted primarily (or exclusively) with the protection of public health and safety, including the EPA, OSHA, the FDA, and NHTSA.

<sup>22</sup> See, e.g., text at notes 42-44, *infra*.

<sup>23</sup> Over its eight terms, the FRC decided 1,011 cases, 724 of them civil, by written opinion. The SRC decided 823 total cases, 578 of them civil in its ten terms. Figures for 1986-2002 Terms compiled from *The Supreme Court, 1986-2002 Term*, Harv L Rev (November, annual in 17 volumes); 2003 Term calculations by the authors' count.

<sup>24</sup> The commonly used *United States Supreme Court Judicial Database* codes cases as *either* "preemption" (issue codes 910, 911) or as belonging to some substantive issue or issue area. That coding is based on a legitimate and—certainly, for political scientists—sensible interest in policies rather than legal distinctions. Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2002 Terms*, Documentation 41 (last updated Nov. 25, 2003), online at <http://www.polisci.msu.edu/pljp/sctcode.pdf>. Still, the procedure entails that "preemption" becomes a residual and underinclusive category. See Appendix B. The procedure adopted here—identifies preemption cases first, and then group by issue—permits a more nuanced analysis of preemption jurisprudence.

- *Public Benefits* (8), meaning benefits such as Social Security, Medicaid, and Veterans' Benefits.<sup>25</sup>
- *Taxation* (6), as distinct from regulation.
- *Other Cases* (14). This category contains five cases concerning the preemptive force of the Federal Arbitration Act, four cases dealing with Indian affairs, and five cases on a variety of issues from government contracting to elections.

The last three categories are self-explanatory, and pose no classification problems. The first four categories encompass the activities of the regulatory state and, collectively, comprise three-quarters of Supreme Court preemption disputes during both the FRC and the SRC. Table 1 shows the distribution.<sup>26</sup>

**Table 1. Preemption Cases by Subject-Matter**

	FRC	SRC	TOTAL
Labor & Employment	22	10	32
Economic Regulation	8	9	17
Transportation & Infrastructure	6	9	15
Health, Safety, Environment	7	6	13
<b>Subtotal Regulatory</b>	<b>43</b>	<b>34</b>	<b>77</b>
Public Benefits	4	4	8
Taxation	5	1	6
Other	6	8	14
<b>Subtotal Non-Regulatory</b>	<b>15</b>	<b>13</b>	<b>28</b>
<b>Total</b>	<b>58</b>	<b>47</b>	<b>105</b>

<sup>25</sup> Arguably, not all cases in this category are true preemption cases. When the injunction against state law flows from the state's acceptance of federal funds (e.g., under Medicaid), the state can (at least in theory) evade "preemption" through the simple expedient of not accepting the funds. An ordinary preemption case, of course, offers no such escape. Nonetheless, the justices have characterized and analyzed such cases as preemption cases, and we take their word for it. See, e.g., *Pharm Research & Mfrs of Am v Walsh*, 538 US 644 (2002).

<sup>26</sup> Distinctions are hard to draw in some individual cases. For example, some preemption cases turn on near-metaphysical distinctions between state health care laws that regulate "the business of insurance" and those that do not. The latter are preempted under ERISA; the former survive preemption under the McCarran-Ferguson Act. See, e.g., *Ky Ass'n of Health Plans, Inc v Miller*, 538 US 329 (2002). It seems equally plausible to lump those cases under "Economic Regulation" or "Labor and Employment." (We chose the latter option.) The vast majority of cases, however, could easily be assigned to one or the other category.

### C. Torts

The preemption of state *common law*—as distinct from state or local statutes—has become a particularly contentious issue both among the justices and legal scholars.<sup>27</sup> Corporate interests look to federal preemption as a last line of defense against state courts and juries, while states (and many legal scholars) lament preemption as an unwarranted interference in an area of “traditional” state power. Landmark cases from *Cippolone v. Liggett*<sup>28</sup> to *Geier v. Honda Motor Company*<sup>29</sup> illustrate the salience of this question.

We identified 32 cases (out of 105) that deal with the federal preemption of state common law claims. Since those claims almost always sound in tort, we called the cases “tort cases.” The aggregate count of tort cases arguably understates their significance, since all but two of them fall into one of the four regulatory categories.<sup>30</sup> In these areas, where the plaintiffs’ bar meets the federal regulatory state, tort cases comprise nearly 40 percent of the case universe, with a slight relative increase for the SRC. Table 2 shows the rounded percentage of tort cases in each category (total number of cases in parentheses).

**Table 2. Preemption of Tort Claims by Subject-Matter (Regulatory Cases)**

	FRC	SRC	TOTAL
Labor & Employment	45% (22)	30% (10)	41% (32)
Economic Regulation	25% (8)	33% (9)	29% (17)
Transportation & Infrastructure	17% (6)	55% (9)	40% (15)
Health, Safety, Environment	28% (7)	66% (6)	46% (13)
<b>Total</b>	35% (43)	44% (34)	39% (77)

Do tort cases differ in some systematic way from cases involving the preemption of statutory law? A first glance at case outcomes suggests an affirmative answer: 20 of the 32 tort cases, or 62.5%, resulted in a ruling for preemption, whereas only 47.9% of the 73 non-tort cases (35) yielded that outcome. For the SRC, the difference widened to a pro-preemption outcome in 67.6% of tort cases and only 45.0%

<sup>27</sup> See note 7 and accompanying text, *supra*.

<sup>28</sup> *Cippolone v Liggett*, 505 US 504 (1991).

<sup>29</sup> *Geier v Honda Motor Co*, 529 US 861 (1999).

<sup>30</sup> The two remaining tort cases, classified as “Other,” both arose under the Federal Arbitration Act. *Mastrobuono v Shearson Lehman Hutton*, 514 US 52 (1995); *Green Tree Fin Corp v Bazzle*, 539 US 444 (2003).

in non-tort cases. These numbers suggest a (perhaps increasing) judicial hostility to state common law. That impression, however, is likely unwarranted. With only two exceptions, tort cases do not involve states as parties. We will argue below that the lack of state participation, rather than the nature of the state law claim (common law versus statutory), most likely explains the higher probability of preemption rulings in tort cases.<sup>31</sup>

#### D. Parties

We distinguish four types of parties in preemption disputes: “Federal” (meaning any branch, agency, or official of the federal government); “State” (meaning any branch, agency, or official of a state government, including local governments and their agents); “Business” (any for-profit corporation or trade association of such enterprises); and other “Private” (including trade unions, Indian tribes, or unaffiliated individuals, such as private plaintiffs in a state tort action).

It is tempting to think of preemption cases as disputes “between the feds and the states.” But while that is true in an abstract legal sense, it is grossly misleading as a matter of litigation economy and case participation. Table 3(a) shows the frequency with which the four categories of parties figured as plaintiffs and defendants in preemption cases that eventually wound their way into the Rehnquist Court. Table 3(b) performs the same operation for petitioners and respondents. The shaded areas and **bold** numbers show the most common constellations of parties.<sup>32</sup>

The Tables show that *the enforcement (or not) of federal preemption through litigation is, to a large extent, the work of business or other private parties*. For example:

- Preemption cases are almost always initiated by a private party. In an overwhelming number of cases (94 out of 105), a business or other private party figured as the plaintiff. State governments participated as an original party to a preemption dispute in just over half of all cases (54)—but typically as

<sup>31</sup> See Part IV *infra*.

<sup>32</sup> The aggregate numbers for the two most common party constellations (Non-Government cases, and those between a state and a private party) in the Plaintiff/Defendant Table do not precisely match the numbers for the same constellations in the Petitioner/Appellee Table. The discrepancy arises because we coded cases in accordance with the principal plaintiff (defendant/petitioner/appellee), as identified in the official caption of each case. In three cases, either the caption or the actual posture of the case changed between its initiation and the Supreme Court’s decision, in such a way as to affect the classification.

Table 3(a).    Preemption Cases by Plaintiff and Defendant

Plaintiff	Defendant				Total
	Business	Private	State	Federal	
Business	6	2	29	1	38
Private	32	8	15	1	56
State	3	1	3	2	9
Federal	0	1	1	0	2
Total	41	12	48	4	105

Table 3(b).    Preemption Cases by Petitioner and Respondent

Petitioner	Respondent				Total
	Business	Private	State	Federal	
Business	6	30	17	0	53
Private	6	8	4	1	19
State	14	10	3	4	31
Federal	0	0	2	0	2
Total	26	48	26	5	105

defendants. In only nine cases did a state agency initiate the lawsuit.<sup>33</sup>

- In cases in which the Rehnquist Court granted *certiorari* and reached a decision on the merits, business petitions (53) far outnumber state petitions (31). Petitions by non-governmental parties (*i.e.*, “Private” and “Business” combined) constitute almost 70 percent of the case universe. A mere six cases (out of 105) involved both the federal and a state government as parties. Conversely, 50 cases involved exclusively private parties.

<sup>33</sup> Curiously, eight of those cases were decided by the FRC. With this one exception, the pattern shows little change between the FRC and the SRC. For that reason (and because the numbers become too small for meaningful statistical comparison), FRC and SRC numbers are not displayed here.

The prominent role of private litigants will prove crucial to an understanding of case outcomes. As shown in Part IV, party constellations have a significant effect on preemption case outcomes. All else equal, rulings *against* preemption are much more likely in cases to which the state is a party than in Non-Government cases.

### E. Outcomes and Votes: A Note on “Mixed” Cases

We coded the outcome in each preemption case, and each justice’s vote in each case, as an outcome or vote *for* or *against* preemption. A few cases, and a larger number of judicial votes and opinions, defied such easy classification—typically, because the Supreme Court held a state law, court judgment, or cause of action to be “partially” preempted. In a few of these “mixed” cases, it proved possible to determine whether the Court’s ruling was *predominantly* (non-) preemptive, and we coded those cases accordingly. Case-by-case examination yielded an unambiguous outcome in 99 of the 105 cases, leaving six cases whose outcome could only be described as “mixed.” In an additional five cases, a minority of justices submitted a “mixed” opinion. In coding these observations, we scored each case or vote as two separate observations and, for statistical purposes, weighted each observation at 50%. Appendix C describes our method and our reasons for adopting it.

The “mixed” cases differ from the preemption universe in two salient respects. First, while fewer than one-third of the Rehnquist Court’s preemption cases have involved state common law claims rather than statutes, four of the six mixed cases, and six of the eleven cases in which any justice submitted a mixed vote, involve the federal preemption of state *common law* and especially tort law.<sup>34</sup> Second, the Rehnquist Court’s preemption decisions show a high degree of consensus: fully 54 of the 105 cases, or over half, were unanimous decisions. The cases with “mixed” votes or verdicts, in contrast, sparked far more disagreement among the justices. Six of the eleven cases, including two of the cases involving the preemption of common law claims, were contested. This pattern explains scholars’ view of state common law preemption as an unsettled frontier of preemption law. The danger lies in mistaking the contested frontier for the considerably more pacific hinterland.

<sup>34</sup> In addition to *Cipollone*, 505 US 504 (1992), the following three cases involving the preemption of state common law produced “mixed” outcomes: *International Paper Co v Ouelette*, 479 US 481 (1987); *CSX Transp, Inc v Easterwood*, 507 US 658 (1993); and *American Airlines, Inc v Wolens*, 513 US 219 (1995). The additional state common law preemption cases that produced mixed opinions by a minority of justices are *Medtronic v Lohr*, 518 US 470 (1995) and *El Al Israel Airlines, Ltd v Tsui Yuan Tseng*, 525 US 155 (1999).

## F. Conflict and Consensus

As just noted, over half of the Rehnquist Court's decisions (54 of 105) have been unanimous. This level of consensus is higher than the general degree of unanimity on the Rehnquist Court, which is 40.3% for all cases.<sup>35</sup> The ratio has remained roughly constant: 29 of the FRC's 58 preemption cases (50.0%) were unanimous, and 25 of the SRC's 47 preemption decisions (53.2%) fit that description.

A strict definition of unanimity arguably overstates the level of judicial conflict especially in preemption cases, where individual justices sometimes hold idiosyncratic views on a particular question or statute.<sup>36</sup> For a more nuanced assessment, we categorized outcomes as "consensual" or "contested," depending on the vote differential. "Consensual" cases are those with a vote differential of four or above—or, put differently, with no more than two dissenting votes (*e.g.*, 6-2 or 7-2). "Contested" cases are those with a vote differential of 3 or below (*e.g.*, 6-3). By that measure, one in four preemption cases proved contested. Table 4(a) shows the distribution. In addition, the mixed cases yielded nine (near-) unanimous verdicts on a preemption question presented in those cases (five for the FRC, and four for the SRC). The weighted distribution is shown in Table 4(b).

**Table 4(a). Judicial Conflict and Consensus in Preemption Cases (unweighted)**

	Consensual			Contested	Total
	Unanimous	1-2 Dissents	Subtotal		
FRC	29	15	44	14	58
SRC	25	11	36	11	47
<b>Total</b>	54	26	80	25	105

<sup>35</sup> Figures for 1986-2002 Terms compiled from "Table I (C)—Unanimity," *The Supreme Court, 1986-2002 Term*, Harv L Rev (November, annual in 17 volumes); 2003 Term calculations: authors' count.

<sup>36</sup> For example, Justice Thomas, alone among all justices, has consistently argued that the Federal Arbitration Act lacks preemptive force. See *Doctors Associates, Inc v. Casarotto*, 517 US 681, 689 (1996); *Mastrobuono v Shearson Lehman Hutton*, 514 US 52, 64 (1995). Justice Stevens and Justice Souter also sometimes dissent from otherwise unanimous rulings for preemption. Justice Stevens has written five such dissents; Justice Souter, one. *Engine Mfrs Ass'n v So Coast Air Quality Mgmt Dist*, 541 US 246 (2004) (Souter, J., dissenting). We have found only one lone dissent from an otherwise unanimous ruling *against* preemption: *Nixon v Missouri Municipal League*, 541 US 125 (2004) (Stevens, J., dissenting).



**Table 4(b). Judicial Conflict and Consensus in Preemption Cases (weighted)**

	Consensual			Contested	Total
	Unanimous	1-2 Dissents	<i>Subtotal</i>		
FRC	30.5	16	46.5	11.5	58
SRC	25	13	38	9	47
<b>Total</b>	55.5	29	84.5	20.5	105

### G. Outcomes

Table 5 shows the weighted conditional probabilities of *pro*-preemption outcomes, broken down by period (FRC/SRC) and level of dissension (consensual/contested). The number of cases is given in parentheses.

**Table 5. Probabilities of Pro-Preemption Ruling by Level of Dissension**

	Consensual	Contested	Total
FRC	.51 (46.5)	.57 (11.5)	.52 (58)
SRC	.51 (38)	.61 (9)	.53 (47)
<b>Total</b>	.51 (84.5)	.59 (20.5)	.52 (105)

Two observations leap out. First, preemption litigation in the Supreme Court has proven by and large a fifty-fifty proposition in both periods.<sup>37</sup> Preemption outcomes are slightly more probable in contested cases, although the number of cases is too small to attach much significance to this finding. Second, the picture strongly suggests continuity rather than change. In particular, and perhaps contrary to perceptions of the Court's increased solicitude for "states' rights," the Rehnquist Court does *not* appear to have become more hostile to federal preemption, at least not by a measure of case outcomes.

That simple measure, of course, may mask important differences in (for example) the selection of cases or the effect of particular rul-

<sup>37</sup> This finding is broadly consistent with earlier empirical assessments. *E.g.* O'Brien, 23 *Publius* at 22 (Table 3) (cited in note 1).

ings.<sup>38</sup> Most important, preemption cases may be path-dependent, especially when they involve the same statute time and again.<sup>39</sup> With all appropriate caution, though, the picture suggests the following inference: In periods of dramatic legal change, the composition of case outcomes (here, for or against preemption) should be expected to change. A Supreme Court majority with the will and cohesion to work legal change will want to do so in a series of cases, and it will find the means to select suitable cases for review.<sup>40</sup> Preemption cases reflect no such pattern. To the extent that preemption law has changed, that change has been subterranean, or a game of inches—and perhaps both.

### III. WHAT ROLE FOR THE SUPREME COURT?

Preemption cases centrally implicate the institutional role of the Supreme Court, both with respect to federal-state relations and vis-à-vis the Congress. For example, do the justices think of their role as guardians and enforcers of federal supremacy? As protectors of a federal-state “balance”? Without pretensions to analytical rigor, one can intuitively distinguish three conceptions of the Supreme Court’s role in preemption cases: a “supremacy” conception; an “error correction” conception; and a “federalism” conception. The pattern of Supreme Court reversals or affirmances of lower-court decisions provide indirect—and, as we shall see, inconclusive—evidence on the Supreme Court’s adherence to one or another of these ideal types.

The *supremacy* conception would have the Supreme Court act as a guardian and enforcer of federal and especially congressional su-

<sup>38</sup> “Selection” here means case selection by the Supreme Court through the *certiorari* process. In this discretionary and strategic context, theories that model the selection of cases by *litigants* (see, e.g., George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984)) cannot be used to predict litigation outcomes (although they may well apply to parties’ decisions to file *certiorari* petitions).

<sup>39</sup> Suppose that business interests and state governments contest the scope of a federal preemption statute in a series of cases, each with a fifty-fifty record of success. (The continuous litigation over federal preemption under ERISA is an example.) Let the Supreme Court, in the next case involving the statute, substantially increase (or decrease) the preemptive scope of the statute: states will legislate around that new interpretation, and parties will again litigate over its precise meaning. A new series of cases may again produce fifty-fifty results, but one cannot infer that preemption law has remained stable.

<sup>40</sup> The Rehnquist Court’s decisions on the states’ sovereign immunity in the wake of *Seminole Tribe of Florida v Florida*, 517 US 44 (1997), are an example: here, the Court decided in the states’ favor in a quick succession of cases. See Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 Mich L Rev 1463, 1488-91 (2003) (Appendix listing cases).

premacy. If so, one should expect that the Court would disproportionately review, and disproportionately reverse, lower-court decisions *against* preemption. (Why grant *certiorari* in a case where lower courts have already enforced federal supremacy?) Further, one might suspect that the Supreme Court would disproportionately reverse anti-preemption rulings by *state* courts, which may have a higher propensity than federal courts to slight federal prerogatives.

A second conception would have the Supreme Court act as a kind of *error correction* agency in preemption cases (though not necessarily as a general proposition). Preemption analysis is essentially a matter of statutory interpretation. Assuming Congress had the constitutional authority to legislate, the only question is whether and to what extent Congress meant to preempt state and local law. To the extent possible, the Court should go about that task without interpretive presumptions that bias the result for or against Congress.<sup>41</sup> One eminently plausible presumption, however, is that Congress would want the preemptive scope and effect of its enactments to be both clear and uniform. This presumption counsels judicial aggressiveness in eliminating lower-court “splits” and erroneous rulings. On this view, one should expect a high reversal rate, with no necessary bias in a pro- or anti-preemption direction.

Under the third, *federalism* conception, the Court’s “nationalist” impulse to safeguard federal supremacy—and perhaps its error-correction function—will be tempered by a concern for states’ rights. It is difficult to decide how these conflicting presumptions should shake out in the general balance of outcomes. It stands to reason, though, that the states’ rights perspective should have gained strength over time, in tandem with the Court’s over-all federalism jurisprudence and its changed composition.

In an effort to obtain (albeit indirect) evidence on the Court’s view of its role, we determined whether preemption cases arrived at the Supreme Court from a *state* court (usually a state supreme court) or a *federal* court. In addition, we determined whether the Supreme Court *affirmed* or *reversed* the lower court’s ruling. Both variables suggest a pronounced shift in the Supreme Court’s preoccupation. Those shifts, however, do not clearly support or refute any of our three stylized conceptions. Moreover, Figures 2 and 3 suggest that the observed changes in direction roughly coincide with the transition from the FRC to the SRC: the trendlines begin to diverge in the 1994 and

<sup>41</sup> See Viet Dinh, 88 Georgetown L J at 2087-88 (cited in note 1). On the Supreme Court, Justice Scalia is the most insistent advocate of this position. See, e.g., *Cippolone v Liggett*, 505 US 504, 544 [1992] (Scalia, J., diss.).

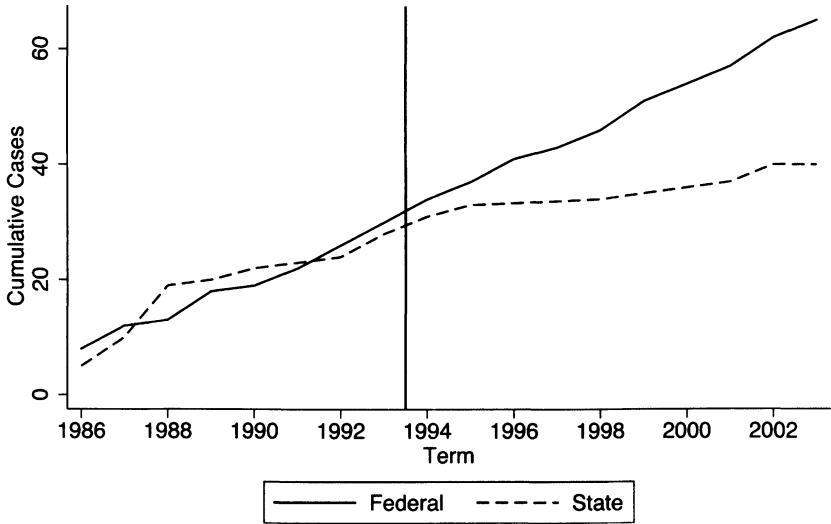


Figure 2. Source of Case

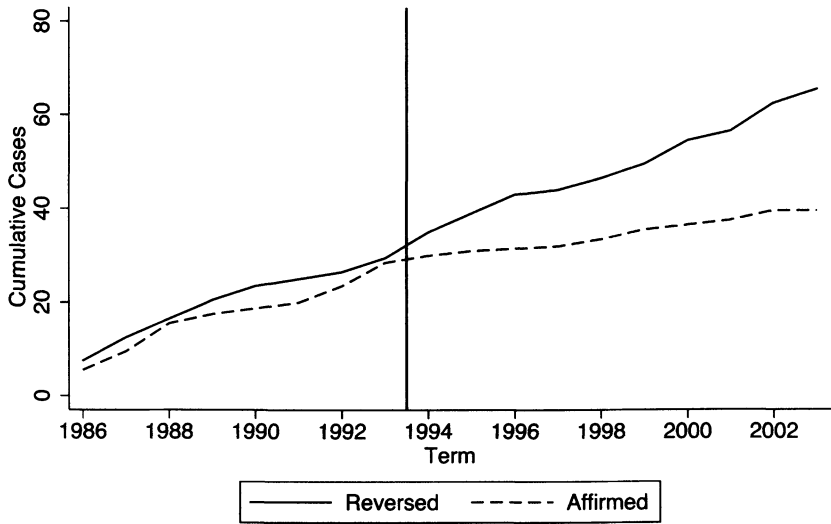


Figure 3. Disposition of Case

1995 Terms. We cannot think of any obvious explanation of why this should be so.

The Rehnquist Court granted *certiorari* to state courts in 40 cases and to lower federal courts, in 65 cases. This mix differs substantially from the composition of all civil cases decided by the Rehnquist

Court: upwards of 84% of those cases have come from federal rather than state courts.<sup>42</sup> On this dimension, moreover, preemption cases show a striking difference between the FRC and the SRC. The FRC granted an almost equal number of *certioraris* to state courts (28) and federal courts (30). The Second Rehnquist Court, in contrast, has focused its attention on *federal* courts: 35 *cert* grants to federal courts, and only 12 to state courts.

A similarly intriguing shift is observable in the reversal/affirmance pattern. Overall, the Rehnquist Court reversed lower-court decisions in 63 cases and affirmed in 37. In the remaining five cases, the Supreme Court affirmed in part and reversed in part, with respect to different and separable preemption claims on which either the Supreme Court or the court below rendered a "mixed" verdict.<sup>43</sup> This ratio of roughly six reversals for every four affirmances is virtually identical to the Court's reversal rate for all cases over the period under consideration.<sup>44</sup> Again, though, the data suggest a marked shift: a near-balance (29:27, with two split reversal/affirmance decisions) in the FRC, and a ratio of over 3:1 (34 reversals versus 10 affirmances, with three splits) for the SRC.

Closer inspection reveals a yet more perplexing picture. Table 6(a) shows the weighted conditional probabilities of *affirmance*, depending on whether the case (i) came from a state or federal court and (ii) was decided for or against preemption by the court below. Table 6(b) contains the same information, but distinguishes between FRC and SRC. The most striking aspect is the sharply lower affirmance rate for state courts during the SRC, regardless of the direction of the lower court's decision.

To what extent does the evidence support one of the three conceptions of the Supreme Court's role in preemption cases? Looking at Table 6(b), the Rehnquist Court reviewed a much larger number of state court decisions *against* preemption (28) than state court deci-

<sup>42</sup> During the FRC, 118 (or 16%) of 724 civil cases came from state courts. During the SRC, the numbers dropped to 63 (11%) of 578 civil cases. For the entire duration of the Rehnquist Court, the numbers work out to 181 (14%) of 1302 civil cases. Figures for 1986-2002 Terms compiled from *The Supreme Court, 1986-2002 Term*, Harv L Rev (November, annual in 17 volumes); 2003 Term calculations: authors' count.

<sup>43</sup> In coding these decisions, we proceeded as we did with the "mixed" cases: we coded the reversed and affirmed portions as separate observations and weighted each at fifty percent. The five cases are *Cippolone v Liggett*, 505 US 504 (1992); *Treasury Dept v Fabe*, 508 US 491 (1993); *American Airlines v Wolens*, 513 US 219 (1995); *Medtronic v Lohr*, 518 US 470 (1996); and *UNUM v Ward*, 526 US 358 (1999).

<sup>44</sup> Lee Epstein, et al, eds, *The Supreme Court Compendium: Data, Decisions and Developments* at 228-229 (Cong Quart 3d ed, 2002) (showing reversal rate of 59% over the 1986-2001 period). As a subgroup, states and territories fared little better, with a 61.5% reversal rate before the Court. *Id* at 710-711.

Table 6(a).   Probabilities of Affirmance, Depending on Lower Court Disposition

	Lower Court Pro-Preemption	Lower Court Anti-Preemption
State Court	.33 (12)	.45 (28)
Federal Court	.41 (34.5)	.30 (30.5)

Table 6(b).   Probabilities of Affirmance, Depending on Lower Court Disposition—  
FRC and SRC

	FRC		SRC	
	Lower Court		Lower Court	
	Pro-P	Anti-P	Pro-P	Anti-P
State Court	.50 (6)	.55 (22)	.17 (6)	.08 (6)
Federal Court	.51 (19.5)	.33 (10.5)	.28 (15)	.27 (20)

sions for preemption (12). In cases from federal courts, in contrast, lower court decisions for preemption outnumber those against (34.5 to 30.5). This observation may lend modest support to the *supremacy* conception. On the other hand, Table 6(a) shows that state courts were more likely to be affirmed in cases where they had ruled against preemption (.45 affirmance, versus .33 affirmance in decisions for preemption). This observation, plus perhaps the larger number of federal court decisions under review, would seem to cut in the opposite direction.

Overall, cases over lower court rulings against preemption outnumber reviews of lower court decisions for preemption (58.5 versus 46.5), lending modest support to a supremacy view. Then again, the conditional probabilities of affirmance are comparable for lower-court rulings for and against preemption. Sustained adherence to a supremacy conception should produce a higher number of reversals in cases where lower courts found no preemption.

Table 6(b) provides one piece of evidence for a *federalism* conception—to wit, the Rehnquist Court’s increased propensity to review preemption ruling by federal rather than state courts. The Court reviewed a roughly equal number of federal appellate decisions in both periods. It also reviewed six state court decisions in favor of preemption in each period. In sharp contrast, reviews of state court decisions against preemption dropped from 22 to six. One could say that these

cases account for more than the entire drop in volume between the FRC (58 preemption cases) and the SRC (47). The evidence is equally supportive, however, of a marked shift towards an *error-correction* view. The SRC found only 1.5 cases (out of twelve) in which a state court had gotten it “right,” and even the federal courts had better than .7 probability of being reversed—regardless of whether they ruled for or against preemption.

The observed shifts between the FRC’s and the SRC’s *certiorari* patterns seem too substantial to be a fluke. Naturally, we have toyed with possible explanations—in particular, Thomas Merrill’s suggestion that the high predictability of judicial votes on a Supreme Court with stable personnel will shape judicial behavior and case outcomes.<sup>45</sup> That hypothesis might help to explain some of the observed shifts, such as the higher reversal rate under the SRC: if “error correction” is a basic function of (preemption) review, then the reversal rate should rise as the justices get better at predicting what all the other justices will view as an error.

Answering these questions would require systematic information on the supply of preemption cases, for the obvious reason that the pronounced shifts just described may reflect either a changed *cert* pool or a different set of choices *from* that pool (or both). *Certiorari* petitions may have shifted from state to federal courts for a variety of reasons. Similarly, preemption law may be an arena of increased circuit court splits and dissents, which might explain a shift to *certiorari* grants to federal courts even if the proportion of petitions from state and federal courts held constant. We have collected much of that information but decline to present it here because the coding and analysis pose difficult problems that merit a full discussion in a separate article.<sup>46</sup>

Given these limitations, we must be satisfied to observe that the change in the pattern of *certiorari* grants has not translated into a change in the Supreme Court’s *direction* with respect to preemption outcomes. A significant shift in a pro- or anti-preemption direction should produce a string of decisions in that direction and a disproportionate number of reversals of lower court decisions in the oppo-

<sup>45</sup> See note 21, *supra*.

<sup>46</sup> For a ready example, while scholars agree (and the Supreme Court has consistently stated) that circuit splits—and more broadly judicial dissension in the courts below—is an important cue for *certiorari* grants, “splits” is not a dichotomous, yes-or-no variable. Lawyers obtain ample compensation to distinguish or harmonize cases. Especially in preemption cases, which often hang on highly nuanced differences among statutory provisions, administrative regulations, or private claims, the “split” signal is highly subject to strategic manipulation both by litigants and justices—and, consequently, to coding and measurement error.



site direction—until the lower courts take the hint. No such shift, however, is observable.

## IV. EXPLAINING OUTCOMES

### A. A Signaling Theory of Preemption

In examining the variables that may explain the outcomes of Supreme Court preemption decisions, we follow scholars who have argued that the Supreme Court relies on signals or “cues,” such as the identity of the parties. What gives signaling theory its plausibility is the insight that the Supreme Court must economize on information. That recognition applies to merits as well as *certiorari* decisions,<sup>47</sup> and it applies with particular force in the context of statutory preemption. First, preemption cases are a steady diet, which implies a premium on not having to think through each case from scratch. Second, the general heading of “preemption” encompasses a broad range of disparate cases involving tobacco advertising, automobile safety, medical devices, telecommunications pricing, outboard motors, and HMOs. The cases involve tangled regulatory schemes, whose political dynamics and economic consequences—it is safe to say—are usually a mystery to the justices. Since life is short, a sensible justice will attempt to reduce the complexity—*inter alia*, by relying on signals. Third, preemption cases pose a high risk of gamesmanship. When the ACLU pushes a First Amendment claim or the NAACP defends a civil rights law, what the Court sees is what it gets. In preemption cases, in contrast, solemn arguments about the sanctity of “our federalism” or “federal supremacy” are often proffered by business or trial lawyers. These parties’ federalism arguments are bound to be strategic, and their alarms will often be false. That consideration, too, might induce a rational judge to look to more reliable signals. We concentrate on the *identity of the parties* as “signals” and examine four hypotheses:

<sup>47</sup> Cue theory has been developed, in increasingly sophisticated game-theoretic variations, primarily in the context of the *certiorari* process. See, e.g., Gregory Caldeira and John Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82:4 *Am Pol Sci Rev* 1109 (1988); H. W. Perry, Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard, 1991); Charles E. Cameron, et al, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94:1 *Am Pol Sci Rev* 101 (Mar 2000). However, at least one scholar has fruitfully applied an informal signaling theory to Supreme Court merits decisions in dormant Commerce Clause cases (which, as a species of federal common law preemption, bears affinity to statutory preemption and especially “implied” preemption): Christopher Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 *S Ct Econ Rev* 233 (1999).

- *State Parties*. A state's complaint about unwarranted federal interference is substantially more authentic and credible than a private party's averment to the same effect.<sup>48</sup> Hence, rulings against preemption will be more likely in cases to which a state is a party than in "Non-Government" cases—that is, cases among private parties.
- *State Amici*. In "Non-Government" cases, the presence of state *amici* should serve to validate federalism arguments and render rulings against preemption more likely.<sup>49</sup>
- *The Solicitor General*. Empirical studies have consistently found that the Office of the Solicitor General ("OSG") "enjoys a unique degree of success as an amicus filer."<sup>50</sup> We hypothesize that the OSG should play a particularly salient role in preemption cases. Those cases turn on the interpretation of federal statutes and agency regulations, where the federal government possesses both special expertise and a high stake in the outcome. Perhaps more interestingly, we predict that the OSG "signal" will be asymmetric. By virtue of its institutional position, the OSG is expected to defend federal prerogatives. An OSG position *for* preemption, in other words, is a kind of default position that conveys little (if any) additional information. In contrast, if the OSG *disclaims* preemption, its position should carry great weight with the Justices.
- *OSG Partisan Affiliation*. We hypothesize that the Supreme Court will view Republican OSGs as more business-friendly, and therefore more supportive of preemption, than Democratic OSGs. Therefore, the effects of the OSG's position for or against preemption should be more strongly asymmetric for Republican than for Democratic OSGs.

This Part first presents the descriptive statistics on the effects of state participation, state *amicus* briefs, and the OSG's participation and partisan affiliation. We then present a simple regression analysis, which shows that the effects of state party participation and OSG participation are sizeable and statistically significant. The evidence on state *amicus* briefs is more mixed: while correlations suggest that

<sup>48</sup> Cf. Drahozal, 7 S Ct Econ Rev 233 (cited in note 47) (showing that dormant Commerce Clause claims by state parties are more successful than complaints by private parties and attributing the phenomenon to the greater authenticity and credibility of federalism complaints by state parties).

<sup>49</sup> While the evidence on the effectiveness of (state) *amicus* briefs is mixed, the authors of the most extensive and sophisticated study have identified some such effects: Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U Pa L Rev 743 (2000).

<sup>50</sup> *Id* at 774.

such briefs may have the desired effect of making rulings in favor of preemption less likely, that effect appears to be neither large nor statistically significant. The same is true of the OSC's Partisan Affiliation: intriguing correlations, but no statistical significance. Nor could we find any other variable with a statistically significant effect on preemption case outcomes. The Part concludes with a brief suggestion for further research.

## B. State Parties

Preemption cases typically take one of two forms:

- *State Participation*: A business or other private party sues a state government. The private plaintiff wields preemption as a sword against the state, and a pro-preemption ruling translates into a loss for the state. This characterization also applies to the rare cases (five) in which a state government initiates a suit against a private party.
- *Non-Government*: A private party (such as a tort plaintiff) sues another private party (typically, a business). Here, defendants wield preemption as a shield against private state law claims. A ruling for preemption in a case brought by private plaintiffs translates into a win for business. No state participates directly in the litigation, but one might say that a pro-preemption outcome translates into an incidental or collateral loss to the state.

In the form in which the cases appeared before the Court—that is, as counted by “petitioners” and “respondents”—the Rehnquist Court has decided 45 “State Party” cases and 50 “Non-Government” cases, accounting for all but ten of all 105 preemption cases.<sup>51</sup> Three of those ten cases involved disputes between state and local governments; in the remaining seven, the federal government was a party. Because these atypical cases are irrelevant to our analysis,<sup>52</sup> we omit them from the descriptive statistics (unless noted otherwise).

Table 7 shows the weighted conditional probabilities of an outcome *for* preemption (number of cases in parentheses). Put simply, preemption outcomes are much more likely in Non-Government cases than in cases in which a state participates. That tendency is more pronounced for the SRC than for the FRC.

<sup>51</sup> See Table 3(b), *supra*.

<sup>52</sup> A case in which state agencies appear on both sides of the dispute is unhelpful in determining whether the presence of a state party is a signal for the Court. The seven cases to which the federal government was a party are unhelpful because the feds' presence may mute any other signal.

Table 7. Probabilities of Preemption, by Party Constellation

	FRC	SRC	Total
State Participation	.44 (25)	.35 (20)	.40 (45)
Non-Government	.57 (27)	.70 (23)	.63 (50)

Further evidence emerges by comparing states to other parties in their respective roles as petitioners and respondents. Recall that the reversal rate—that is to say, the rate at which petitioners prevail—is about 61 % for the Rehnquist Court, both for preemption cases and for all cases.<sup>53</sup> Table 8 below shows the parties' "unexpected success ratios" in cases against one another—that is to say, the difference between the expected success rate (61 %) and the parties' actual record.<sup>54</sup> Horizontally, a positive number means that the petitioner did that much better in preemption cases than the "average" petitioner. Read vertically, a positive number means that the respondent did that much *worse* than the average respondent.

While the exercise involves uncomfortably small numbers of observations (in parentheses), it holds an interesting suggestion. *Business* seems to do okay against Private Parties, but it cannot seem to catch a break against the States, regardless of its role as petitioner or

<sup>53</sup> See note 44 and accompanying text, *supra*. The precise reversal rate for preemption cases is 62.3 %, but that miniscule difference does not affect the results here.

<sup>54</sup> We have adapted this useful analytical device from Kearney and Merrill, 148 U Pa L Rev at 788 (cited in note 49). Table (8) does not display the "Business versus Business" cases (six) and the "Private versus Private" cases (eight) because we cannot tell, without case-by-case examination, whether the cases were brought by a pro- or anti-preemption party. Hence, we cannot calculate success ratios. Strikingly, though, eleven of the fourteen "intra-group" disputes resulted in a finding *for* preemption. While that may be a coincidence or an artifact of small numbers, it might on closer inspection constitute a piece of evidence in support of a signaling theory. In cases among *different* parties, the participants' identity and the constellation carry informational content. For example, when a Private party asks for *certiorari* in a case against Business, every justice readily grasps the social and ideological dimension (*e.g.*, trial bar versus corporate America) and the crucial role of statutory preemption in policing the divide. Intra-group cases provide no such signal. All the Court sees is a boring private quarrel of the sort that it must sometimes decide—but whose appearance on the docket it would rather minimize (so as to make room for cases that the justices deem more interesting and important). In that setting, preemption may look like a conflict-minimizing rule. More precisely: preemption may *always* hold attraction as a conflict-minimizing rule. But while that attraction is in other cases tempered by countervailing considerations (for example, a concern that an excessively preemption-friendly jurisprudence might trample on states' rights or unduly advantage corporate America), those considerations to some extent depend on an antecedent party signal. When that signal is missing, the goal of conflict minimization gains the upper hand. To repeat: this train of thought is no more than an intriguing possibility. But it may merit further investigation.

Table 8.    Petitioners' Unexpected Success Ratios

Petitioner	Respondent			
	Business	Private	State	Total
Business	***	-.04 (30)	-.14 (17)	-.08 (47)
Private	-.19 (6)	***	.15 (4)	.04 (10)
State	.18 (14)	-.21 (10)	***	.10 (24)
Total	.06 (20)	-.08 (40)	-.09 (21)	(81)

respondent. *Private* parties figure too rarely as petitioners to put any confidence in the numbers, but they emerge (somewhat surprisingly) unscathed: in fact, they appear to do a bit better than the “average” party, both on the petitioner and the respondent side. The *States* do well against Business, and surprisingly poorly against Private Parties.

Contrary to suggestions that pro-preemption decisions are a kind of pro-business concession by otherwise federalism-minded justices,<sup>55</sup> Table 8 actually suggests an *anti-business* story. Liberal justices, that story goes (in the vernacular), dislike big business to begin with. Conservative justices do not share that antipathy. But neither do they view it as part of their job description to bail out corporate America, when a decent respect for federalism appears to command the opposite result. And so—the story concludes—when states insist upon their right to regulate business over and above a federal baseline, the Court will often give them their due.<sup>56</sup>

The fact remains that pro-preemption outcomes are substantially less likely in State Participation than in Non-Government Cases, which suggests that the presence of a state party serves as a signal.<sup>57</sup> It is possible that State Participation is an independent signal (and that the states’ poor record against Private parties is a statistical fluke, caused by the small number of such cases). It is also possible that State Participation is (in a manner of speaking) the flipside of, or interdependent with, a Business Participation signal. The evidence appears to permit either explanation.

<sup>55</sup> See, e.g., Baybeck and Lowery, 30:3 Publius 73 (cited in note 1).

<sup>56</sup> An anti-business story is also consistent with the striking frequency of pro-preemption findings in *Business v. Business* and *Private v. Private* disputes, where that reflex (due to the party constellation) does not come into play. See note 54, *supra*.

<sup>57</sup> It is possible that the *quality* of anti-preemption advocacy is higher for states (who are repeat players in the Supreme Court) than for private plaintiffs’ lawyers (most of whom are not). But that explanation seems inconsistent with the perfectly respectable batting average of Private Parties.

## C. State *Amici*

### 1. Filing Pattern

We find extensive and still-growing state *amicus* participation in preemption cases—predictably, almost exclusively on the anti-preemption side.<sup>58</sup> States participated as *amici* in 64 of the 105 cases, or 60.9%.<sup>59</sup> The rate of state participation increased from 58.6% of cases (34 in 58) for the FRC to 63.8% (32 in 47) for the SRC. State *amicus* briefs are typically joined by more than one state. Of the 64 cases in which any state participated as an *amicus*, fully 48 cases featured “mass briefs” with twelve or more signatories against preemption, including 15 cases in which 22 or more states participated. By these measures, too, state *amicus* participation has increased. Mass briefs were filed in 22 (37.9%) of preemption cases during the FRC; that figure increased to 26 (55.3 %) for the SRC. Table 9 shows the distribution.

**Table 9. State *Amicus* Participation in Preemption Cases**

		FRC	SRC	Total	
No State Amicus		24	17		41
Some State Amici	Single State	4	2	6	16
	2-11 States	8	2	10	
Mass State Amici	12-21 States	17	16	33	48
	22+ States	5	10	15	

Table 10 shows the likelihood of a state *amicus* appearance for the major party constellations, depending on the parties’ appearance as petitioner or respondent (total number of cases in parentheses). While “only” 52% of Non-Government preemption cases feature a state *amicus*, state *amici* participated in 71% of State-Party cases. It

<sup>58</sup> We found only one case (*Hillside Dairy v Kadish*, 5 US 605 (2002)) where state *amici* favored preemption. In four cases, state *amici* were split (number of state *amici* for and against preemption in parentheses): *Wisconsin Intervenor v Mortier*, 501 US 597 (1990) (6/11); *Hawaiian Airlines v Norris*, 512 US 246 (1994) (1/14); *Smiley v Citibank*, 517 US 735 (1995) (14/26); and *Norfolk Southern Ry v Shanklin*, 529 US 344 (1999) (5/12).

<sup>59</sup> We report exclusively *amicus* participation by states *as states*. These numbers understate the extent of state participation because they exclude participation by local government agencies, state-level associations entrusted with public functions, and intergovernmental organizations (such as the National Association of Governors). We have collected but not yet analyzed that data.

appears, moreover, that states prefer to submit *amicus* briefs for petitioners, rather than respondents.<sup>60</sup> When a sister state or a Private litigant presses an anti-preemption position against a Business respondent, states participate as *amici* in roughly nine out of ten cases. Conversely, when business petitioners insist on preemption, states will lend *amicus* support “only” in half of all cases—regardless of whether the respondent is one of their own, or a Private Party.

Table 10.    State *Amicus* Participation Rates

Petitioner	Respondent			Total
	Business	Private	State	
Business	.50 (6)	.50 (30)	.59 (17)	.53 (53)
Private	.83 (6)	.38 (8)	.50 (4)	.55 (18)
State	.93 (14)	.70 (10)	****	.83 (24)
Total	.81 (26)	.52 (48)	.57 (21)	.61 (95)

Scholars have argued that *amicus* briefs may serve the strategic objective of manipulating the signals for the Supreme Court.<sup>61</sup> From that vantage (and for that matter from any outcome-oriented perspective), the states’ pattern of *amicus* participation in preemption cases looks suboptimal. First, one would expect the state “signal” to be more robust in Non-Government cases. In State-Party cases, state *amici* cannot send any signal that the Court has not already received from the party-state; they can at most heighten the intensity of that signal.<sup>62</sup> In Non-Government cases, in contrast, state *amici* could authenticate the “federalism” position urged by the anti-preemption party, which might otherwise look opportunistic. The optimal strategy, then, would concentrate state *amicus* efforts on Non-Government cases. The observed pattern is the opposite. Second, Kearney’s and Merrill’s study of *amicus* participation in Supreme Court merits decisions from 1946 to 1995 shows state *amici* have a statistically sig-

<sup>60</sup> This finding is impressively confirmed by the data—not presented here—on the number of state *amici* and the frequency of mass briefs.

<sup>61</sup> Caldeira and Wright, 82:4 Am Pol Sci Rev 109 (cited in note 27); Lee Epstein, *Courts and Interest Groups*, in John B. Gates and Charles A. Johnson, eds, *The American Courts: A Critical Assessment* 335 (Cong Q, 1991); and Cameron et al, 94:1 Am Pol Sci Rev 101, 103 (cited in note 47).

<sup>62</sup> Of course, state *amici* may (and often do) submit information that the litigating state, due to page limitations or other reasons, cannot fully brief. But that is also true of state *amicus* briefs in Non-Government cases.



nificant effect on outcomes when they participate on behalf of *respondents*, whereas no such effect could be shown for state *amicus* participation on behalf of petitioners.<sup>63</sup> If that is right, the states' preference for assisting petitioners rather than respondents in preemption cases again seems suboptimal.

At first impression, inefficient signaling casts doubt on the hypothesized signal: if the signal were worth something, parties would surely invest resources in getting it "right." Their failure to do so suggests that state *amicus* briefs (as other *amicus* briefs) principally serve the filers' organizational needs, as opposed to outcome-oriented objectives. That is a possible explanation—but not the only possible explanation. We will return to the question below, after examining the evidence.<sup>64</sup>

## 2. Outcomes

Table 11 shows the weighted conditional probabilities of a ruling *against* preemption—that is to say, the states' success ratio—for preemption cases, disaggregated into Non-Government cases and State Party cases and, further, into cases without state *amici*, some state *amici*, and "mass briefs." The numbers of cases appear in parentheses.<sup>65</sup>

**Table 11. State *Amici* and Anti-Preemption Outcomes**

	All Cases	State Party	Non-Government
No State <i>Amicus</i>	.36 (37)	.43 (14)	.33 (23)
Some State <i>Amici</i>	.31 (13)	.40 (5)	.25 (8)
Mass State <i>Amici</i>	.62 (40)	.69 (26)	.41 (14)
All Cases	.47 (90)	.58 (45)	.37 (45)
State Particip. Rate	59%	69%	49%

As already noted, rulings against preemption are more likely in cases to which a state is a party. It also appears that *mass* state *amicus* participation has a positive effect on state success in preemption litigation, whereas participation by only a few states does not. (To the limited extent that the small numbers permit any conclusion, briefs

<sup>63</sup> Kearney and Merrill, 148 U Pa L Rev at 749, 810-11 (cited in note 49).

<sup>64</sup> See notes 79-83 and accompanying text, *infra*.

<sup>65</sup> For purposes at hand, we have removed not only the state-versus-state cases and the cases with a federal party but also, and for obvious reasons, the cases in which some states *avored* preemption (see notes 52 and 58, along with accompanying text, *supra*).

by a small number of state *amici* appear to make an anti-preemption outcome *less* likely.) Consistent with a signaling theory, the number of signatories may serve as a kind of proxy for the intensity of state concern.<sup>66</sup> In contrast, the correlations provide no evidence for our expectation that state *amicus* participation should be more effective in Non-Government cases than in State Party cases (where the “states’ rights” signal will often be redundant). While we cannot reject that hypothesis outright,<sup>67</sup> the correlations suggest that state mass briefs are more effective in State Party than in Non-Government cases. One possible explanation is that mass state participation, contrary to our earlier suggestion, signals not only the intensity of state concern but also the *authenticity* of the states’ position. Mass briefs may suggest that the proffered position reflects the views of the states *as states*—in other words, a true federalism interest, as opposed to a parochial and opportunistic interest in a particular outcome that may well differ from the interests of other states.

#### D. The Solicitor General

We predict that the effects of the OSG’s position in preemption cases will be strong; asymmetric, in the sense that an OSG *amicus* filing against preemption will provide a stronger signal than a filing for preemption; and more strongly asymmetric for Republican than for Democratic OSGs. The data support all three predictions, though to varying degrees.

The OSG submitted briefs in 80 of the 105 preemption cases decided by the Rehnquist Court. Excluding, as we have all along, the three state-to-state cases (which offer little insight into the matter) and seven cases to which the federal government was a party (where the OSG submitted a party rather than an *amicus* brief and *ipso facto* took a pro-preemption position), the OSG participated in 73 of 95 cases (72.6%). We coded each OSG brief with respect to its preemption position.<sup>68</sup> In addition, we recorded whether the OSG brief in

<sup>66</sup> State *amicus* briefs may make a difference on account of their informational content (*e.g.*, the presentation of economic or other empirical evidence) as well as their signaling value. That hypothesis, though, fails to explain why *mass* state briefs should have an effect over and above state *amicus* briefs with few signatories.

<sup>67</sup> One specification of our regression suggests that state *amicus* briefs in Non-Government (but not State Party) cases may affect outcomes. However, the numbers are too small to put confidence in that result. The correlations shown *supra* suggest that the *amicus* effect appears to be stronger in State Party cases.

<sup>68</sup> As with case outcomes and judicial votes, briefs urging partial preemption were coded as two separate observations, with each observation weighted at 50 percent. Luckily (in light of the manifest interdependence problem), there were only three such briefs: *International Paper Co v Ouelette*, 479 US 481 (1986); *CSX Transport Inc v*

question was filed by a Solicitor serving a Democratic or Republican administration. Table 12 shows the distribution.

**Table 12. OSG *Amicus* Preemption Briefs**

	State Party (48)		Non-Government (47)		All (95)	
	R	D	R	D	R	D
Pro-P	47% (14.5)	25% (4)	41% (11)	45% (9.5)	44% (25.5)	36% (13.5)
Anti-P	37% (11.5)	56% (9)	19% (5)	40% (8.5)	28% (16.5)	47% (17.5)
Abstention	16% (5)	19% (3)	41% (11)	14% (3)	28% (16)	16% (6)
Total	31	16	27	21	58	37

The OSG has taken a pro-preemption position in 39 of 95 preemption cases, or about 40 percent—a figure that, in light of the Office's institutional role, strikes us as remarkably low. As expected,<sup>69</sup> Democratic OSGs appear more willing than Republican OSGs to take an *anti*-preemption position, both in State Party and Non-Government cases. Republican OSGs have a higher propensity to abstain in Non-Government cases (but not in State Party cases). Republican OSGs sat out eleven of 26 such cases; Democrat OSGs, only 3 of 21.<sup>70</sup>

Does it matter? Table 13 below shows the weighted conditional probabilities for pro-preemption outcomes. In interpreting the numbers, note that the OSG's success ratio for cases decided "Against Preemption" is the *obverse* of the probability of a pro-preemption outcome (the number shown). Overall, the OSG has a "batting average" of slightly over .800 in the preemption cases in which it chooses (or is asked to) participate—high, but comparable to the OSG's general success rate over time.<sup>71</sup>

As expected, the distribution is asymmetric both along the pro-/anti-preemption dimension and along the partisan dimension. Whereas an anti-preemption outcome is highly likely (.85) when the OSG argues *against* preemption, anti-preemption parties still have roughly

*Easterwood*, 507 US 658 (1992); *American Airlines v Wolens*, 513 US 219 (1994). The Supreme Court substantially adopted the OSG's position in all three cases, a fact that provides a first glimpse of the OSG's prominent role and extraordinary success. In one case (*Mansell v Mansell*, 490 US 581 (1989)), the OSG changed its position very late in the litigation; we coded the briefs as an Abstention.

<sup>69</sup> See IV.A., *supra*

<sup>70</sup> We checked whether Solicitors under different Republican administrations—Reagan, Bush I, Bush II—differed in this respect. The answer is "no."

<sup>71</sup> Epstein, et al, *Supreme Court Compendium* at 675, Table 7-16 (cited in note 44).

Table 13.    Conditional Probabilities, Pro-Preemption Outcome (Weighted)

OSG Brief	SG Party		Total
	Republican	Democrat	
For Preemption	.71 (25.5)	.81 (13.5)	.74 (39.0)
Against Preemption	.00 (16.5)	.29 (17.5)	.15 (34.0)
Abstention	.72 (16.0)	.67 (6.0)	.70 (22.0)

a one-in-four chance of prevailing when the OSG argues *for* preemption—only marginally worse than their batting average in cases where the OSG abstains. The partisan asymmetries are stark. A Republican OSG signal in favor of preemption shows no difference to Abstention, suggesting that the Supreme Court views a Republican pro-preemption stance as a kind of default position that carries little informational value. In contrast, a Democratic OSG’s pro-preemption brief appears to increase the likelihood of a ruling to that effect. Conversely, the Supreme Court appears to view a Democratic OSG’s *anti*-preemption stance as a kind of default position, whereas Republican OSGs have a startling 1.000 batting record in arguing against preemption.

The fact that the OSG has an exceptionally high *success* ratio before the Supreme Court does not show that OSG briefs have an *effect*. A facile inference from success to effect is precluded by a massive endogeneity problem: the institutional role of the OSG as a “Tenth Justice” and a genuine “friend of the Court” may induce its occupants to act, think, and argue like Supreme Court clerks. Such an office may be in a better position than other litigants to predict the likely disposition of a given case, and more disposed to act on those predictions, than are parties with an agenda other than “getting the law right.” But a perfect endogeneity story fails to explain why Republican OSGs should be better at predicting the outcomes of one set of cases (those that go against preemption) than another set (pro-preemption rulings), while Democratic OSGs have the opposite tendency. It is easier to tell a coherent signaling story that maps the results. Under any circumstances, the OSG will tend to defend federal prerogatives. But a Democratic OSG will face countervailing pressures from liberal constituencies that want the states to retain an ability to regulate on top of a federal baseline. Thus, while a Democratic OSG’s disavowal of preemption merits respect, it cannot be taken at face value. In contrast, when a Republican OSG disavows preemption, it opts against both its institutional interest and the administration’s business clientele. Its position can readily be taken as the best statement of the law. To all intents, the case is over.

## E. Regression

Tables 14(a) and 14(b) show, for all cases<sup>72</sup> and contested cases respectively, the results for a regression with four independent variables: the position of the Office of the Solicitor General, pro- and anti-preemption; the presence of a state party; and the presence (yea or nay) of a state *amicus* against preemption.<sup>73</sup>

**Table 14(a). Regression Results, All Cases**

	Coeff.	Std. Error	T	P > t
OSG No Preemption	-.53	.12	-4.48	0.00
State Party	-.15	.08	-1.79	0.08
State Amicus	.02	.09	0.19	0.85
Constant	.75	.09	8.03	0.00

Number of Observations: 104

$R^2 = 0.33$

**Table 14(b). Regression Results, Contested Cases**

	Coeff.	Std. Error	T	P > t
OSG No Preemption	-.27	.32	-0.84	0.41
State Party	-.49	.23	-2.12	0.05
State Amicus	.13	.27	0.48	0.64
Constant	.84	.24	3.53	0.00

Number of Observations: 21

$R^2 = 0.28$

Little difference (and no statistically significant difference) can be observed between an OSG Abstention and an OSG intervention in

<sup>72</sup> As we have done throughout, we exclude the "State versus State" cases and the cases to which the federal government was a party.

<sup>73</sup> Given the small number of cases in the dataset, we need to be judicious in choosing our covariates. In general, the variables we do not focus on here generate coefficients that are not statistically significant in the preemption regressions. This includes coefficients for the case type dummies, the coefficient on the federal court variable (which generates a positive coefficient that is not statistically different from zero), and the variable capturing whether the lower court found for preemption (which generates a negative coefficient that is not statistically different from zero). In virtually all specifications in which all cases are included, we find the relationship between OSG No Preemption and State Party that is presented in Table 14(a).

favor of preemption.<sup>74</sup> The effect of the OSG “No Preemption” and State Participation variables is in the expected direction (*i.e.*, a lower likelihood of a ruling for preemption). For both variables, the effect is substantial and, moreover, statistically significant at a .10 level for “all cases”; for contested cases, the OSG variable loses significance (quite probably a victim of small numbers). The State *Amicus* variable has a small effect, which does not approach statistical significance and, moreover, points in the wrong direction. To all intents, the effect is nil. That result does not change when we look at mass briefs (versus few or no briefs), and it remains the same for any subset or configuration of cases. In short, we could find no specification under which state *amicus* participation makes a statistically significant difference.<sup>75</sup>

Distinguishing between Republican and Democratic OSGs improves the over-all fit of the model ( $R^2 = .36$ ; regression results not shown here). We observe no statistically significant effect for “OSG Preemption” for either political party. The effect of “OSG No Preemption” remains highly significant for both parties; as suggested by our earlier correlations, it is substantially stronger for Republican than Democrat OSGs. Predictably, the added variables tend to diminish the significance of the State Party variable.

In light of our earlier observations concerning the outcomes differences between “tort” and “statutory” preemption cases,<sup>76</sup> we experimented with various specifications containing that variable. Consistently, the tort variable had a small, statistically insignificant effect and failed to improve the fit of the model. Its principal effect is to render the State Party variable statistically insignificant. We are inclined to attribute that fact to a colinearity problem. As noted earlier,<sup>77</sup> only two tort cases involve a state party. While we cannot exclude the possibility that “torts” make a difference, we strongly suspect that it is the absence of a state party, rather than the nature of the cases, that explains the higher likelihood of preemption findings in tort cases.

In light of our surprising finding that Private litigants appear to do better against the States than do Business parties, we examined whether the presence of Business might render pro-preemption rul-

<sup>74</sup> We omit results from this specification which generates a negative coefficient that is not statistically different from zero on the OSG Preemption variable.

<sup>75</sup> Conceivably, state *amicus* effects are masked by the OSG variable. *Cf.* Kearney and Merrill, 148 U Pa L Rev at 799 (cited in note 49) (suggesting that the Solicitor General’s success may mask effects of disparities of *amicus* support). But we doubt that that is what is going on here. If masking occurs due to high correlation, the standard error for both variables should go up in a multivariate regression. That is not happening.

<sup>76</sup> See notes 27-31 and accompanying text, *supra*.

<sup>77</sup> See note 30, *supra*.

ings less likely (all else considered). The effect does indeed run in that direction, but it is small and statistically insignificant.

Finally, we experimented with the possibility that the origin of a preemption case in state or federal court might have signal value.<sup>78</sup> The underlying intuition is that the Supreme Court might expect state courts to give short shrift to federal prerogatives. But even the correlations did not support that surmise, and neither did any regression. It stands to reason that the signal—if operative at all—will operate principally at the *certiorari* stage.

## F. Future Research

If signaling theory is approximately right, private litigants should eventually respond to emerging inefficiencies in the signaling “market.” Their efforts can be observed and analyzed. Such studies might shed light on our tentative conclusions.

For Business, the principal objective should be to keep the OSG on the sidelines in cases where the Office might be inclined to argue against preemption. (As noted, the rewards of having the Solicitor support preemption in cases where he might be inclined to abstain appear to be negligible, especially under Republican administrations.) Symmetrical rewards should accrue to pro-regulatory constituencies and to the states from having the OSG—and especially a Republican OSG—argue *against* preemption in a larger number of cases. Of course, everyone who has any business before the United States Supreme Court is already well aware of the OSG’s influence. Interest groups do lobby the OSG, albeit with the tact and circumspection that is indicated in lobbying an office that likes to be viewed as being above politics. (The states, which are naturally bi-partisan and, moreover, perceived as somewhat more dignified than ordinary lobbies, may enjoy an advantage.) An empirical examination of these interactions would make for a fascinating study, though not an easy one.

A more manageable (because directly observable) area of investigation is the states’ *amicus* strategy. To be sure, our failure to find statistically significant effects for state *amicus* briefs may suggest that that such briefs tend to be filed to serve the filers’ “consumption” interests (for example, a desire to “show the flag”), wholly apart from a realistic expectation of influencing the outcome. However, our finding is far from robust. In addition to small-numbers problems, participation by other *amici* may mask or mute the effects of state par-

<sup>78</sup> We also examined whether the numbers for federal court cases might be unduly influenced by Supreme Court reversals of the Ninth Circuit Court of Appeals. However, this is not the case.



icipation.<sup>79</sup> Snippets of evidence, moreover, suggest that the states do pay attention to production values. For example, states are much more likely to file *amicus* briefs in contested than in uncontested cases: while state *amicus* participation in uncontested cases lies consistently in the 60% range, the rate for contested cases is 70% for the FRC and approaches 80% for the SRC.<sup>80</sup> Similarly, due to the coordinating activities of the National Association of Attorneys General (NAAG), the states have professionalized their *amicus* activities and substantially increased state participation rates.<sup>81</sup> Especially if we are right in suspecting that mass state participation may signal the authenticity of state concern as well as its intensity, NAAG coordination may very well be an effective investment.

The intriguing query to our minds arises from our earlier suggestion that the states' *amicus* strategy looks inefficient, both because it is targeted to assist petitioners rather than respondents and, more importantly, because it is more common in State Party than in Non-Government cases. If those inefficiencies are real, they should not long persist.

From the states' vantage, the existing pattern of *amicus* participation may very well be rational. Such participation is bound to depend not only on the odds of producing a favorable outcome but also on transaction costs and consumption values. In State Party cases, NAAG intervention and coordination is typically prompted by a request from the party-state—meaning that the first move has been made, by a trustworthy party.<sup>82</sup> *Sua sponte* coordination by NAAG, or NAAG coordination at the request of a third (private) party, would likely involve far higher transaction costs. Moreover, much as non-profit firms participate as *amici* for reasons of organization maintenance,<sup>83</sup> state

<sup>79</sup> Cf. Kearney and Merrill, 148 U Pa L Rev at 821-822 (cited in note 49) [suggesting an "arms race" explanation of rising *amicus* participation and arguing that the resulting symmetry of *amicus* filings may obscure their effect].

<sup>80</sup> If *amicus* briefs can be expected to make a difference in any set of cases, it should be in contested rather than "clear" cases. It is also possible that *amicus* briefs turn what would otherwise have been a (near) unanimous case into a contested case. We have no empirical evidence to support or reject this hypothesis.

<sup>81</sup> See Eric N. Waltenburg and Bill Swinford, *Litigating Federalism: The States Before the U.S. Supreme Court* 47-51 (Greenwood, 1999); Cornell Clayton and Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 Kan J L & Pub Pol'y 17 (2001).

<sup>82</sup> Also, Dan Schweitzer of the NAAG has suggested to us that the higher rate of *amicus* participation on behalf of petitioners may be explained by the states' antecedent participation at the *certiorari* stage. Thus, it no longer needs to be *organized* at the merits stage, which effectively lengthens the time that can be allocated to writing and circulating an *amicus* brief.

<sup>83</sup> See, e.g., Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J L & Pol 639, 675-676 (1993).

attorneys general may support a sister-state for reasons of collegiality and its returns—which, *unlike outcome-related returns*, can be internalized by the office-holder. Given these constraints, the states' *amicus* strategy looks quite focused.

Still, a *rational amicus* strategy (given transaction costs and other constraints) is not necessarily *efficient* from a global perspective. To put the paradox directly: a signal that is cheap may not be worth a whole lot. Conversely, a signal that would mean a lot may not be forthcoming because—well, because it is expensive. The trick, then, is to drive down the transaction costs. In Non-Government preemption cases, plaintiffs' attorneys and pro-regulatory constituencies have an enormous stake in soliciting support for an anti-preemption, "states' rights" position. They should seek to expand state *amicus* participation especially in cases where they are respondents against business petitioners, which often result in preemption rulings and where, as noted, state *amicus* participation is less common than in State Party cases. The rational strategy would be to mobilize state *amici*, either through the attorney general of the litigant's home state or through the NAAG. In cases where the litigants angle for every conceivable advantage, the actors' willingness (or not) to make that investment might provide a real-world test of our analysis.

## V. HOW THE JUSTICES VOTE

Statutory preemption cases are often viewed as a species of "federalism." From that vantage, preemption cases present a conundrum, nicely captured by the *United States Supreme Court Judicial Data Base*. That widely used data set includes preemption cases under the general issue area of "federalism."<sup>84</sup> Within that issue area, it codes a "pro-federal" or "anti-state" outcome or vote as "liberal."<sup>85</sup> But whatever plausibility that coding may have in the context of straightforward federalism cases, it makes no sense in preemption cases, where a "liberal" vote for the federal government (and against the states) is also a vote for "big business" (and against pro-regulatory constituencies that want states to regulate above the federal baseline)—an attitude that the *Judicial Database* in many other contexts codes as "conservative."<sup>86</sup> In preemption cases, conservative attitudes (pro-state, pro-business) conflict, as do the corresponding liberal attitudes.

How do the justices respond to that conflict? The common view is that conservative (pro-state) and liberal (nationalist) attitudes "flip"

<sup>84</sup> Spaeth, *Supreme Court Judicial Database* at 50 (cited in note 24) (issue area: Federalism; issue codes: 910, 911).

<sup>85</sup> *Id.* at 51, 53.

<sup>86</sup> *Id.* at 52.

in preemption cases. The bloc of five conservative justices that, for most of the period here under consideration, has carried the federalism banner (for example, in Commerce Clause, Fourteenth Amendment, and Eleventh Amendment cases)<sup>87</sup> votes for preemption and *against* the states. Conversely, the liberal bloc that has resolutely opposed the Rehnquist Court's federalism votes *for* the states in preemption cases. This Part examines whether, and to what extent, the justices' voting record conforms to the common view of a massive discontinuity—colloquially, a judicial flip-flop—between federalism and preemption. We find substantial evidence to that effect. However, preemption case law is not an exact mirror image of the Rehnquist Court's federalism: the voting alignments are substantially more fluid.

Shown below are the conditional probabilities of a *pro*-preemption vote for each justice during the FRC and the SRC, for all cases (Figure 4(a)) and contested cases (4(b)). The horizontal lines represent the conditional probability of a *pro*-preemption decision by the Court as a whole for the period under observation.

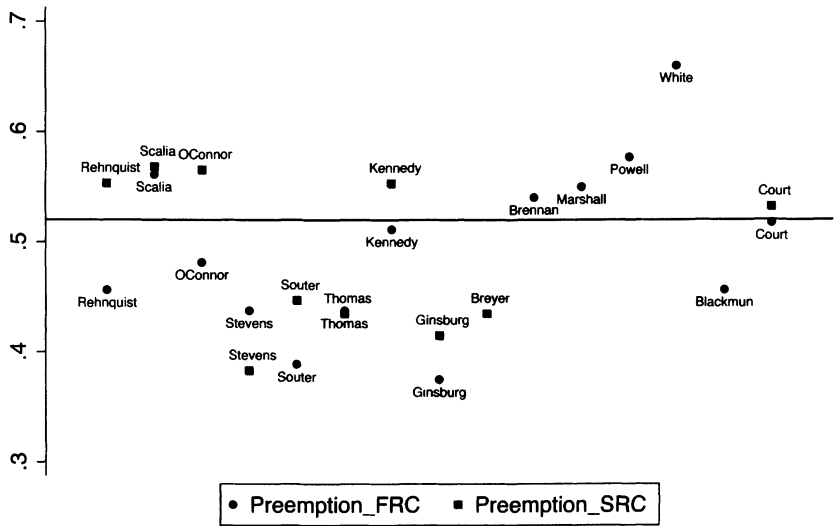


Figure 4(a). Probability of Voting for Preemption FRC vs. SRC

Most justices are about as likely to vote for (or against) preemption as the Court as a whole. Since four out of five preemption cases are (nearly) unanimous, it would be odd if it were otherwise. In contested

<sup>87</sup> All of the landmark cases cited in note 8, *supra*, were decided by the same 5-4 majority of justices.

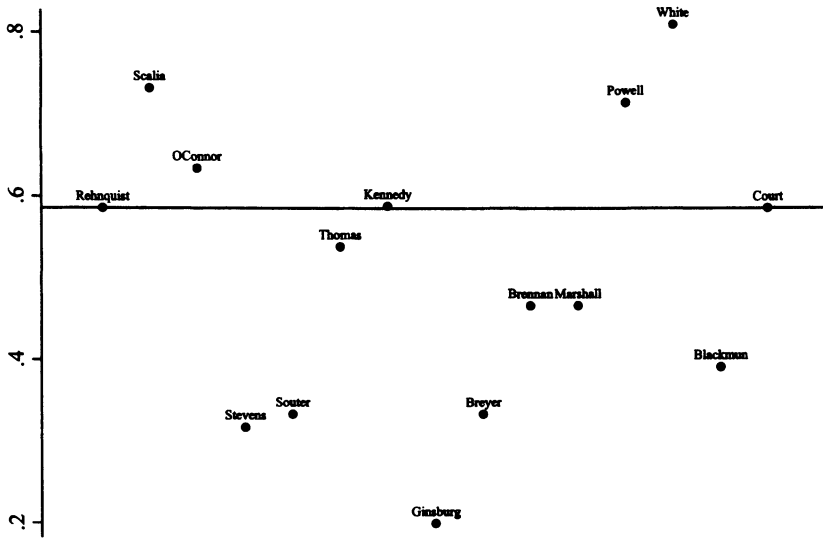


Figure 4(b). Probability of Voting for Preemption—Contested Cases

cases, the conditional probabilities of a pro-preemption vote diverge more sharply. The prominent outliers—that is, justices with a record of substantial divergence from the Court average—are Justice White on the pro-preemption side and Justices Breyer, Ginsburg, Souter, and Stevens on the anti-preemption side. In contested cases, Justice Scalia's record is distinctly more pro-preemption than that of the Court, especially during the SRC.

A comparison between the FRC and the SRC suggests a hardening of positions. Figure 4(a) shows that Justice Souter's and Justice Stevens's anti-preemption positions have become firmer. (In contested cases, Justice Souter has turned as hostile to preemption as Justice Stevens.) Personnel changes on the Court have cut in the same direction. Figure 4(c) plots the "lifetime preemption averages" for the former justices and their replacements. All of the justices appointed to the Rehnquist Court (Thomas, Kennedy, Souter, Ginsburg, Breyer) are substantially more hostile to preemption claims than the justices whom they replaced.

If the Court as a whole has nonetheless failed to move towards a more pro-state, anti-preemption position, that is because four conservative justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and O'Connor) appear to have turned more preemption-friendly (see Figure 4(a)). In other words, preemption positions appear to have hardened on both sides.

The conventional spatial array of the SRC has Justice Stevens at one

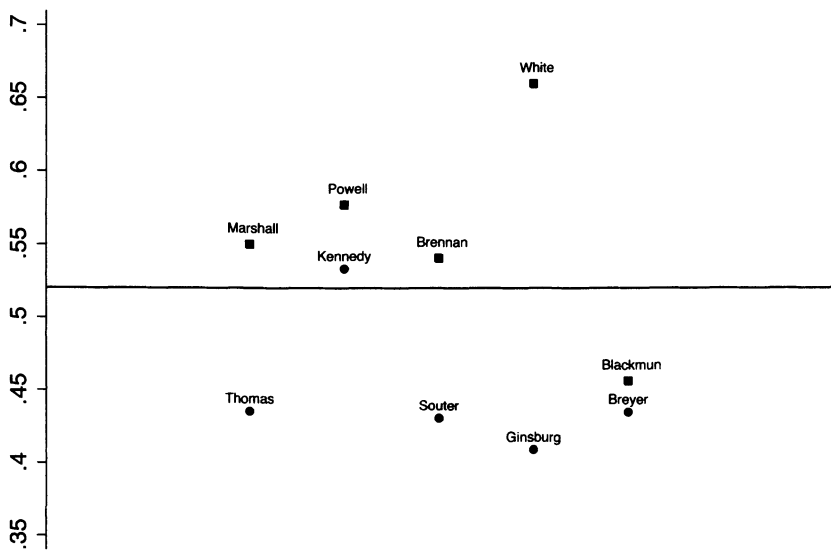


Figure 4(c). The Replacements

(liberal) pole, followed in order by Ginsburg, Breyer, Souter, O'Connor, Kennedy, Rehnquist, Scalia, and Thomas.<sup>88</sup> With the conspicuous exception of Justice Thomas, the justices' voting record in preemption cases matches this array: as we move from liberal to conservative, the preemption "scores" go up, with a noticeable discontinuity between the liberals on one side and moderates and conservatives (excepting Thomas) on the other.

Table 15. Pro-Preemption Votes

	Lifetime	SRC
Stevens	.41	.38
Ginsburg	.41	.41
Breyer	.43	.43
Souter	.43	.45
O'Connor	.52	.56
Kennedy	.53	.55
Rehnquist	.50	.55
Scalia	.56	.57
Thomas	.44	.43

<sup>88</sup> See Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 *Pol Analysis* 134 *passim* (2002).

The analysis suggests the emergence of a conservative bloc for pre-emption (Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia) and an equally cohesive bloc of liberal anti-preemption justices (Breyer, Ginsburg, Souter, and Stevens). That impression seems to be demonstrated in Figure 4(d), which plots the LRC justices' voting records in all cases and in contested cases: in the contested cases, the blocs seem to harden.

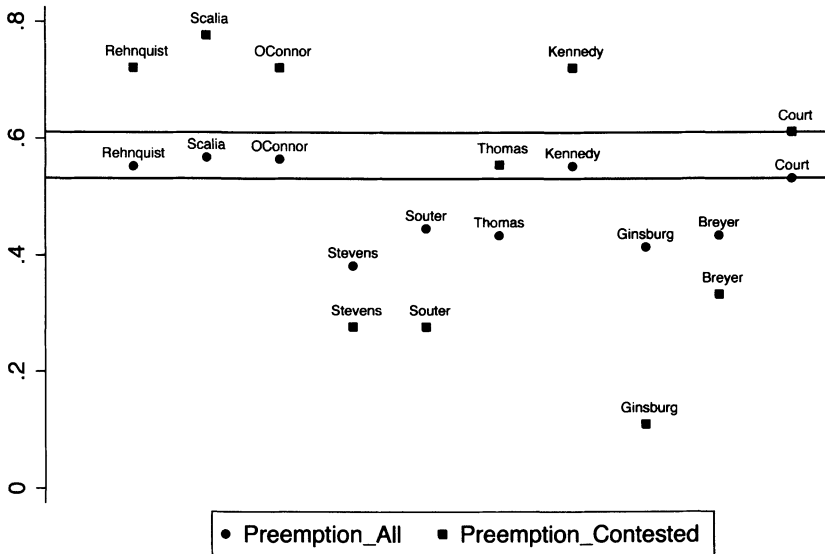


Figure 4(d). Probability of Voting for Preemption—SRC

The coalitions here look like the mirror image of the pro-state and anti-state blocs in straightforward federalism cases, with this qualification: Justice Thomas appears to play the role of the swing vote that, in federalism cases, falls to Justice Kennedy or Justice O'Connor.

A closer examination of contested preemption cases, however, reveals a more complicated picture. Table 16(a) below shows the number of times each justice voted with the majority on contested preemption issues during the SRC. At first impression, the Table appears to confirm the ideological division. Note, though, the conspicuous lack of zeroes and the paucity of "perfect scores": there appears to be no single "swing vote" that controls the outcomes. In any given case, though, it appears possible to pick up a vote from this or that "unlikely" justice.

Table 16(b) provides better evidence in support of that observation. It shows the likelihood of justices voting with one another in contested preemption cases (SRC only). Only eleven of the 36 paired

Table 16(a).    Frequency of Voting with the Majority in Contested Holdings (SRC)

	Pro-Preemption (6)	Anti-Preemption (4)	All Contested (10)
Rehnquist	4	1	5
Scalia	5	1	6
O'Connor	4	1	5
Kennedy	5	2	7
Thomas	4	2	6
Stevens	2	3	5
Souter	3	4	7
Ginsburg	1	4	5
Breyer	3	4	7

observations are significant at a .10 level; and, six of those eleven observations bear a negative sign (indicating a statistically significant likelihood that the paired justices will be found on *opposite* sides).<sup>89</sup> If we cannot easily find matching pairs, we certainly cannot find blocs.

The Table suggests that Justice Ginsburg anchors the anti-preemption vote; it affirmatively tells us that Justice Stevens and Chief Justice Rehnquist will be on opposite sides in any given case. Only Justice Breyer's record, however, correlates significantly with that of the Court as a whole. It is very difficult to interpret the evidence as an indication of ideological bloc voting. Conservative justices tend to vote for preemption in many cases, and liberal justices tend to do the opposite. But neither side seems to agree on what cases, precisely, call for the "default" response.

VI. CONCLUSION

Our principal purpose has been descriptive: we have sought to provide an accurate and complete picture of the Rehnquist Court's statutory preemption decisions. Our *explanation* has been tentative and preliminary. Some intriguing aspects of the Rehnquist Court's preemption performance—notably, the startling changes in the mix of preemption cases from the First to the Second Rehnquist Court<sup>90</sup>—we cannot explain at all. With respect to case outcomes, the intuitive from of "cue" or signaling theory that we have employed does not map easily onto any of the standard models (or any of their sophisticated variations)—attitudinal, strategic, or legal.

We hope that our preliminary analysis will prompt more ambitious

<sup>89</sup> The observations here are weighted. For *unweighted* observations, no pairing shows significance.

<sup>90</sup> See text at notes 42-45, *supra*.



**Table 16(b). Likelihood of Voting Together—Contested Cases (SRC)**

	Rehnquist	Scalia	O'Connor	Stevens	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	1.00								
Scalia	-0.33	1.00							
	0.35								
O'Connor	0.45	-0.33	1.00						
	0.19	0.35							
Stevens	-1.00	0.33	-0.45	1.00					
	0.00	0.35	0.19						
Kennedy	0.72	-0.33	0.17	-0.72	1.00				
	0.01	0.35	0.64	0.02					
Souter	-0.45	-0.27	-0.45	0.45	-0.17	1.00			
	0.19	0.46	0.20	0.20	0.64				
Thomas	-0.06		-0.55	0.06	-0.06	0.06	1.00		
	0.88	0.07	0.10	0.88	0.88	0.88			
Ginsburg	-0.57	0.19	-0.57	0.57	-0.57	0.57	0.32	1.00	
	0.09	0.60	0.09	0.09	0.09	0.09	0.37		
Breyer	-0.09	-0.19	-0.09	0.09	-0.09	0.61	-0.32	.050	1.00
	0.80	0.60	0.81	.080	.081	0.06	0.37	0.14	
Supreme Court	0.01	0.12	0.01	-0.01	0.27	0.49	0.20	0.28	0.56
	0.97	0.74	0.97	0.97	0.45	0.15	0.57	0.43	0.09

theoretical efforts, and we ourselves plan to conduct more rigorous analyses. There is a powerful reason, though, to approach preemption cases with theoretical humility. In contrast to the sorts of cases that have been the subject-matter of the vast bulk of the theoretical literature, preemption cases are multi-dimensional, both in that they bring judicial attitudes in conflict and in that they involve multiple layers of legal argument, from statutory interpretation to delegation to federalism. Even a ruthlessly "attitudinal" or "strategic" judge—one who consistently votes to maximize his political preferences—would confront difficult trade-offs in this environment. Scholars have observed that preemption cases are unlikely to yield clear confirmation for either an "attitudinal" or a "legal" model of judicial behavior.<sup>91</sup>

A great deal of academic commentary has focused on the perceived discontinuity between the Rehnquist Court's averred solicitude of states' rights and its continued (albeit uneasy) support for "implied" preemption. More preemption, the theory goes, *ipso facto* means less federalism. At the same time (the theory continues), more preemption means less regulation: if more federal statutes are held to preempt state regulation, at least some states will be precluded from regulating on top of federal minimum standards. The situation in "pure" federalism cases is the reverse: here, a vote for "states' rights" typically means less regulation. (If the Congress lacks the authority to enact a Gun-Free School Zones Act, at least some states will choose not to enact an equivalent state law.) A consistent advocate of states' rights should vote for states' rights in all federalism cases, *including preemption cases*. Conversely, a consistent "nationalist" should defend federal supremacy in both types of cases. If a justice's voting behavior changes depending on the type of case ("pure" federalism or preemption), that switch must be driven by attitudes for or against regulation, rather than legal considerations pertaining to federalism and states' rights. Discontinuities between federalism and preemption cases should (on the theory just sketched) count as a major victory for the attitudinal model—a conclusive demonstration that "concepts of states' rights and national supremacy are used opportunistically, when convenient, to defend specific rulings, but not as guiding principles for decision-making."<sup>92</sup>

<sup>91</sup> Bill Swinford and Eric N. Waltenburg, *The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc*, 28:2 *Publius* 25 (1998).

<sup>92</sup> Baybeck and Lowry, 30:3 *Publius* at 96 (cited in note 1). The authors claim that statutory preemption cases provide a unique test for the attitudinal model because "constitutional issues (as opposed to regulation) are more complex, and any model would have to factor in issues related to constitutional law." *Id.* at 84. Wrongly believing that statutory preemption cases involve no such inconvenient distractions, the authors

This seemingly robust result, though, is produced by re-designating one set of attitudes (pro- or anti-state, which the canonical *Supreme Court Judicial Database* codes as an attitudinal variable)<sup>93</sup> as a legal principle, while letting the second, conflicting set (pro- or anti-business) continue to operate as expressing an attitude. This is a sleight of hand.<sup>94</sup> If the federalism variable remains an attitude, the true test for an attitudinal or strategic model is to explain how justices resolve conflicts among those attitudes or preferences. If the federalism variable becomes a legal principle, one has to allow that the legal arguments that support the principle may also define its reach. Put less abstractly: one has to allow for the possibility that a legal federalism principle may not cover statutory preemption cases at all—and that it may explain *why* those cases have nothing to do with federalism.<sup>95</sup>

To be sure, an ostensibly legal distinction may itself be based on attitudinal or strategic considerations—most obviously perhaps, by a desire to shield business from the potential impact of the Rehnquist Court's states' rights enthusiasm. But this inference, too, is at best premature. The clearest illustration is the dormant Commerce Clause, which is continuous with "implied" statutory preemption. (Implied statutory preemption operates against states when Congress has expressed its intent to preempt only unclearly; the dormant Commerce Clause bars discriminatory state legislation when Congress has said nothing at all or failed to clearly authorize such state laws.) Justice Stevens is the most aggressive advocate of the "dormant" Commerce Clause. Justice Scalia, in contrast, has denounced it as an extra-constitutional invention and as akin to free-market sloganeering.<sup>96</sup>

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construct a model with two binary variables (states' rights' versus nationalist; liberal versus conservative) and confidently reach the conclusion quoted in the text. *Id* at 96.

<sup>93</sup> See note 86 and accompanying text, *supra*.

<sup>94</sup> It is not the only such maneuver in the attitudinal literature. For a trenchant critique of one such move, strikingly similar to the one here at issue, see Richard A. Brinson, Jr., *Slaying the Dragon: Segal, Spaeth, and the Function of Law in Supreme Court Decision Making*, 40 Am J Pol Sci 1004, 1008 (1996) (critiquing Jeffrey A. Segal and Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 Am J Pol Sci 971 (1996)).

<sup>95</sup> For a few suggestions to that effect see Greve, 7 Tex Rev L & Polit at 116-17 (cited in note 7).

<sup>96</sup> See, e.g., *Oklahoma Tax Comm'n v Jefferson Lines, Inc*, 514 US 175, 200 (1995) (Scalia, J., dissenting) (noting that the dormant Commerce Clause "is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution."); and *West Lynn Creamery Inc v Healy*, 512 US 186, 207 (1994) (Scalia, J., diss.) (accusing the majority of having "canvassed the entire corpus of negative-Commerce-Clause opinions, culled out every free-market snippet of reasoning, and melded them into the sweeping principle that the Constitution is violated by any state law or regulation that" obstructs national markets.).

Yet when it comes to “implied” federal preemption—that is, cases where Congress has mumbled, as distinct from remaining entirely silent—Justice Stevens emerges as a defender of state prerogatives, and Justice Scalia often takes the opposite tack. One could argue that both justices are being incoherent—that one cannot have a robust implied preemption doctrine without a dormant Commerce Clause, or (conversely) that a dormant Commerce Clause well-nigh compels a recognition of implied preemption. Quite obviously, though, the perceived discontinuity on either side cannot be attributed to pro- or anti-business attitudes.

Beyond our call for theoretical caution in this area, we hazard one last guess: perhaps, the messy stability of preemption law has to do with the fact that that body of law *lacks* any systematic connection to federalism values. True, the justices’ analysis often purports to be guided by generalized federalism presumptions—prominently, a presumption against implying federal preemption in areas of “traditional state authority.”<sup>97</sup> However, nothing in the existing doctrinal framework bears a connection to a traditional, constitutional federalism that would let the states govern their own internal affairs (for example, on labor relations), while entrusting the federal government with the task of preventing discrimination and aggression among the states (for example, in the form of regulatory and tax exports). A serious reflection on the constitutional equilibrium might bring more coherence to preemption law, and it might reduce the perceived discontinuities between federalism and preemption law. It would ultimately have to rest, however, on constitutional intuitions that the Rehnquist Court has largely failed to articulate even in constitutional cases. Having failed to do so, the Court has nothing to fall back on in preemption cases but manipulable presumptions and contestable interpretations of statutory language and congressional intent—and signals.

<sup>97</sup> The origin of this oft-quoted presumption is *Rice v Santa Fe Elevator*, 331 US 218, 229 (1947) (“the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

## Appendix A

### Preemption Cases in the Rehnquist Court

#### First Rehnquist Court

- 1986 *R.J. Reynolds Tobacco Co v Durham County, N.C.*, 479 US 130 (1986).  
 1986 *California Federal Sav & Loan Ass'n v Guerra*, 479 US 272 (1987).  
 1986 *324 Liquor Corp v Duffy*, 479 US 335 (1987).  
 1986 *International Paper Co v Ouellette*, 479 US 481 (1987).  
 1986 *California Coastal Com'n v Granite Rock Co*, 480 US 572 (1987).  
 1986 *Pilot Life Ins Co v Dedeaux*, 481 US 41 (1987).  
 1986 *Metropolitan Life Ins Co v Taylor*, 481 US 58 (1987).  
 1986 *CTS Corp v Dynamics Corp of America*, 481 US 69 (1987).  
 1986 *Rose v Rose*, 481 US 619 (1987).  
 1986 *International Broth of Elec Workers, AFL-CIO v Hechler*, 481 US 851 (1987).  
 1986 *Fort Halifax Packing Co Inc v Coyne*, 482 US 1 (1987).  
 1986 *Caterpillar Inc v Williams*, 482 US 386 (1987).  
 1986 *Perry v Thomas*, 482 US 483 (1987).  
 1987 *Schneidewind v ANR Pipeline Co*, 485 US 293 (1988).  
 1987 *Bennett v Arkansas*, 485 US 395 (1988).  
 1987 *Puerto Rico Dept of Consumer Affairs v Isla Petroleum Corp*, 485 US 495 (1988).  
 1987 *City of New York v FCC*, 486 US 57 (1988).  
 1987 *Goodyear Atomic Corp v Miller*, 486 US 174 (1988).  
 1987 *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399 (1988).  
 1987 *Mackey v Lanier Collection Agency & Service Inc*, 486 US 825 (1988).  
 1987 *Felder v Casey*, 487 US 131 (1988).  
 1987 *Mississippi Power & Light Co v Mississippi ex rel Moore*, 487 US 354 (1988).  
 1988 *Shell Oil Co v Iowa Dept of Revenue*, 488 US 19 (1988).  
 1988 *Bonito Boats, Inc v Thunder Craft Boats Inc*, 489 US 141 (1989).  
 1988 *Volt Information Sciences Inc v Board of Trustees of Stanford*, 489 US 468 (1989).  
 1988 *Northwest Central Pipeline Corp v State Corp Com'n of Kansas*, 489 US 493 (1989).  
 1988 *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989).  
 1988 *California v ARC America Corp*, 490 US 93 (1989).  
 1988 *Massachusetts v Morash*, 490 US 107 (1989).  
 1988 *Cotton Petroleum Corp v New Mexico*, 490 US 163 (1989).  
 1988 *Mansell v Mansell*, 490 US 581 (1989).  
 1988 *ASARCO Inc v Kadish*, 490 US 605 (1989).  
 1989 *Golden State Transit Corp v City of Los Angeles*, 493 US 103 (1989).  
 1989 *Adams Fruit Company Inc v Barrett*, 494 US 638 (1990).  
 1989 *United Steelworkers of America v Rawson*, 495 US 362 (1990).  
 1989 *North Dakota v US*, 495 US 423 (1990).  
 1989 *California v FERC*, 495 US 490 (1990).

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- 1989 *English v General Elec Co*, 496 US 72 (1990).
- 1990 *FMC Corp v Holliday*, 498 US 52 (1990).
- 1990 *Ingersoll-Rand Co v McClendon*, 498 US 133 (1990).
- 1990 *Wisconsin Public Intervenor v Mortier*, 501 US 597 (1991).
- 1991 *Barker v Kansas*, 503 US 594 (1992).
- 1991 *Morales v Trans World Airlines*, 504 US 374 (1992).
- 1991 *Gade v National Solid Wastes Management Ass'n*, 505 US 88 (1992).
- 1991 *Cipollone v Liggett Group, Inc*, 505 US 504 (1992).
- 1992 *District of Columbia v Greater Washington Bd of Trade*, 506 US 125 (1992).
- 1992 *Itel Containers Intern Corp v Huddleston*, 507 US 60 (1993).
- 1992 *Building & Con Traders v Builders & Contractors of Mass*, 507 US 218 (1993).
- 1992 *CSX Transp, Inc v Easterwood*, 507 US 658 (1993).
- 1992 *US Department of Treasury v Fabe*, 508 US 491 (1993).
- 1993 *John Hancock Mut Life Ins v Harris Trust & Sav Bank*, 510 US 86 (1993).
- 1993 *Department of Revenue of Oregon v ACI Industries Inc*, 510 US 332 (1994).
- 1993 *Northwest Airlines v County of Kent*, 510 US 355 (1994).
- 1993 *American Dredging Co v Miller*, 510 US 443 (1994).
- 1993 *PUD No 1 of Jefferson County v Washington Dept of Ecology*, 511 US 700 (1994).
- 1993 *Dpt of Taxation & Finance of NY v Millhelm Attea & Bros Inc*, 512 US 61 (1994).
- 1993 *Livadas v Bradshaw*, 512 US 107 (1994).
- 1993 *Hawaiian Airlines Inc v Norris*, 512 US 246 (1994).

### Second Rehnquist Court

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- 1994 *Nebraska Dept of Revenue v Loewenstein*, 513 US 123 (1994).
- 1994 *American Airlines Inc v Wolens*, 513 US 219 (1995).
- 1994 *Allied-Bruce Terminix Companies Inc v Dobson*, 513 US 265 (1995).
- 1994 *Mastrobuono v Shearson Lehman Hutton*, 514 US 52 (1995).
- 1994 *Anderson v Edwards*, 514 US 143 (1995).
- 1994 *Freightliner Corp v Myrick*, 514 US 280 (1995).
- 1994 *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins Co*, 514 US 645 (1995).
- 1995 *Dalton v Little Rock Family Planning Services*, 516 US 474 (1996).
- 1995 *Barnett Bank of Marion County, NA v Nelson*, 517 US 25 (1996).
- 1995 *Doctor's Associates, Inc v Casarotto*, 517 US 681 (1996).
- 1995 *Smiley v Citibank (South Dakota), NA*, 517 US 735 (1996).
- 1995 *Medtronic, Inc v Lohr*, 518 US 470 (1996).
- 1996 *Atherton v FDIC*, 519 US 213 (1996). 1996 *Ca Div of Labor Standards Enft v Dillingham Const, NA, Inc*, 519 US 316 (1997). 1996 *De Buono v NYSA-ILA Medical and Clinical Services Fund*, 520 US 806 (1997). 1996 *Boggs v Boggs*, 520 US 833 (1997).
- 1997 *Foster v Love*, 522 US 67 (1997).
- 1997 *ATT v Central Office Telephone Inc*, 524 US 214 (1998).

- 1998 *El Al Israel Airlines Ltd v Tsui Yuan Tseng*, 525 US 155 (1999).  
 1998 *Humana Inc v Forsyth*, 525 US 299 (1999).  
 1998 *AZ Department of Revenue v Blaze Construction Company*, 526 US 32 (1999).  
 1998 *UNUM Life Ins Co of America v Ward*, 526 US 358 (1999).  
 1999 *US v Locke*, 529 US 89 (2000).  
 1999 *Norfolk Southern Ry Co v Shanklin*, 529 US 344 (2000).  
 1999 *Geier v American Honda Motor Co Inc*, 529 US 861 (2000).  
 1999 *Pegram v Herdrich*, 530 US 211 (2000).  
 1999 *Crosby v National Foreign Trade Council*, 530 US 363 (2000).  
 2000 *Dir of Revenue v CoBank ACB*, 531 US 316 (2001).  
 2000 *Buckman Co v Plaintiff's Legal Committee*, 531 US 341 (2001).  
 2000 *Circuit City Stores Inc v Adams*, 532 US 105 (2001).  
 2000 *Egelhoff v Egelhoff ex rel Breiner*, 532 US 141 (2001).  
 2000 *Lorillard Tobacco Co v Reilly*, 533 US 525 (2001).  
 2001 *Wisconsin Dept of Health & Family Services v Blumer*, 534 US 473 (2002).  
 2001 *New York v FERC*, 535 US 1 (2002).  
 2001 *Rush v Moran*, 536 US 355 (2002).  
 2001 *City of Columbus v Ours Garage & Wrecker Service Inc*, 536 US 424 (2002).  
 2002 *Sprietsma v Mercury Marine*, 537 US 51 (2002).  
 2002 *Ky Ass'n of Health Plans Inc v Miller*, 538 US 329 (2003).  
 2002 *Pharm Research & Mfrs of Am v Walsh*, 538 US 644 (2003).  
 2002 *Entergy La Inc v La PSC*, 539 US 39 (2003).  
 2002 *Ben Nat'l Bank v Anderson*, 539 US 1 (2003).  
 2002 *American Ins Assn v Garamendi*, 123 SCt 2374 (2003).  
 2002 *Green Tree Fin Corp v Bazzle*, 123 SCt 2402 (2003).  
 2002 *Hillside Dairy Inc v Lyons*, 539 US 59 (2003).  
 2003 *Engine Manufacturers Ass'n v So Coast Air Quality Mgmt Dist*, 561 US 246 (2004).  
 2003 *Nixon v Missouri Municipal League*, 541 US 125 (2004).  
 2003 *Aetna Health Inc v Davila*, 542 US 200 (2004).

## Appendix B

### Case Search and Selection Criteria

We conducted a LEXIS basic keyword search for all Supreme Court cases from 1986 to the present with the words “preemption,” “pre-empt,” or “preempted.” Conducted in October 2003, that search generated 129 cases, 116 of which were decided during William Rehnquist’s tenure as Chief Justice. Predictably, that broad search proved over-inclusive; a review of the opinions identified 81 genuine statutory preemption cases.

We identified an additional 24 cases through less systematic means,



such as reviews of the pertinent legal literature. We also cross-checked our case set against earlier studies of the topic<sup>98</sup> and against the *United States Supreme Court Judicial Database*.<sup>99</sup> Finally, three preemption cases were decided during the 2003-2004, after our LEXIS search. We coded and added these cases in July 2004.

Our interest is *statutory* federal preemption, meaning the preemption of state law under federal statutes or administrative regulations. Accordingly, we *excluded*, in addition to straightforward constitutional cases, four types of cases:

- a. Cases in which Section 1983 serves to enforce constitutional rights. While Section 1983 is of course a "statute," the inclusion of cases where that provision is used to enforce substantive constitutional rights would have swept up an enormous number of cases that are fundamentally "about" those rights, rather than the nature and scope of statutory preemption.<sup>100</sup>
- b. Cases involving the imposition of *affirmative obligations* on states, typically under a federal statute conferring private rights of action.<sup>101</sup>
- c. Cases involving federal *common law* preemption,<sup>102</sup> such as constitutional canons of construction governing Indian affairs<sup>103</sup> and, most important, the dormant Commerce Clause. However, we included the handful of cases involving preemption under U.S. treaties or executive agreements with foreign nations.<sup>104</sup>
- d. Cases involving the (state or federal) judiciary's authority to enforce arguably preemptive federal rules. Cases concerning

<sup>98</sup> O'Brien, 23 *Publius* 15 (cited in note 1); Waltenburg and Swinford, *Litigating Federalism* at 107-109 (cited in note 81).

<sup>99</sup> The *United States Supreme Court Judicial Database*, issue codes 910 and 911, yields 76 preemption cases for the 1986-2002 Terms, eight of which are not true preemption cases. In addition to the remaining 62 matches with our cases, we identified another 34 statutory preemption cases during the period.

<sup>100</sup> Our cases include one decision about the preemptive scope of Section 1983 itself: *Felder v Casey*, 487 US 131 (1988).

<sup>101</sup> For example, *Gregory v Ashcroft*, 501 US 452 (1991) is sometimes read as a preemption case and included in preemption case samples (e.g., O'Brien, 23 *Publius* at 24-25 [cited in note 1]). By our criteria, *Gregory* is *not* a preemption case.

<sup>102</sup> E.g., *O'Melveny & Myers v FDIC*, 512 US 79 (1994); *Boyle v United Technologies*, 487 US 500 (1988).

<sup>103</sup> E.g., *California v Cabazon*, 480 US 202 (1987) [counted in other samples as a preemption case].

<sup>104</sup> E.g., *American Airlines v Wolens*, 513 US 219 (1995) (Warsaw Convention); *American Insurance Ass'n v Garamendi*, 539 US 396 (2003) (executive agreements or "policies").

federal abstention or the concurrent authority of state courts to enforce federal law fall into this category.<sup>105</sup>

Some cases involve questions in addition to statutory preemption (for example, dormant Commerce Clause claims). We included those cases so long as the preemption claim occupied a non-trivial part of the Court's opinion. Importantly, we coded the case outcomes and judicial votes exclusively on the statutory preemption dimension. For example, a holding or vote to the effect that a particular state law *is not* preempted by statute but *is* preempted under the dormant Commerce Clause would be coded as a decision or vote *against* preemption.

## Appendix C

The coding of "mixed" preemption cases and votes presents undeniable difficulties. Excluding the cases and votes would sacrifice much valuable information and, moreover, skew the analysis. An examination of (often very similar) state law provisions or claims in one and the same case compels justices to articulate their preemption views with some care and specificity. For this reason, the mixed cases tend to be precedent-setting and as highly instructive with respect to the individual justices' views. The alternative option of making a series of "gut calls" and scoring the rulings as unambiguously for or against preemption would involve a great deal of arbitrariness and, moreover, distorted what the justices *thought* they were doing in those cases. With one exception,<sup>106</sup> the mixed cases present separate state law claims and provisions, which the Court subjected to individualized preemption analysis and which yielded separate holdings.

Accordingly, we decided to treat the holdings and opinions in "mixed" cases as separate observations. To illustrate: in *Cipollone v. Liggett*, 505 U.S. 504 (1992), a plurality of four justices (Stevens, Rehnquist, White, and O'Connor) held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted some, but not all, tort liability claims under state law. Three justices (Blackmun, Kennedy, and Souter) held that all of the plaintiff's state law claims should be al-

<sup>105</sup> The *Judicial Database* includes some such cases under "preemption." E.g., *Tafflin v. Levitt*, 493 US 455 (1990) (concurrent state court jurisdiction over RICO actions); *Yellow Freight v. Donnelly*, 494 US 820 (1989) (concurrent state court jurisdiction in Title VII actions).

<sup>106</sup> In *International Paper Co v. Ouelette*, 479 US 481 (1987), the Supreme Court held that the Clean Water Act, 33 USC 1251 et seq., preempts common law nuisance suits over interstate water pollution when the claim is based on the common law of the "receiving" state *but not* when it is based on the law of the *source* state.

lowed to proceed. Two justices (Scalia and Thomas) opined that all of the plaintiff's claims were preempted. We scored the case and the votes twice, as follows (with "P" denoting a vote for preemption and "NP" a vote against):

Plurality	Blackmun Group	Scalia/Thomas	Outcome	Vote
P	NP	P	P	6-3
NP	NP	P	NP	2-7

In dealing with the problem of multiple majorities, some scholars have, for statistical purposes, scored those cases twice (without weighting them).<sup>107</sup> We have instead weighted each observation at 50 percent to account for the possibility of strategic voting or "vote trading" in mixed cases.<sup>108</sup> Weighting the observations is a rough and ready means of dealing with possibly interdependent observations.<sup>109</sup>

<sup>107</sup> See, e.g., Paul H. Edelman and Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 NC L Rev 1225, 1240 (2000).

<sup>108</sup> Not all preemption rulings or claims are created equal. *Cipollone*, for example, was at the time widely viewed as a victory for the tobacco industry and its pro-preemption position. However, weighting the observations in mixed cases at anything other than 50:50, on a case-by-case basis, would have introduced an excessive degree of subjectivity.

<sup>109</sup> While interdependence may also occur in consecutive cases, the simultaneous examination of state law claims in a single case creates a greater possibility of strategic voting. For a simple example, justices be inclined in a difficult preemption case to "split the difference" between several state law claims. That is much harder to do in consecutive cases.