
Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis

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This article presents an empirical analysis of the Rehnquist Court's and the Roberts Court's decisions on the federal (statutory) preemption of state law. In addition to raw outcomes for or against preemption, we examine cases by subject-matter, level of judicial consensus, tort versus regulatory preemption, party constellation, and origin in state or federal court. We present additional data and analysis on the role of state amici and of the U.S. Solicitor General in preemption cases, and we examine individual justices' voting records. Among our findings, one stands out: over time and especially under the Roberts Court, lawyerly preemption questions have assumed a distinctly ideological flavor. Preemption cases are much more likely to be contested than they were in earlier decades; and in those cases, once-rare judicial bloc voting has become common.

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I. INTRODUCTION

A 2006 article, co-authored by two of the present authors, provided a preliminary empirical assessment of the Rehnquist Court's decisions on federal preemption.¹ This article, covering the last (2004) term of the Rehnquist Court and the first eight terms of the Roberts Court (2005-2012), updates and in some respects refines that earlier study (hereafter, "*PRC*").²

Since *PRC*, federal preemption has remained a subject of intense scholarly debate³ and of a steady—and to virtually all observers, confusing—stream of Supreme Court decisions. Now as then, our ambition is modest. Difficult questions over the “presumption against preemption,” the true scope of “obstacle preemption,” and other doctrines routinely arise in this contested field, but we do not engage them. Instead of asking what the Supreme Court *should* be doing about federal preemption, we ask what it *has been* doing over the general run of preemption cases. We aim to supply reliable empirical data, and we submit a few cautious hypotheses that might explain the pattern of case outcomes and judicial alignments. In many respects, our analysis confirms the findings reported in *PRC*. However, our survey and analysis of the Roberts Court's preemption record yielded several noteworthy and (to us) surprising results, especially in comparison to the Rehnquist Court.

The remainder of this Introduction provides a partial summary of the literature and an overview of the present study.

A. Preemption Questions

The copious preemption literature of the past decade or so can be arranged in four overlapping categories: (1) legal analysis; (2) normative theory; (3) empirics; and (4) politics and ideology. Studies directly relevant to this article fall primarily into categories (3) and (4).

¹ Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 S Ct Econ Rev 43 (2006).

² Our empirical research for this project also encompassed three additional subjects: the disposition of “express” versus “implied” preemption cases; the Supreme Court's *certiorari* docket in preemption cases; and cases in which the Court requested the Solicitor General's views (“CVSG”). The findings will be reported in a forthcoming article.

³ For conference and symposium volumes since 2006 see, for, example, William W. Buzbee, *Preemption Choice: The Theory, Law, And Reality Of Federalism's Core Question* (Cambridge, 2008); Richard A. Epstein and Michael S. Greve, eds, *Federal Preemption: States' Powers, National Interests* (AEI Press 2007); Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 Nw U L Rev 503 (2008); Symposium, *Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices*, 33 Pepperdine L Rev 1 (2006). Mark Lindsay, *Complete Preemption and Copyright: Toward a Successive Analysis*, 20 J Intell Prop L 43 (2012).

Legal Analysis. An extensive literature addresses preemption questions in particular fields of the law. Naturally, the most prominent fields are those that have preoccupied the Supreme Court,⁴ including pharmaceutical drugs and medical devices;⁵ immigration;⁶ banking and financial regulation;⁷ and the Federal Arbitration Act.⁸

⁴ An intriguing exception is federal copyright preemption of contracts under state law—a subject of intense scholarly debate but a question that the Supreme Court has not addressed in any decision since *Bonito Boats, Inc v Thunder Craft Boats, Inc*, 489 US 141 (1989). For discussion see Christina Bohannon, *Copyright Preemption of Contracts*, 67 Md L Rev 616 (2008); Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 UC Davis L Rev 45 (2007); Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 Harv L Rev 703 (2006); Kathleen K. Olson, *Preserving the Copyright Balance: The Statutory and Constitutional Preemption of Contract-Based Claims*, 11 Comm L & Pol’y 83 (2006); Frank H. Easterbrook, *Contract and Copyright*, 42 Houston L Rev 953 (2005); Mark Linsey, *Complete Preemption and Copyright: Toward a Successive Analysis*, 20 J Intell Prop L 43 (2012).

⁵ See, for example, *PLIVA v Mensing*, 131 S Ct 2567 (2011); *Wyeth v Levine*, 555 US 555 (2009); *Riegel v Medtronic, Inc*, 552 US 312 (2008). For discussion see, for example, Richard Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW U L Rev Colloquy 54 (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo Wash L Rev 449 (2008); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L Rev 227 (2007); Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L Rev 1353 (2006); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J Tort L, (2006) Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J Tort L, (2006) at art 5; Note, Michael E. Bowlus, *Runaway Preemption: The Reckless Doctrine of Pliva and Mutual Pharmaceutical*, 88 S Cal L Rev 913 (2015).

⁶ See *Arizona v US*, 132 S Ct 2492 (2012); *Chamber of Commerce v Whiting*, 131 S Ct 1968 (2011). For discussion, see, for example, Lauren Gilbert, *Immigration Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 Berkeley J Emp & Lab L 153 (2012); Mark S. Grube, *Preemption of Local Regulations Beyond Lozano v City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 Cornell L Rev 391 (2010); Maria Marulanda, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 Fordham L Rev 321 (2010); Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 Notre Dame L Rev 691; Jordan Jodre *Preemptive Strike: The Battle for the Control over Immigration Policy*, 25 Geo Immigr LJ 551 (2011).

⁷ See *Cuomo v Clearing House Association, LLC*, 557 US 519 (2009); *Watters v Wachovia Bank, NA*, 550 US 1 (2007). For discussion see, for example, Raymond Natter and Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 Va L & Bus Rev 301 (2012); Jared P. Roscoe, *State Courts and the Presumption Against Banking Preemption*, 67 NYU Ann Surv Am L 309 (2011); Arthur E. Willmarth, Jr., *The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services*, 36 J Corp L 893 (2011); Jason B. Hirsh, Christopher L. Ropiequet, and Christopher S. Naveja, *An Introduction to the Dodd-Frank Act—The New Regulatory Structure for Consumer Finance Emerges*, Banking, 29 No 8 Banking & Fin Services Poly Rep 1 (2010); Sandra Zellmer, *Preemption by Stealth*, 45 Houston L Rev 1659 (2009).

⁸ See, for example, *AT&T Mobility v Concepcion*, 131 S Ct 1740 (2011); *Buckeye Check Cashing v Cardegna*, 546 US 440 (2006). For discussion see, Peter Rutledge,

Normative Legal Theory. Many scholars have proffered overarching, normative theories of federal preemption doctrine. The proposals range from adjustments of ancillary doctrines to a plea for wholesale abandonment,⁹ with a wide variety of often ambitious theories in between.¹⁰ The sustained bull market in preemption theory hit a high in the aftermath of Justice Thomas's concurring opinion in *Wyeth v. Levine*,¹¹ which launched a frontal attack on the "presumption against preemption" and on implied "obstacle" preemption.¹² Justice Thomas's ambitious proposal to re-think preemption doctrine from the constitutional ground up prompted intense scholarly debate.¹³

Empirics. Following and sometimes relying on *PRC*, scholars have subjected preemption decisions to further empirical examination.¹⁴

Arbitration And The Constitution (Cambridge 2012); Adam J. Karr and Michael G. McGuinness, *California's "Unique" Approach to Arbitration: Why this Road Less Traveled Will Make All the Difference on the Issue of Preemption Under The Federal Arbitration Act*, 2005 J Disp Resol 61 (2005); David Horton, *Federal Arbitration Act Preemption, Purposivism and State Public Policy*, 101 Geo LJ 1217 (2013); Kristopher Kleiner, *AT&T Mobility LCCV. Concepcion: The Disappearance of the Presumption Against Preemption in Context of FAA*, 89 Denv U L Rev 747 (2012).

⁹ Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 Pepperdine L Rev 39 (2005); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex L Rev 795 (1996); Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767 (1994).

¹⁰ See, for example, Robert R. Gasaway and Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in Epstein and Greve, eds, *Federal Preemption* (cited in note 3); Ernest A. Young, *Federal Preemption and State Autonomy*, in Epstein and Greve, eds, *Federal Preemption* (cited in note 3); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw U L Rev 727 (2008); Mark D. Rosen, *Contextualizing Preemption*, 102 Nw U L Rev 781 (2008); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 NYU L Rev 1 (2007); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 Pepperdine L Rev 25 (2005); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum L Rev 1 (2011); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex L Rev 1 (2004); Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill L Rev 1349 (2001).

¹¹ *Wyeth v. Levine*, 555 US 555 (2009).

¹² *Id* at 582. Justice Thomas's opinion rests in substantial part on what may well be the most influential preemption article ever written, authored by one of the Justice's former law clerks: Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000).

¹³ See, for example, Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich L Rev 1 (2013); Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 Geo Mason L Rev 367 (2011); Catherine M. Sharkey, *Against Freewheeling. Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 NYU J L & Liberty 63 (2010). Ernest A. Young, *The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*, 2011 SupCt Rev 23 (2011).

¹⁴ See Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 Harv

Those studies shed light on important features of preemption law, including aspects beyond the scope of both *PRC* and the present study. While the data are not always comparable,¹⁵ several of the authors' findings seem broadly consistent with those in *PRC* and here.¹⁶ We are not aware of an empirical study that casts doubt on our earlier findings and analysis.

Politics and (Judicial) Ideology. Scholars and pundits—the commentariat that explains the Court's legalisms to the broader public—have often viewed the trajectory of the Supreme Court's preemption decisions in a political and ideological context. Naturally, the discussion over the past decade reflects the change in the Supreme Court's composition and the change from a Republican to a Democratic administration. A particular focus of attention, especially after the appointment of Chief Justice John Roberts and, subsequently, Justice Samuel Alito, has been the Court's supposed “pro-business” orientation.¹⁷ While much of the agitation has arisen

L Rev 1604 (2007) (examining congressional responses to Supreme Court preemption decisions between the 1983 and 2003 Terms); Bradley W. Joondeph, *The Partisan Dimensions of Federal Preemption in the United States Court of Appeals*, 2011 Utah L Rev 223 (2011) (examining 560 appellate preemption cases decided in 2005–2009); William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 Notre Dame L Rev 1441 (2008) (examining a set of 131 Supreme Court preemption cases decided after Chevron to examine the role of judicial deference in such cases); Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 Neb L Rev 682 (2011) (examining “obstacle preemption” cases between 1993 and 2009).

¹⁵ Eskridge's valuable study, Eskridge, 83 Notre Dame L Rev (cited in note 15), provides a good illustration. While the great majority of Eskridge's 131 cases fall into the time period under examination in *PRC* and here, only 62 cases are found in both case sets. In a few cases, the mismatch may reflect different judgment calls in difficult-to-classify cases. For the most part, however, it is a result of different research interests and designs. Eskridge deliberately excluded preemption cases that involved no federal agency inputs; thus, entire classes of cases that appear in the *PRC* set—for example, cases under the Federal Arbitration Act—are excluded from Eskridge's study. Conversely, Eskridge's study—unlike *PRC* or the present study—includes a sizeable number of cases that we would characterize as “statutory interpretation” rather than true preemption cases. In such cases, the preemptive force of the federal enactment is not at issue; the question, rather, is the substantive reach of the statute.

¹⁶ For example, Joondeph's study, Joondeph, 2011 Utah L Rev (cited in note 15) found that more than 94% of the circuit courts' published preemption decisions were unanimous but that in the most contested cases, “Republican appointees were more than three times as likely as Democratic appointees to vote in favor of preemption (roughly 73% versus 21%),” *id.* at 225). That pattern—a level of consensus in preemption cases that exceeds the (best estimates of) judicial consensus overall, “partisan” voting in highly contested cases—is broadly consistent with the preemption decisions of the Rehnquist Courts: Greve and Klick, *PRC* at 56 (cited in note 1). The Roberts Court is a different story. See text below.

¹⁷ See, for example, Richard A. Posner, Lee Epstein, and William M. Landes, *How Business Fares in the Supreme Court*, 97 Minn L Rev 1431 (2013); Erwin Chemerinsky,

over the Court's high-stakes constitutional decisions,¹⁸ a steady stream of pro-preemption (and therefore often "pro-business") decisions has also figured quite prominently.¹⁹ The 2008 election, meanwhile, seemed to point in the opposite, anti-preemption direction. Under President Bush, agencies often took a firm position in favor of preemption. President Obama, in contrast, instructed government agencies to strike preemption language from their regulations (barring "full consideration of the legitimate prerogatives of the States and; . . . a sufficient legal basis")²⁰ and, moreover, to examine a decades worth of regulations for unwarranted preemption language.²¹ That change, coupled with a number of Supreme Court rulings against federal preemption, suggested that "[t]he preemption winds have shifted"²² in a more state-friendly direction.

PRC articulated our misgivings about understanding preemption cases along a single "attitudinal," ideological dimension.²³ Judicial "attitudes" for or against business are *one* dimension of preemption cases, and as explained in a moment, we have sought in this study to capture that dimension more accurately than we did in *PRC*. But they are *only* one dimension, and our examination of the Roberts Court provides further grounds for resisting any facile attitudinalism in the preemption domain. To break the suspense: our analysis of preemption decisions supports the perception of a distinctly business-friendly Roberts Court—but only up to a point, and for (we believe) surprising reasons.

B. Scope of the Study

PRC covered preemption cases over the Supreme Court's 1986–2003 Terms. The present study extends the analysis, covering the Rehnquist Court's final Term (2004) and the first eight Terms (2005–2012) of the Roberts Court. *PRC* distinguished between a "First"

The Roberts Court at Age Three, 54 Wayne L Rev 947, 962 (2008); Jeffrey Rosen, *Supreme Court, Inc.*, NY Times Mag at 38 (Mar 16, 2008).

¹⁸ See, for example, *Citizens United v FEC*, 558 US 310 (2010).

¹⁹ For example, Rosen, *Supreme Court, Inc.*, NY Times Mag at 38.

²⁰ *Memorandum on Preemption*, 2009 Daily Comp Pres Doc 384, at 1 (May 20, 2009), online at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900384.pdf>; see also Michele E. Gilman, *Presidents, Preemption, and the States*, 26 Const Comment 339, n1 (2010).

²¹ Gilman, *Presidents, Preemption, and the States*, at 339-40 (cited in note 21)

²² *Id* at 340 (mentioning *Altria Group, Inc v Good*, 555 US 70 (2008); *Wyeth v Levine*, 555 US 555 (2009); and *Cuomo v Clearing House Ass'n, LLC*, 557 US 519 (2009). For a polemical discussion, see Michael S. Greve, *Atlas Croaks*, *Supreme Court Shrugs*, 6 Charleston L Rev 15 (2011).

²³ Greve and Klick, *PRC* at 48, 86-88 (cited in note 1).

Rehnquist Court ("FRC"), spanning the 1986-1993 Terms, and a "Second" Rehnquist Court ("SRC"), spanning the 1994–2003 Terms. The divide, suggested by Thomas W. Merrill in an important article,²⁴ proved analytically useful there; we have maintained it here because the periods are sufficiently similar in length and case volume to permit comparisons.

Our initial study was prompted by misgivings about the reliability of extant data sets for purposes of examining statutory preemption, and it explained why and how we generated our data set "from scratch."²⁵ We have followed the same methodology and coding procedures here, with very minor exceptions²⁶ and with one important qualification: the categorization of cases as involving the preemption of "torts." The principal reason for this change, already alluded to, is to capture more closely the interest group dimension of preemption cases. The point, the procedures, and the results are described in Section II.D. below.

Section II provides an overview of preemption cases and outcomes. Section III examines the role of the litigating parties and of the Supreme Court's review of lower (state or federal court) decisions. Section IV discusses the role of the Solicitor General. Section V examines the Roberts Court and, in particular, the voting pattern of the individual justices. As already suggested, the findings of this study are broadly consistent with the results and tentative conclusions presented in *PRC*. Differences that have prompted us to modify our earlier analysis are discussed in the text. Section VI concludes.

II. CASES AND OUTCOMES

A. Case Volume

Our 2006 study identified 105 Supreme Court preemption cases decided by written opinion(s) between 1986 and 2003. Between 2004 and 2012, we have identified another 30 cases (two for the last Term of the SRC; 28 for the Roberts Court).²⁷ Appendix A shows all cases

²⁴ Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *SLU L J* 569 (2003).

²⁵ Greve and Klick, *PRC*, Appendix B (cited in note 1).

²⁶ A few cases were re-coded with respect to "subject-matter." The changes are too minor to affect any of the results reported here.

²⁷ During the 2013 and 2014 terms, the Roberts court decided four additional preemption cases: *Nothwest Inc. v. Gingsberg*, 134 S Ct 1422 (2014); *CJS Corp v. Waldburger*, 134 S Ct 2175 (2014); *Oneok Inc. v. Learjet*, 135 S Ct 1591(2015); and *Armstrong v. Exceptional Child Center, Inc.*, 135 S Ct 1378 (2015). These cases were not part of our analysis.

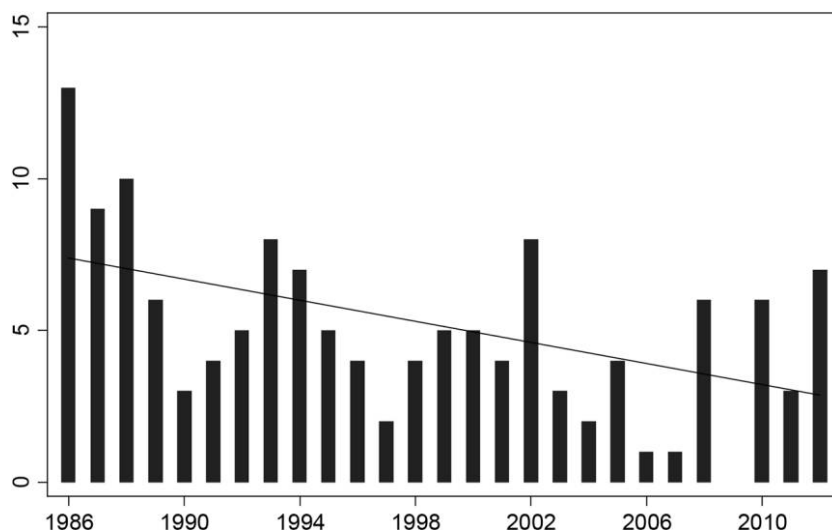


Figure 1. Cases by Term

by case name, citation (including calendar year), and term. Preemption cases range in frequency from zero cases (2009) to a high of 13 (1986), with an average of 5 cases per Term. Figure 1 shows the distribution and the trendline.

The picture suggests a gradual decline in the number of preemption cases. The FRC decided 58 preemption cases, or slightly over 7 cases per Term; the SRC, 49 (4.4 cases per Term); the Roberts Court, 28 (3.1 cases per Term). However, we hesitate to read too much into the declining numbers. The higher volume during the FRC reflects the Court's then-larger (civil) docket. In addition, while the Roberts Court had three terms with only one or no preemption case (2006, 2007, 2009), the more recent terms suggest a reversion to the norm. For all Courts, preemption cases constitute roughly seven or eight percent of the civil docket.²⁸

²⁸ The 28 preemption cases decided by the Roberts Court constitute about 7 percent of the Court's civil docket of 409 cases (out of 624 total cases) over those Terms. See *Supreme Court: The Statistics*, 127 Harv L Rev 408 (2013); *Supreme Court: The Statistics*, 126 Harv L Rev 388 (2012); *Supreme Court: The Statistics*, 125 Harv L Rev 362 (2011); *Supreme Court: The Statistics*, 124 Harv L Rev 411 (2010); *Supreme Court: The Statistics*, 123 Harv L Rev 382 (2009); *Supreme Court: The Statistics*, 122 Harv L Rev 516 (2008); *Supreme Court: The Statistics*, 121 Harv L Rev 436 (2007); *Supreme Court: The Statistics*, 120 Harv L Rev 372 (2006).

Table 1. Preemption Case by Subject Matter²⁹

	FRC	SRC	Roberts	Total
Labor & Employment (incl. ERISA)	23	10	2	35
Health, Safety, Environment	7	7	9	23
Economic Regulation	6	9	3	18
Transportation & Infrastructure	6	10	4	20
<i>Subtotal Regulatory</i>	<i>42</i>	<i>36</i>	<i>18</i>	<i>96</i>
Taxation	5	1	1	7
Public Benefits	4	3	2	9
FAA	2	5	3	10
Other (incl. Indian cases)	5	4	4	13
<i>Subtotal Other</i>	<i>16</i>	<i>13</i>	<i>10</i>	<i>39</i>
<i>Total</i>	<i>58</i>	<i>49</i>	<i>28</i>	<i>135</i>

B. Subject-Matter

PRC grouped preemption cases into four “regulatory” categories (labor and employment, including ERISA; health, safety, and environmental regulation; economic regulation, including banking and securities law; and transportation and infrastructure). Cases in these categories, we noted, comprise roughly 75 percent of all Supreme Court preemption cases. Table 1 shows that such cases have continued to preoccupy the Court under Chief Justice Roberts’ tenure. The noteworthy change has occurred within the “regulatory” category. Labor and employment cases have declined sharply. (Miraculously, the Roberts Court made it through eight terms without deciding a single ERISA case, versus nine such cases for each of its predecessors). On the other hand, health, safety and environmental cases (including the controversial cases concerning preemption under statutes administered by the Food and Drug Administration) account for half of all regulatory cases under the Roberts Court, and for almost one-third of all preemption cases.

²⁹ *PRC* lumped cases arising over (or under) the Federal Arbitration Act (“FAA”) under a catch-all “Other” Category. In light of their frequency and somewhat unique characteristics, those cases are shown separately in this study.

Table 2. Judicial Conflict and Consensus in Preemption Cases (weighted)

	Unanimous	1–2 Dissents	Subtotal	Contested	Total
FRC	30.5	16	46.5 (80%)	11.5 (20%)	58
SRC	25	14	39 (80%)	10 (20%)	49
Roberts	7.75	8.5	16 (57%)	12 (43%)	28
Total	63.25	38.25	101.5	33.5	135

C. Conflict and Consensus; Outcomes

We divided preemption case outcome into “consensual” (unanimous, or a vote differential of four or above) and “conflictual” (vote differential of three or below). The updated results—weighted to account for decisions with multiple preemption holdings³⁰—are shown Table 2. The numbers for the Roberts Court suggest two noteworthy shifts.

The first change is the level of judicial consensus in preemption cases. On the FRC as well as the SRC, four out of five preemption cases were decided unanimously or with a dissent by no more than one or two justices. The Roberts Court presents a very different picture. Consensual cases outnumber conflictual cases only 16:12. Entirely unanimous decisions have dropped to 25%, versus 50% on the Rehnquist Courts. The difference is quite substantial and is statistically significant at the 5% level.³¹

The second change has to do with preemption outcomes. On both Rehnquist Courts, pro-preemption holdings were a 50:50 proposition in consensual cases and a smidgen higher in contested cases. Not so on the Roberts Court, as shown in Table 3 (below).

The widespread impression that the Roberts Court is more “business friendly” (or in any event preemption-friendly) than its predecessors appears to be correct. Somewhat perplexingly, however, contested cases are no more likely to produce pro-preemption outcomes than they were under the Rehnquist Courts. The pro-preemption trend has unfolded in cases *without* (much) dissent: in such cases, the

³⁰ With one exception, no split decision involved more than two holdings (each of which was then weighted at .5). The exception is *Arizona v United States*, 132 S Ct 2492 (2011) where the Supreme Court separately analyzed four different provisions of the state’s immigration statute and different majorities of justices arrived at different preemption conclusions. We weighted each holding at .25 and respectfully implore the justices not to do this again.

³¹ We have tested most of our results for statistical significance through ordinary methods (using robust standard errors). We report partial results but, in the interest of parsimony, do not show the calculations; they are available upon request.

Table 3. Probabilities of Pro-Preemption Ruling by Level of Dissension

	Consensual	Contested	Total
FRC	51% (46.5)	57% (11.5)	52% (58)
SRC	50% (39)	55% (10)	51% (49)
Roberts	80% (16)	58% (12)	71% (28)
<i>Total</i>	<i>55% (101.5)</i>	<i>57% (33.5)</i>	<i>55% (135)</i>

Roberts Court has ruled for preemption with unusual frequency.³² The difference between the combined Rehnquist Courts and the Roberts Court is large, and statistically significant at the 5% level. Section V examines the pattern in greater detail.

D. Torts

PRC noted that the preemption of state common law and especially torts (as opposed to state statutes or regulations) had become a particularly contentious issue among scholars and among the justices. Accordingly, *PRC* distinguished and compared “tort” and “non-tort” (or “regulatory”) preemption cases.³³ The key finding was that tort cases were more likely than regulatory case to generate pro-preemption outcomes. Upon examination, however, that supposed result turned out to be a by-product of a (statistically significant) *party effect*.³⁴ Anti-preemption rulings are substantially more likely

³² 14 of 18 unweighted observations (12.75 of 16 cases) are pro-preemption.

³³ Greve and Klick, *PRC* at 52-53 (cited in note 1). The “torts” terminology is not beyond cavil. Richard Epstein has gently chided us for failing to distinguish in our earlier study between harms to strangers and torts that occur in a contractual context: Richard Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 Nw U L Rev 551 (2008) We take the point but stick with the terminology. As far as we can see, *all* federal preemption cases deal with “torts” that Professor Epstein (and we ourselves) would classify as arising out of a contractual context. The “harm to stranger” cases discussed in Epstein’s article are cases of interstate pollution, which are governed (in the absence of a federal statute) by *federal* common law. In these cases, the Supreme Court applies a “displacement” analysis that differs significantly from preemption analysis. For obvious reasons no presumption in favor of state law applies, and displacement analysis embraces a form of field occupation that the Supreme Court has largely disavowed in true preemption cases. See *Am Elec Power Co, v Connecticut*, 131 S Ct 2527 (2013) (Clean Air Act displaces federal common law of interstate nuisance for air pollution, including greenhouse gas emissions). Our case set is limited to the preemption of *state* law and does not include cases of federal common law displacement.

³⁴ Greve and Klick, *PRC* at 52-53, 76 (cited in note 1).

Table 4. Tort Preemption Claims by Subject Matter

	FRC	SRC	Roberts	Total
Labor & Employment (incl. ERISA)	55% (6)	6% (1)	0% (0)	18% (7)
Health, Safety, Environment	18% (2)	31% (5)	54% (7)	35% (14)
Economic Regulation	9% (1)	19% (3)	8% (1)	13% (5)
Transportation & Infrastructure	9% (1)	25% (4)	15% (2)	18% (7)
Other	9% (1)	19% (3)	23% (3)	18% (7)
Total Tort Cases	11	16	13	40
Total Non-Tort Cases	47	33	15	95
Total Cases	58	49	28	135

in cases to which a state is a party than in cases among private parties—and practically all tort cases fit the latter description.

The present study revisits and slightly revamps the “torts” analysis, for two reasons. *First*, tort cases have assumed ever-greater prominence in terms of raw numbers. Table 4 shows the distribution of tort cases for the four subject-matter categories (which comprise all but seven tort cases) and “All Other” cases. Note that tort cases progressively constitute a larger proportion of all cases (almost one-half under the Roberts Court, compared to less than 20 percent under the FRC and about one-third under the FRC). Note further the proportionally large number of tort cases in the “Health” category under the Roberts Court: cases of this description constitute 25 percent of the Court’s entire preemption universe (7 of 28 cases).

Second, “tort preemption” cases are ideologically contentious, in a way in which most regulatory preemption cases are not. They pit business directly against the plaintiffs’ bar, in a continuous stream of zero-sum conflicts—quite often, over what looks like all the marbles.³⁵ The suspicion arises, then, that especially on an ideologically divided Court, tort preemption cases might differ meaningfully from more “states’ rights-ish” cases; and that any differences in outcomes may have more to do with the justices’ predispositions vis-à-

³⁵ In one sense, the cases *are* over all the marbles: Congress practically never overrides statutory preemption decisions. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study on Congressional Responses to Supreme Court Preemption Decisions*, 120 Harv L Rev 1604, 1612 (“Congress almost never overrides the Supreme Court’s preemption decisions”). To all intents, then, the Supreme Court’s word on preemption is final. In a different perspective, preemption litigation in fields such as pharmaceutical regulation, securities regulation, and ERISA is a game of inches, one case and claim at a time. Preemption outcomes in these domains are highly path-dependent, a point that should be kept in mind in assessing the statistical results. See text-accompanying II.D.

vis business and the plaintiffs' bar than with preemption doctrine, statutory interpretation canons, or federalism intuitions.

More specifically (and polemically): the Supreme Court's and especially the Roberts Court's restrictive approach to class action certification,³⁶ pleading requirements,³⁷ and related questions³⁸ has prompted observers to surmise, or allege, that the Court—or at any rate its conservative majority—"has it in" for the plaintiffs' bar.³⁹ "Tort preemption" cases may partake of that broader pattern: the Court may be anti-plaintiff rather (or more) than pro-business.

To examine these possibilities, we (re)-classified as a "Torts" case any case in which (1) a *private* plaintiff (2) seeks *monetary* relief and (3) the cause of action does not arise from a written instrument, such as an employee benefit plan.⁴⁰ Is there a distinctive, ideologically driven "tort preemption" pattern?

Table 5. Tort v. Regulatory Cases: Conflict Level and Outcomes

Court	Probability Contested		Probability of Preemption		Total
	Torts	Non-Torts	Torts	Non-Torts	
FRC	18% (11)	20% (47)	50% (11)	52% (47)	58
SRC	22% (16)	20% (33)	59% (16)	47% (33)	49
Roberts	50% (13)	37% (15)	69% (13)	72% (15)	28
Total	40	95	40	95	135

Table 5 provides a first, inconclusive impression. Unquestionably, tort preemption cases have become more contested (left-hand columns). As already suggested, however, that is true of *all* preemption cases. The differences are much more pronounced across time and Courts than they are between tort and regulatory cases. The probability of preemption (right-hand columns) looks largely random. The likelihood of tort preemption has increased from one

³⁶ *Halliburton Co v Erica P. John Fund, Inc*, 134 S Ct 2398 (2014); *Comcast Corp v Behrend*, 133 S Ct 1426 (2013); *Wal-Mart Stores, Inc v Dukes*, 131 S Ct 2541 (2011).

³⁷ See, for example, *Bell Atl Corp v Twombly*, 550 US 544 (2007); *Ashcroft v Iqbal*, 556 US 662 (2009).

³⁸ *Stoneridge Investment Partners v Scientific-Atlanta, Inc*, 552 US 148 (2008); *Dura Pharmaceuticals, Inc v Broudo*, 544 US 336 (2005).

³⁹ See, for example, David Zaring, *The Roberts Court's Business Jurisprudence*, The Conglomerate Blog (Sept. 18, 2010), online at <http://www.theconglomerate.org/2010/09/the-roberts-courts-business-jurisprudence.html>; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, NY Times, July 1, 2007, at A1.

⁴⁰ The parameters differ somewhat from those utilized in PRC. For details and explanation, see Appendix B.

Court to the next. Surely the most striking observation, though, is the Roberts Court's outlier status on the Non-Tort, Regulatory side.

Ideological divisions are bound to surface most clearly in contested cases. Table 6 below shows the conditional probabilities for pro-preemption outcomes in tort/regulatory cases for contested cases only.

Table 6. Tort v. Regulatory Cases: Pro-Preemption Outcomes, Contested Cases

Court	Tort	Regulatory	Total
FRC	1	.47	.57
	2	9.5	11.5
SRC	.86	.38	.55
	3.5	6.5	10
Roberts	.69	.45	.58
	6.5	5.5	12
Total	.79	.44	5.7
	12	21.5	33.5

While the numbers here get uncomfortably small, the substantially higher rate of pro-preemption outcomes appears to support the "anti-plaintiffs'-bar" story. However, two notes of caution are in order.

First, as already noted, *PRC* found that the perceived "tort effect" was actually a *party* effect: rulings against preemption are substantially more likely in cases to which a state is a party, and that is generally not the case in tort cases. We have performed the same analysis for the Roberts Court and found the earlier result confirmed.

Second, the raw case count masks the path-dependent dynamic of tort preemption litigation over time. A finding for preemption in a tort case (1) does not necessarily settle the scope of preemption under a given statutory provision; it may merely invite the plaintiffs' bar to plead substantially the same claims on slightly different, often novel and made-for-preemption-evasion theories in cases (2), (3), and (4).⁴¹ To make preemption "stick" in such situations, the defense

⁴¹ The pattern is pronounced in securities cases, pharmaceutical regulation, ERISA cases, and (with some qualifications) litigation over the preemptive scope of the Federal Arbitration Act.

Regulatory (non-tort) preemption litigation does not have the same dynamic, and pro-preemption business constituencies cannot litigate in the same strategic fashion. Their preemption claims are either defensive (in tort cases) or anticipatory defenses against state regulation (in regulatory cases). Either way, another party is the first mover, thus obviating any sequenced business strategy to expand the preemptive reach of a given federal statute or provision.

bar must win *all* of its cases; to defeat it, the plaintiffs' bar need win only once. By the same token, a pro-preemption ruling in cases (2) and (3) need not signal unremitting judicial hostility to plaintiffs' lawyers; it may merely mean that the justices are policing an earlier ruling against evasion and circumvention. We cannot think of a way to capture the dynamic in numbers. It is nonetheless real, and it counsels caution in interpreting the statistical results.

III. PREEMPTION LITIGATION: A PARTIAL ANATOMY

PRC examined the pattern of preemption litigation in the Supreme Court with respect to party constellations and the provenance of cases in state or federal court. We here report our updated findings, along with comments on noteworthy developments and several wrong guesses on our part.

A. Party Constellations.

Preemption disputes (among business, other private actors, states, and the federal government) arise—and arrive at the Supreme Court—in many configurations. ERISA cases may pit business litigants or private parties against each other; immigration cases may involve the federal government directly. However, two party constellations predominate both in the original plaintiff-defendant setup and in the petitioner-respondent configuration in which cases arrive at the court: business versus state governments, and private parties versus business (collectively, “non-government parties.”) Table 7 shows the distribution for plaintiffs and defendants; Table 8, for petitioners and respondents. Because the pattern has remained

Table 7. Preemption Cases by Plaintiff and Defendant

Plaintiff	Defendant				Total
	Business	Private	State	Federal	
Business	6	3	38	1	48
Private	44	10	19	1	74
State	3	1	3	3	10
Federal	0	1	2	0	3
Total	53	15	62	5	135

Table 8. Preemption Cases by Petitioner and Respondent

Petitioner	Respondent				Total
	Business	Private	State	Federal	
Business	7	37	23	0	67
Private	12	9	5	1	27
State	17	13	3	5	38
Federal	0	0	3	0	3
Total	36	59	34	6	135

fairly constant over time, we do not show the distribution for the three Courts.

As shown (Table 7), there were 44 private lawsuits against business and 38 business lawsuits against states. Together, these cases account for 61 percent of the case universe. And as shown in Table 8, 49 (37 plus 12) cases featured business and private parties as petitioners and respondents in the Supreme Court, while 40 cases (23 plus 17) pitted business against states as petitioners or respondents. Cases in these two configurations account for two-thirds of all preemption cases.⁴²

Do some classes of petitioners do better than others? The short answer is no. Table 9 shows the parties' "unexpected success ratio." Roughly, petitioners prevail in 59% of preemption cases (as they do in all cases). The Table shows how much better or worse each group of petitioners did against other groups. The differences translate into no more than one or two "extra" cases won or lost for any given constellation over the entire period, and they are far too small to be meaningful. In an essentially atomistic litigation market (where no group of petitioners is capable of policing the flow of *certiorari* petitions), that is the expected result.

In another respect, however, the party constellation matters quite a bit. As shown in Table 10, pro-preemption outcomes are much more likely—or rather, *used* to be more likely—in cases without state participation than in cases to which a state is a party. *PRC* noted the pattern for the FRC and the SRC and tentatively attributed it to a signaling effect: in preemption cases of any constellation

⁴² The two configurations appear yet more paradigmatic when one backs out, in addition to atypical cases involving the federal government and state-versus-state cases, the far larger number of cases arising under ERISA and the Federal Arbitration Act, which account for the vast majority of the non-conforming cases.

Table 9. Petitioners' Unexpected Success Ratios

Petitioner	Respondent			
	Business	Private	State	Total
Business	***	-.01 (37)	-.05 (23)	-.03 (60)
Private	-.27 (12)	***	.22 (5)	-.07 (17)
State	.04 (17)	.03 (13)	***	.03 (30)
Total	.01 (29)	-.00 (50)	-.01 (28)	(107)

Table 10. Probabilities of Preemption, by Party Constellation⁴³

	FRC	SRC	Roberts	Total
State Participation	47% (31)	38% (24)	70% (14)	48% (69)
	44% (25)	33% (21)	75% (12)	47% (58)
Non-Government	57% (27)	67% (24)	71% (14)	64% (65)
	57% (27)	67% (24)	71% (14)	64% (65)

(excluding cases to which the federal government is a party), a state party's position against preemption is bound to be the only non-strategic "federalism" position the justices will encounter. However, the state-party effect seems to have disappeared under the Roberts Court. Regression analysis confirms that impression.

We attribute this phenomenon, not to any grand judicial re-thinking of the role of states in the federal system or in preemption litigation but simply to the peculiar mix of preemption cases decided by the Roberts Court. Three of them were immigration cases (involving a single state, Arizona—which lost on virtually all counts). In those cases, the state party "signal" carries different connotations than it does in ordinary commercial cases. Three additional cases arose over an expansive express preemption provision governing transportation regulation; states lost all three by a unanimous vote.⁴⁴ Given the small case universe, those cases are bound to affect the overall picture.

States as a group have an alternative means of communicating their position to the Supreme Court: *amicus* briefs. *PRC* documented the states' extensive *amicus* participation in preemption cases; Table 11 below shows the updated information. (There has been no substan-

⁴³ Table 10 excludes cases to which the federal government was a party and cases among state actors.

⁴⁴ For a brief summary and case cites see text accompanying note 70.

Table 11. State Amicus Participation Rates⁴⁵

Petitioner	Respondent			
	Business	Private	State	Total
Business	57% (7)	54% (37)	65% (23)	58% (67)
Private	58% (12)	33% (9)	40% (5)	46% (26)
State	94% (17)	77% (13)	***	87% (30)
Total	75% (36)	56% (59)	61% (28)	63% (123)

tial change in the overall pattern.) From an outcome-oriented perspective, the states' *amicus* practice seems suboptimal. State participation is substantially higher in cases in which a state is already a party than in wholly private cases, where state *amici* might contribute a distinctive, authentic perspective. Moreover, state participation is higher when states are petitioners rather than respondents. In contrast, an extensive study has shown that as a rule, *amicus* briefs on respondents' behalf—but *not* petitioners'—may significantly affect case outcomes.⁴⁶ Most likely, the observed pattern reflects the organizational dynamics of the *amicus* process. Rallying support for a state's petition is a relatively low-cost proposition; monitoring wholly private cases and formulating a common state position in those cases involves much higher transaction costs.

It is not clear, moreover, that state *amicus* briefs have a discernible impact. (*PRC* found no statistically significant effect on case outcomes, and the present study confirmed that non-result.) As shown in Table 12, (below) anti-preemption outcomes are in fact more likely in cases with mass (22 or more) state *amicus* briefs (though not in

Table 12. State Amici and Anti-Preemption Outcomes

	All Cases	State Party	Non-Government
No State Amicus	32% (46)	33% (15)	31% (31)
Some State Amicus	36% (11)	50% (4)	29% (7)
Mass State Amicus	55% (66)	62% (39)	44% (27)
All Cases	44% (123)	53% (58)	36% (65)

⁴⁵ Tables 11 and 12 exclude cases to which the federal government or opposing state entities (*for example*, state versus local governments) were parties.

⁴⁶ Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U Pa L Rev 743, 810-11 (2000).

cases with “some” state *amici*). The effect is statistically significant at the 5% level. However, it disappears in a multivariate regression that includes the position of the Office of the Solicitor General and the participation of a state as a litigant as independent variables.⁴⁷

B. State Courts, Federal Courts, and Several Non-Results

Certiorari grants to federal courts have the Supreme Court play a coordinating, “housekeeping” role atop of the federal judicial hierarchy. (Many of the cases will involve splits among the circuits.) The exercise of appellate jurisdiction over state courts, in contrast, has constitutional salience and federalism implications over and above the substantive preemption issue in any given case. *Certiorari* grants to state courts are a rough proxy for the Supreme Court’s willingness to assure the supremacy of federal law, in a context where federal interests may go under-enforced. Preemption cases implicate federal supremacy in a particularly direct way. Thus, one would expect a relatively high number of *certiorari* grants to state courts and, quite probably, a high reversal rate when state courts have found no federal preemption. However, the observed pattern fails to confirm those expectations.

PRC noted the gradual disappearance of state court (preemption) cases from the Supreme Court’s docket, beginning with the 1994 Term. As the updated Figure 2 (below) shows, the tendency has been pronounced and persistent. Under the FRC, almost half of all preemption cases (28 of 58) were *cert* grants to state courts. During the SRC, state courts cases dropped to roughly 25 percent (13 of 49 cases). Under the Roberts Court, the ratio is about the same: seven of 28 *cert* grants were to state courts.

To a considerable extent, the drop reflects a broader trend that cuts across the Court’s entire docket. During the FRC, civil cases from state courts constituted 16.3 percent of the Court’s civil docket (118 of 724 cases). During the SRC, the percentage dropped to 10.8 (67 of 622 civil cases). For the Roberts Court, the percentage is 8.2 percent (33 of 402 cases).⁴⁸

⁴⁷ See Tables 17(a), (b).

⁴⁸ *The Supreme Court, 2003 Term, The Statistics*, 118 Harv L Rev 497 (2004); *The Supreme Court, 2004 Term, The Statistics*, 119 Harv L Rev 415 (2005); *The Supreme Court, 2005 Term, The Statistics*, 120 Harv L Rev 372 (2006); *The Supreme Court, 2006 Term, The Statistics*, 121 Harv L Rev 436 (2007); *The Supreme Court, 2007 Term, The Statistics*, 122 Harv L Rev 516 (2008); *The Supreme Court, 2008 Term, The Statistics*, 123 Harv L Rev 382 (2009); *The Supreme Court, 2009 Term, The Statistics*, 124 Harv L Rev 411 (2010); *The Supreme Court, 2010 Term, The Statistics*, 125 Harv L Rev 362 (2011); *The Supreme Court, 2011 Term, The Statistics*, 126 Harv L Rev 388 (2012); *The Supreme Court, 2012 Term, The Statistics*, 127 Harv L Rev 408 (2013).

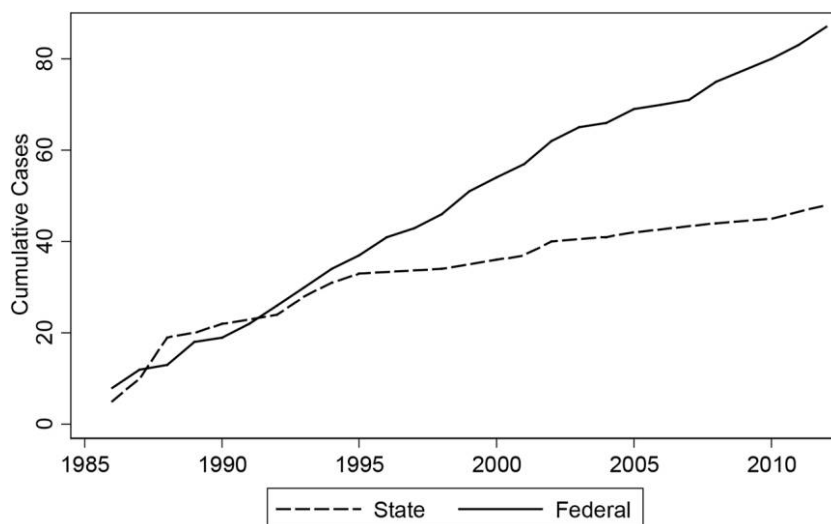


Figure 2. Source of Case

It is not the case, moreover, that state court preemption rulings, especially rulings against preemption, are more reversal-prone than federal rulings. As shown in Tables 13(a)-(d) below, state court rulings reviewed by the Supreme Court are substantially more likely to have gone against rather than for federal preemption; not so with lower federal court rulings. However, the Supreme Court has affirmed such rulings at a 46% rate. (By way of context: because the Supreme Court reverses lower courts in about 60 percent of all cases—preemption or other—the expected affirmance rate is 40 percent, not 50 percent.) Neither that number nor any other data point suggests any suspicion on the justices' part that state courts tend to under-enforce preemptive federal statutes.

The only noteworthy observation—aside from the fluky fact that the Roberts Court affirmed eight of nine federal court pro-preemption rulings—is the unusually high reversal rate under the SRC, regardless of what court below (state or federal) had reached what result.⁴⁹ One would expect such a pattern in the wake of federal statutes whose preemptive meaning has to be liquidated or after Supreme Court decisions that unsettle established doctrines over a wide swath of cases. Neither explanation, however, seems very plausible.⁵⁰ We have been unable to think of any alternative explanation.

⁴⁹ Both results are statistically significant.

⁵⁰ Allowing for a three- or four-year time lag, the unsettled legislation or unsettling precedent should have occurred around 1990. However, that period was a time of

Table 13(a). Probabilities of Affirmance, Depending on Lower Court Disposition

	Lower Court Pro-Preemption	Lower Court Anti-Preemption
State Court	36% (14)	46% (34)
Federal Court	47% (44.5)	28% (42.5)

Table 13(b). Probabilities of Affirmance, Depending on Lower Court Disposition (FRC)

	Lower Court Pro-Preemption	Lower Court Anti-Preemption
State Court	50% (6)	55% (22)
Federal Court	51% (19.5)	33% (10.5)

Table 13(c). Probabilities of Affirmance, Depending on Lower Court Disposition (SRC)

	Lower Court Pro-Preemption	Lower Court Anti-Preemption
State Court	17% (6)	21% (7)
Federal Court	25% (16)	28% (20)

Table 13(d). Probabilities of Affirmance, Depending on Lower Court Disposition (Roberts)

	Lower Court Pro-Preemption	Lower Court Anti-Preemption
State Court	50% (2)	40% (5)
Federal Court	75% (9)	25% (12)

Finally, we explored possible interdependencies between party constellation, lower-court venue, and case type (tort versus regulatory). As shown earlier in Table 7 and 8, roughly three-quarters of preemption cases conform to one of two scenarios:

legislative quiescence, and the only preemption case that fits the description is the splintered decision in *Cipollone v Liggett Group, Inc.*, 505 US 504 (1991).

Table 14. Lower Courts—Tort and Statutory Cases

<i>Tort Cases</i>	FRC	SRC	Roberts	Total
Federal	6	12	8	26
State	5	4	5	14
Total Tort Cases	11	16	13	40
<i>Non-Tort Cases</i>				
Federal	24	24	13	61
State	23	9	2	34
Total Non-Tort Cases	47	33	15	95

- Business or other private parties, confronted with an arguably preempted state regulation, sue the state or its officers on preemption grounds.⁵¹
- A private party sues a business firm under state common or statutory law.

Preemption challenges to state regulations may be brought in federal court,⁵² and it stands to reason that business plaintiffs will usually seek to avail themselves of that perceived advantage. Private tort plaintiffs against business, on the other hand, will generally prefer to litigate in state court. Moreover, except for diversity cases (which may be removed to federal court), the cases will *remain* in state court.⁵³ Hence, we expected that cases arriving at the Supreme Court from lower federal courts would tend to implicate state laws and regulations, while cases arriving from state courts would be disproportionately tort cases. That expectation, too, proved erroneous:

Tort cases of the *Wyeth v. Levine* variety—arising and stuck in state court, and decided in the first instance by juries with little sympathy for corporate defendants or, perhaps, respect for federal law—are every defense lawyer’s nightmare. Surprisingly few of them,

⁵¹ Of course, a firm may also raise the defense in a state enforcement action. Only three cases of that nature, however, have appeared on the Supreme Court’s preemption docket. See Table 7.

⁵² *Shaw v Delta Airlines, Inc*, 463 US 85 (1983); *Verizon Maryland, Inc v Public Service Comm’n of Maryland*, 535 US 635 (2002).

⁵³ If the plaintiffs’ case arises under state law, the well-pleaded complaint rule bars removal to federal court on a federal (preemption) defense. We put aside rare cases of “complete” preemption under ERISA and the National Bank Act. See, respectively, *Metropolitan Life Ins Co v Taylor*, 481 US 58 (1987); *Beneficial Nat’l Bank v Anderson*, 593 US 1 (2003).

however (fourteen, over the entire period under examination), have made it onto the Supreme Court's docket. Perhaps, many such cases are dying a quiet death on the Court's *cert* docket. Or perhaps, such cases are not all that common to begin with and diversity jurisdiction and removal doctrines afford, more commonly than the defense bar's lamentations would suggest, an escape from a potentially biased state forum. However this may be, the category of cases that is disappearing from the Court's docket comprises state court decisions on conflicts between federal and state *statutory* law. While such cases constituted almost half of the FRC's non-tort preemption docket, the Roberts Court has decided only two cases of this description. Regulatory cases account for the entire decline in the Court's appellate review of state court preemption decisions.

IV. THE SOLICITOR GENERAL AND THE COURT

PRC examined the merits submission by the OSG in preemption cases. We found that the OSG participated in over 70 percent of all preemption cases. In over 80 percent of those cases, the Supreme Court agreed with the OSG's position on the merits. The high level of agreement does not show that the OSG's position has any independent effect on case outcomes. The OSG prides itself on its role as a "Tenth Justice," and its enviable batting average may simply reflect its ability to anticipate the Court's disposition.

It did appear, however, that the OSG's submission *against* federal preemption had a substantial and significant effect, in the expected direction. Moreover, the OSG's partisan affiliation appeared to have an independent effect: we found *no* case in which the Supreme Court failed to follow a Republican OSG's recommendation against preemption. The justices may treat such submissions as a "signal"—as an admission against (pro-business) interest, and therefore as almost certainly the best view of the law.

As shown in Tables 15 and 16, the new data confirm our earlier results.⁵⁴ The percentages do not differ substantially. Table 15 shows that the OSG has participated in almost 80 percent (96 of 123) of the cases in the universe. Republican OSGs are more likely to abstain in cases between private and business parties. One plausible explanation is that such cases might compel the OSG to take a position against preemption; for a Republican OSG, abstention may be the preferable course of action. (The unusually low number of actual

⁵⁴ Cases involving the federal government as a party and cases between states are omitted from both Tables.

Table 15. OSG Amicus Preemption Briefs

	State Party		Non-Governmental		Total	
	R	D	R	D	R	D
Pro-P	51% (18)	39% (9)	46% (16.5)	40% (11.5)	49% (34.5)	39% (20.5)
Anti-P	31% (11)	43% (10)	18% (6.5)	47% (13.5)	25% (17.5)	45% (23.5)
Abstention	17% (6)	17% (4)	36% (13)	14% (4)	27% (19)	15% (8)
Total	35	23	36	29	71	52

Table 16: Conditional Probabilities, Pro-Preemption Outcome

OSG Brief	OSG Party		Total
	R	D	
For Preemption	67% (34.5)	83% (20.5)	73% (55)
Against Preemption	0% (17.5)	38% (23.5)	22% (41)
Abstention	71% (19)	75% (8)	72% (27)

Republican OSG submissions against preemption in those types of cases supports this hypothesis.) As one would expect, Republican OSGs are more likely to favor preemption than are Democratic OSGs (49% to 39%).

Table 16 shows the conditional probabilities of pro-preemption outcomes depending on the OSG's position and party affiliation. The differences are larger and more meaningful on the anti-preemption side. Pro-preemption outcomes are unlikely when the OSG argues against preemption; when a *Republican* OSG takes that position, the Court has consistently done so as well.⁵⁵ The unusually high number of pro-preemption outcomes in cases where a Democratic OSG argues for preemption (83%) suggests that such submissions, too, may have a signaling effect, in the opposite direction; however, this is not statistically significant.

The OSG's outsized influence is confirmed by a more formal regression analysis of the likelihood that the Court holds for preemption.⁵⁶ The results are shown in Tables 17(a), (b). All else equal,

⁵⁵ These results are significant at a 1% level.

⁵⁶ We omit any case where the federal government is a party to the litigation or where the litigation is a dispute between two state parties, though this does not

Table 17(a). Effect of OSG Participation on Likelihood of Preemption, All Cases

	Coefficient	Robust S.E.	T-stat	P value
OSG No Preemption	-0.48	0.08	-5.80	0.00
State Party	-0.12	0.08	-1.45	0.15
Mass State Amici	-0.11	0.08	-1.35	0.18
Constant	0.83	0.06	14.13	0.00

$R^2 = 0.26$ [aweight=weight, robust, n=134=literal number of observations]

Table 17(b). Effect of OSG Participation on Likelihood of Preemption, Contested Cases

	Coefficient	Robust S.E.	T-stat	P value
OSG No Preemption	-0.17	0.19	-0.92	0.36
State Party	-0.34	0.18	-1.89	0.07
Mass State Amici	-0.13	0.18	-0.70	0.49
Constant	0.90	0.17	5.28	0.00

$R^2 = 0.15$ [aweight=weight, robust, n=134=literal number of observations]

when the OSG argues against preemption, the likelihood of a pro-preemption outcome drops by almost 50 percent and this effect is statistically significant. The presence of a state party has no statistically significant effect (and even the point estimate of the effect is much smaller than the OSG effect), nor does the existence of mass state amicus briefs (where the point estimate is almost zero).⁵⁷

As in our earlier study, when we restrict the sample to contested cases, the OSG effect is significantly reduced. In fact, it is no longer statistically significant owing to the much smaller point estimate, not merely due to a drop in power arising from the smaller number of observations. Interestingly, the presence of a state party in a contested case becomes a more important (and statistically significant)

matter substantively for the results that follow. We eliminate the state versus state cases since the hypothesized state signals would be meaningless in this context. Eliminating the cases where the federal government is a party makes sense given our interest in the OSG position as a signal.

⁵⁷ We used *mass state amici* as the independent variable because the participation of only some (fewer than 22) states appeared to have no effect on outcomes at all. See Table 13.

negative signal, with the Court being 34 percent less likely to hold for preemption in such contested cases.

The outsized role of the OSG will surprise neither professional Court watchers nor lawyers who practice in these venues. It may bear on the simmering debate over the Court's "pro-business" orientation. At least one scholar has noted that pro-business decisions may have more to do with the Solicitor General's central role than with any judicial bias towards business as a constituency.⁵⁸ To the extent that preemption cases are typical of "business cases" in general, our data and analysis tend to support that proposition.

V. PREEMPTION ON THE ROBERTS COURT

As noted above, the Roberts Court has proven more hospitable to preemption claims—when measured by raw case outcomes—than either of the Rehnquist Courts. Moreover, preemption cases have proven far more contentious and generated an unusually large proportion of divided votes. This Part examines the Roberts Court more closely. To state two key findings upfront:

First, bloc voting in preemption cases has increased very substantially on the Roberts Court. However, the liberal bloc is far more stable than the conservative bloc. And while Justice Kennedy is a "swing vote" in the sense that a pro-preemption majority requires his vote, the evidence suggests that just about *every* conservative justice may "defect" in one case or another.

Second, the widely held impression of a distinctly "pro-business," pro-preemption Roberts Court is correct—but only up to a point and for (we believe) under-appreciated reasons. As already suggested and as shown in Table 3, the Court's pro-preemption record is in large measure a result of an abnormally high proportion of *unanimous* decisions in favor of preemption. Put differently, it is *not* primarily the product of a cohesive conservative bloc.

Section A. provides a brief overview of the Roberts Court's preemption decisions. Section B. provides an analysis of the Justices' votes.

A. The Court in Transition.

The transition from the "First" to the "Second" Rehnquist Court marked a generational shift. Justices whose basic intuitions for

⁵⁸ Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 Santa Clara L Rev 943 (2009).

varying reasons cut in favor of preemption were succeeded by substantially less “preemption-friendly” jurists.⁵⁹ Nonetheless, the Second Rehnquist Court proved more inclined to find federal preemption, largely because pro-preemption sentiments hardened among the conservative justices. The transition also marked a shift from a high turn-over of justices to a period of extraordinary stability: from Justice Stephen Breyer’s appointment in 1994 to Chief Justice Rehnquist’s retirement after the end of the 2004 term, the Court sat in the same composition, a time span exceeded only once in its history.

The first eight terms of the Roberts Court have witnessed—in addition to a new Chief Justice—three changes in personnel. In 2006, Justice Samuel Alito took Justice Sandra Day O’Connor’s seat. In 2009, after the end of the 2008 Term, Justice Sonya Sotomayor succeeded Justice David Souter; in 2010, Justice Elena Kagan replaced Justice John Paul Stevens. In the one-dimensional, ideological cases over “God, guns, and gays” that dominate the public’s perception of the Court, the net effect of these personnel changes was the emergence of Justice Kennedy as the lone swing vote among hardened liberal and conservative blocs.

In terms of its preemption docket, too, the Roberts Court has brought a number of changes. As noted earlier, labor cases—a staple of preemption jurisprudence for decades—have virtually disappeared from the docket. And to an unusual extent, the Court has been occupied with a relatively limited number of recurring questions.

- In six cases, the Roberts Court has addressed preemption conflicts between state tort claims (such as misbranding and failure to warn) and federal labeling requirements contained in health and safety statutes administered by the Food and Drug Administration.⁶⁰ These cases are very contentious and tend to produce consistent (though not entirely stable) conservative-liberal “bloc voting.”⁶¹ To a very large extent, they drive the statistical results for the Roberts Court’s preemption decisions.

⁵⁹ Justices Marshall, Brennan, White and Powell were all substantially more likely to favor preemption than their successors. The contrast is most dramatic for Justices White and Ginsburg—respectively, the most and least preemption-friendly members of the Court over the entire period under examination.

⁶⁰ See *Mutual Pharmaceutical Co v Bartlett*, 133 S Ct 2466 (2012); *PLIVA v Mensing*, 131 S Ct 2567 (2011); *Bruesewitz v Wyeth*, 131 S Ct 1068 (2010); *Altria Group, Inc v Good*, 555 US 70 (2008); *Wyeth v Levine*, 555 US 555 (2008); *Riegel v Medtronic, Inc.*, 552 US 312 (2008).

⁶¹ Four of the cases were contested, and no case went without a dissent. Justice Ginsburg dissented in *Riegel v Medtronic, Inc*, 552 US 312 (2008). Justices Ginsburg and Sotomayor dissented in *Bruesewitz v Wyeth*, 131 S Ct 1068 (2010).

- Two cases arose over federal banking regulation and supervision, with differing (pro- and anti-preemption) results. Both were contested; both produced unorthodox voting alignments.⁶² The preemption ruling in *Watters* has been effectively reversed by provisions of the Dodd-Frank Act,⁶³ a voluminous statute whose complicated preemption provisions are bound to generate a great deal of litigation in years to come.⁶⁴
- In three cases, all involving the State of Arizona, the Supreme Court addressed preemption questions in a fairly new venue—citizenship and immigration.⁶⁵ The crude notion that liberal and conservative default positions on preemption “flip” in these cases (and the justices simply vote their policy preference in any preemption case) is only partially correct. Very clearly, however, immigration cases scramble the voting alignments.⁶⁶

⁶² *Watters v. Wachovia Bank, NA*, 550 US 1 (2007); *Cuomo v. Clearinghouse Association, LLC*, 557 US 519 (2009). Justice Stevens’ dissent in *Watters* was joined by Chief Justice Roberts and Justice Scalia (Justice Thomas did not participate). Justice Scalia’s majority opinion in *Cuomo* was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Thomas’s dissenting opinion was joined by Chief Justice Roberts and by Justices Kennedy and Alito. While styled as a “partial” dissent, both sides in the case—as well as legal experts—have characterized the outcome as an unequivocal victory for the state and its anti-preemption position. We have coded it accordingly.

⁶³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L No 111-203, §§ 1044, 1046, codified at 12 USC. §§ 25b, 1465.

⁶⁴ See, for example, Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U Pa. L Rev 1235 (2013); Danyeale L. Hensley, *Section 1044 Of Dodd-Frank: When Will State Laws Be Preempted Under The OCC’s Revised Regulations?*, 16 NC Banking Inst 161 (2012); Jeffrey Karek, Geoffrey Waguespack, and Ralph Wutscher, 31 No. 1 Banking & Fin Services Pol’y Rep 1 (2012); Courtney Gaughan, *Some More Watters, Please: The Dodd-Frank Act’s New Preemption Standards Lighten Consumers’ Wallets*, 63 Fla L Rev 1459 (2011).

⁶⁵ See *Arizona v The Inter Tribal Council of Arizona*, 133 S Ct 2247 (2012); *Chamber of Commerce v Whiting*, 131 S Ct 1968 (2011); *Arizona v United States*, 132 S Ct 2492 (2011). Immigration and naturalization questions did not appear in any preemption case decided by the Rehnquist Court. However, the states’ role in these matters was at issue in the foundational case of *Hines v Davidowitz*, 312 US 52 (1941).

⁶⁶ In *Chamber of Commerce v Whiting*, 131 S Ct 1968 (2011), Chief Justice Roberts’ opinion for the Court (holding Arizona law conditioning business licenses on observance of restrictions on employing unauthorized aliens not preempted) was joined by Justices Scalia, Kennedy, and Alito. Justice Thomas concurred in the judgment and in parts of the opinion for the Court. Justices Breyer, Ginsburg, and Sotomayor dissented; Justice Kagan took no part. Note, however, that the case poorly fits an attitudinal explanation: the case went against the business interests that argued for preemption. In *Arizona v United States*, 132 S Ct 2492 (2011), Justice Kennedy’s opinion for the Court (finding most but not all provisions of the Arizona statute at issue preempted) was joined by Chief Justice Roberts and by Justices Ginsburg,

- The Roberts Court decided three preemption cases involving the Federal Arbitration Act.⁶⁷ The most important of these cases, involving the FAA preemption of California's common law of unconscionability, was decided in favor of preemption by a sharply divided Court, split along conservative-liberal lines.⁶⁸
- Three cases were decided under the FAAAA (not a keyboard malfunction: at issue is the Federal Aviation Administration Authorization Act of 1994). The cases merit mention as more than preemption trivia because, taken together, they affect the statistics. They arise under an express preemption provision; concern the preemption of state statutory rather than tort law; and were consistently decided in favor of preemption by a unanimous Court.⁶⁹ The Roberts Court's pro-preemption record is partly a result of these humdrum, uncontroversial cases.

B. How the Justices Vote

As mentioned, a principal feature of preemption decisions on the Roberts Court is a hardening of positions on both sides. A simple measure is the individual justices' "distance" from the average of the Court as a whole. Table 18 shows the results for the sitting justices, ordered by likelihood of voting for preemption in contested cases.

The distances are somewhat larger than those observed on the SRC (not shown here). Justice Alito is clearly a "hard" vote for preemption; but since that was also true of Justice O'Connor,⁷⁰ his arrival on the Court does not translate into any major change in preemption cases. Justice Scalia, the most preemption-friendly Justice on the SRC, has become less likely than the Court to vote in favor of preemption; conversely, Justice Thomas has become more so. Chief Justice Roberts' record is identical to Chief Justice Rehnquist's. The

Breyer, and Sotomayor. Justices Scalia, Thomas, and Alito filed separate opinions concurring and dissenting in different parts. Justice Kagan did not participate. In *Arizona v The Inter Tribal Council of Arizona*, 133 S Ct 2247 (2012), Justices Thomas and Alito dissented from the majority's holding in favor of preemption.

⁶⁷ See *AT&T Mobility v Concepcion*, 131 S Ct 1740 (2011); *Preston v Ferrer*, 552 US 346 (2008); *Buckeye Check Cashing v Cardegna*, 546 US 440 (2006). The classification of *Buckeye* as a preemption case is a judgment call. However, only Justice Thomas dissented (as he has in many FAA preemption cases). Inclusion of the case does not significantly affect the overall picture.

⁶⁸ *AT&T Mobility v Concepcion*, 131 S Ct 1740 (2011).

⁶⁹ In addition to the FAAAA cases, see *National Meat Association v Harris*, 132 S Ct 965 (2011).

⁷⁰ See Greve and Klick, *PRC* at 83 (cited in note 1).

Table 18

Alito	.86 [11]
Roberts	.75 [12]
Thomas	.68 [11]
Kennedy	.67 [12]
<i>Court</i>	.58 [12]
Scalia	.54 [12]
Breyer	.38 [12]
Sotomayor	.36 [7]
Ginsburg	.29 [12]
Kagan	.27 [5.5]

numbers for Justices Ginsburg and Breyer are unchanged; the records of Justices Sotomayor and Kagan mirror their predecessors'.

The raw numbers disguise a somewhat messy, unstable voting pattern. Table 19 below shows the sitting justices' votes with the majority in the twelve contested cases:

Justice Kennedy is in a class by himself: he was in the majority in all contested cases but one. (This was *not* the case on the SRC, where Justice Kennedy voted with the majority in only seven of ten contested cases—a record then matched by Justices Souter and Breyer.) More remarkably still, no other justice has voted with

Table 19. Voting With the Majority

	Pro-Preemption (7)	Anti-Preemption (5)	All Cases (12)	Total Votes
Scalia	3.5	2	5.5	12 (45%)
Kennedy	7	4	11	12 (92%)
Thomas	4.5	2	6.5	11 (59%)
Ginsburg	2.5	4	6.5	12 (54%)
Breyer	3.5	4	7.5	12 (63%)
Roberts	5	1	6	12 (50%)
Alito	6.5	1	7.5	11 (68%)
Sotomayor	1.5	0	1.5	7 (14%)
Kagan	1.5	0	1.5	5.5 (27%)

the majority in more than 7.5 of the twelve cases. The justices least likely to vote with the majority (excluding Justices Sotomayor and Kagan)⁷¹ are Justices Scalia and Ginsburg. Both are quite likely to be found among dissenters, regardless (it appears) of the outcome.

Is there a pattern in the churn? Table 20 below shows the likelihood of voting “pairs” among the justices for all contested cases. (The upper number for each pair shows the correlation; the lower number, the associated p value.) The Table contains the (to our minds) most noteworthy of our findings, in comparison to the SRC.

PRC found that between the FRC and the SRC, pro- and anti-preemption positions hardened on both the conservative and the liberal side. Still, *PRC* found *no* voting pairs at the 5% confidence level. It found only eleven observations at the 10% confidence level, six of them bearing a negative sign (meaning a statistically significant likelihood that the paired justices will be found on opposite sides). And where there are no pairs among justices, there can be no voting blocs.

The Roberts Court presents a very different picture. Of the 36 pairs, 16 are significant at the 5% level (the shaded pairings in Table 17).⁷² Six of those observations bear a positive sign; the remaining ten, a negative sign. The following observations stand out:

- Only Justice Kennedy’s votes do not correlate with *any* other justices’ votes. He alone is likely to be found in the majority in any given case; his vote alone correlates with the Court’s.
- On the anti-preemption side, a firm bloc has emerged. Justice Ginsburg, Breyer, and Sotomayor will usually vote together; each vote pairing among them is strongly positive and statistically significant. We strongly suspect that Justice Kagan may soon join the coalition; her failure to do so to date is largely a product of a small number of votes.⁷³
- On the conservative side, the picture is more complicated. Of the six possible pairings among the four justices, only

⁷¹ The two justices’ votes in Table 19 come with a very large asterisk: their unblemished pro-preemption record is attributable to pro-preemption votes in contested immigration cases.

⁷² Another six pairs are significant at the 10% level.

⁷³ The emergence of such a bloc matters because it may compensate in some ways for a shift that might otherwise prove highly consequential: with the retirement of Justice John Paul Stevens, the anti-preemption camp lost its anchor. Simon Lazarus, *Stripping the Gears of National Government: Justice Steven’s Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 Nw U L Rev 769 (2012). A succeeding justice can substitute an equally reliable anti-preemption vote—but not Justice Stevens’s senior status, or his strategic acumen honed in decades on the Court.

Table 20. Likelihood of Voting Together, Contested Cases (Roberts Court)

	Scalia	Kennedy	Thomas	Ginsburg	Breyer	Roberts	Alito	Sotomayor	Kagan
Scalia									
Kennedy	-0.30								
	0.28								
Thomas	0.42	0.30							
	0.13	0.31							
Ginsburg	-0.70	0.06	-0.79						
	0.00	0.82	0.00						
Breyer	-0.84	0.18	-0.58	0.83					
	0.00	0.51	0.03	0.00					
Roberts	0.63	0.00	0.69	-0.90	-0.75				
	0.01	1.00	0.01	0.00	0.00				
Alito	0.40	0.35	0.57	-0.58	-0.48	0.35			
	0.16	0.22	0.04	0.03	0.08	0.22			
Sotomayor	-0.75	-0.55	-1.00	1.00	0.75	-0.85	-0.70		
	0.01	0.10	1.00	0.00	0.01	0.00	0.02		
Kagan	-0.39	0.00	-0.77	0.77	0.39	-0.77	0.00	0.77	
	0.45	1.00	0.07	0.07	0.45	0.07	1.0	0.07	
Court	-0.10	0.84	0.16	0.17	0.31	-0.10	0.25	-0.55	0.00
	0.73	0.00	0.58	0.54	0.27	0.73	0.39	0.10	1.00

three are statistically significant (Scalia/Roberts; Roberts/Thomas; Thomas/Alito). There is a bloc of sorts, then, but it suffers frequent defections.

In our view, the explanation of this somewhat curious picture—bloc voting, coupled with unstable case outcomes and (unlike in, say, equal protection cases) a large number of defections from one of the blocs—must be sought in doctrine, rather than raw ideology.⁷⁴ Preemption cases are multi-dimensional and heterogeneous. Preemption may be implied or express, tort or regulatory. Cases may be highly path-dependent (as with ERISA or pharmaceutical cases) or present novel issues under untested statutes. Preemption cases may arise over a wide range of policy arenas, and they intersect with questions of statutory interpretation and deference to agency decisions. These sometimes subordinate but recurrent questions, as well as the justices' strongly held jurisprudential views, shape the contours of preemption litigation.

VI. CONCLUSION

We refrain from drawing any broad or firm conclusions. The universe of cases, and especially the universe of “contested” cases that drive most of the results, is simply too small to instill any great confidence. As we have suggested, a few quirky cases can affect statistical results, and even a handful of such cases over the next two or three terms may produce a very different picture of the Roberts Court. Moreover, a full picture of preemption litigation would have to include here-omitted variables, notably including factors affecting the Court's decisions to grant or deny *certiorari*. Especially in an otherwise data-free environment, our analysis yields, or so we hope, valuable information. It reveals insights into patterns that might otherwise go unnoticed, and it may help to dispel misconceptions arising from more casual observation or a focus on a few “headline” cases. But the analysis does *not* provide a basis for any grand theorizing.

All those caveats duly noted, we highlight one finding that frankly surprised us: over time and especially under the Roberts Court, lawyerly preemption questions have assumed a distinctly ideological flavor. Preemption cases are much more likely to be contested than they were in earlier decades. In those cases, once-rare judicial bloc voting has become common and Justice Kennedy has emerged as a

⁷⁴ This intuition prompted our empirical project in the first place: Greve and Klick, *PRC* at 48 [cited in note 1].

true swing vote, akin to his role in “headline” cases over intensely controversial social issues. That departure from the more fluid pattern that prevailed under the Rehnquist Court(s) seems difficult to attribute to the Court’s changed composition: as noted, the newly appointed justices’ voting record in preemption cases differs little from their predecessors’. Much more likely, it has to do with extrajudicial factors—much more intense resource mobilization (including sharper and better lawyering) on all sides; the failure of Congress to update old statutes even when their judicially divined preemptive effect assumes unexpected and occasionally odd contours; the partial substitution of litigation for federal rulemaking as a principal means of industry regulation; or combination of these and other factors. These questions, while beyond the scope of our analysis, merit further examination.

APPENDIX A

No.	Case	Term
1	<i>RJ Reynolds Tobacco Co v Durham County, NC</i> , 479 US 130	1986
2	<i>California Federal Sav & Loan Ass’n v Guerra</i> , 479 US 272	1986
3	<i>324 Liquor Corp v Duffy</i> , 479 US 335	1986
4	<i>International Paper Co v Ouellette</i> , 479 US 481	1986
5	<i>California Coastal Com’n v Granite Rock Co</i> , 480 US 572	1986
6	<i>Pilot Life Ins Co v Dedeaux</i> , 481 US 41	1986
7	<i>Metropolitan Life Ins Co v Taylor</i> , 481 US 58	1986
8	<i>CTS Corp v Dynamics Corp of America</i> , 481 US 69	1986
9	<i>Rose v Rose</i> , 481 US 619	1986
10	<i>International Broth Of Elec Workers, AFL-CIO v Hechler</i> , 481 US 851	1986
11	<i>Fort Halifax Packing Co, Inc v Coyne</i> , 482 US 1	1986
12	<i>Caterpillar Inc v Williams</i> , 482 US 386	1986
13	<i>Perry v Thomas</i> , 482 US 483	1986
14	<i>Schneidewind v ANR Pipeline Co</i> , 485 US 293	1987
15	<i>Bennett v Arkansas</i> , 485 US 395	1987
16	<i>Puerto Rico Dept of Consumer Affairs v Isla Petroleum Corp</i> , 485 US 495	1987
17	<i>City of New York v FCC</i> , 486 US 57	1987
18	<i>Goodyear Atomic Corp v Miller</i> , 486 US 174	1987
19	<i>Lingle v Norge Div of Magic Chef, Inc</i> , 486 US 399	1987

No.	Case	Term
20	<i>Mackey v Lanier Collection Agency & Service, Inc</i> , 486 US 825	1987
21	<i>Felder v Casey</i> , 487 US 131	1987
22	<i>Mississippi Power & Light Co v Mississippi ex rel Moore</i> , 487 US 354	1987
23	<i>Shell Oil Co v Iowa Dept of Revenue</i> , 488 US 19	1988
24	<i>Bonito Boats, Inc v Thunder Craft Boats, Inc</i> , 489 US 141	1988
25	<i>Volt Information Sciences, Inc v Board of Trustees Stanford</i> , 489 US 468	1988
26	<i>Northwest Central Pipeline Corp v State Corp Com'n of Kansas</i> , 489 US 493	1988
27	<i>Mississippi Band of Choctaw Indians v Holyfield</i> , 490 US 30	1988
28	<i>California v ARC America Corp</i> , 490 US 93	1988
29	<i>Massachusetts v Morash</i> , 490 US 107	1988
30	<i>Cotton Petroleum Corp v New Mexico</i> , 490 US 163	1988
31	<i>Mansell v Mansell</i> , 490 US 581	1988
32	<i>ASARCO Inc v Kadish</i> , 490 US 605	1988
33	<i>Golden State Transit Corp v City of Los Angeles</i> , 493 US 103	1989
34	<i>Adams Fruit Company, Inc v Barrett</i> , 494 US 638	1989
35	<i>United Steelworkers of America v Rawson</i> , 495 US 362	1989
36	<i>North Dakota v United States</i> , 495 US 423	1989
37	<i>California v FERC</i> , 495 US 490	1989
38	<i>English v General Elec Co</i> , 496 US 72	1989
39	<i>FMC Corp v Holliday</i> , 498 US 52	1990
40	<i>Ingersoll-Rand Co v McClendon</i> , 498 US 133	1990
41	<i>Wisconsin Public Intervenor v Mortier</i> , 501 US 597	1990
42	<i>Barker v Kansas</i> , 503 US 594	1991
43	<i>Morales v Trans World Airlines</i> , 504 US 374	1991
44	<i>Gade v National Solid Wastes Management Ass'n</i> , 505 US 88	1991
45	<i>Cipollone v Liggett Group, Inc</i> , 505 US 504	1991
46	<i>District of Columbia v Greater Washington Bd of Trade</i> , 506 US 125	1992
47	<i>Itel Containers Intern Corp v Huddleston</i> , 507 US 60	1992
48	<i>Building and Construction Traders Council v Assoc Builders and Contractors of Mass</i> , 507 US 218	1992
49	<i>CSX Transp, Inc v Easterwood</i> , 507 US 658	1992
50	<i>United States Department of Treasury v Fabe</i> , 508 US 491	1992

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No.	Case	Term
51	<i>John Hancock Mut Life Ins v Harris Trust & Sav Bank</i> , 510 US 86	1993
52	<i>Department of Revenue of Oregon v ACI Industries, Inc</i> , 510 US 332	1993
53	<i>Northwest Airlines v County of Kent</i> , 510 US 355	1993
54	<i>American Dredging Co v Miller</i> , 510 US 443	1993
55	<i>PUD No 1 of Jefferson County v Washington Dept of Ecology</i> , 511 US 700	1993
56	<i>Department of Taxation and Finance of New York v Millhelm Attea & Bros, Inc</i> , 512 US 61	1993
57	<i>Livadas v Bradshaw</i> , 512 US 107	1993
58	<i>Hawaiian Airlines, Inc v Norris</i> , 512 US 246	1993
59	<i>Nebraska Dept of Revenue v Loewenstein</i> , 513 US 123	1994
60	<i>American Airlines, Inc v Wolens</i> , 513 US 219	1994
61	<i>Allied-Bruce Terminix Companies, Inc v Dobson</i> , 513 US 265	1994
62	<i>Mastrobuono v Shearson Lehman Hutton</i> , 514 US 52	1994
63	<i>Anderson v Edwards</i> , 514 US 143	1994
64	<i>Freightliner Corp v Myrick</i> , 514 US 280	1994
65	<i>New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins Co</i> , 514 US 645	1994
66	<i>Dalton v Little Rock Family Planning Services</i> , 516 US 474	1995
67	<i>Barnett Bank of Marion County, NA v Nelson</i> , 517 US 25	1995
68	<i>Doctor's Associates, Inc v Casarotto</i> , 517 US 681	1995
69	<i>Smiley v Citibank (South Dakota), NA</i> , 517 US 735	1995
70	<i>Medtronic, Inc v Lohr</i> , 518 US 470	1995
71	<i>Atherton v FDIC</i> , 519 US 213	1996
72	<i>California Div of Labor Standards Enforcement v Dillingham Const, NA, Inc</i> , 519 US 316	1996
73	<i>De Buono v NYSA-ILA Medical and Clinical Services Fund</i> , 520 US 806	1996
74	<i>Boggs v Boggs</i> , 520 US 833	1996
75	<i>Foster v Love</i> , 522 US 67	1997
76	<i>American Telegraph & Telephone Co v Central Office Telephone, Inc</i> , 524 US 214	1997
77	<i>El Al Israel Airlines, Ltd V Tsui Yuan Tseng</i> , 525 US 155	1998
78	<i>Humana Inc v Forsyth</i> , 525 US 299	1998

No.	Case	Term
79	<i>Arizona Department of Revenue v Blase Construction Co, Inc</i> , 526 US 32	1998
80	<i>UNUM Life Ins Co of America v Ward</i> , 526 US 358	1998
81	<i>United States v Locke</i> , 529 US 89	1999
82	<i>Norfolk Southern Ry Co v Shanklin</i> , 529 US 344	1999
83	<i>Geier v American Honda Motor Co Inc</i> , 529 US 861	1999
84	<i>Pegram v Herdrich</i> , 530 US 211	1999
85	<i>Crosby v National Foreign Trade Council</i> , 530 US 363	1999
86	<i>Dir of Revenue v CoBank ACB</i> , 531 US 316	2000
87	<i>Buckman Co v Plaintiff's Legal Committee</i> , 531 US 341	2000
88	<i>Circuit City Stores, Inc v Adams</i> , 532 US 105	2000
89	<i>Egelhoff v Egelhoff ex rel Breiner</i> , 532 US 141	2000
90	<i>Lorillard Tobacco Co v Reilly</i> , 533 US 525	2000
91	<i>Wisconsin Dept of Health and Family Services v Blumer</i> , 534 US 473	2001
92	<i>Sprietsma v Mercury Marine</i> , 537 US 51	2002
93	<i>New York v FERC</i> , 535 US 1	2001
94	<i>Rush v Moran</i> , 536 US 355	2001
95	<i>City of Columbus v Ours Garage and Wrecker Service, Inc</i> , 536 US 424	2001
96	<i>Ky Ass'n of Health Plans, Inc v Miller</i> , 538 US 329	2002
97	<i>Pharm Research & Mfrs of Am v Walsh</i> , 538 US 644	2002
98	<i>Entergy La, Inc v La PSC</i> , 539 US 39	2002
99	<i>Ben Nat'l Bank v Anderson</i> , 539 US 1	2002
100	<i>American Ins Assn v Garamendi</i> , 539 US 396	2002
101	<i>Green Tree Fin Corp v Bazzle</i> , 539 US 444	2002
102	<i>Hillside Dairy, Inc v Lyons</i> , 539 US 59	2002
103	<i>Aetna Health Inc v Davila</i> , 542 US 200	2003
104	<i>Engine Manufacturers Ass'n v So Coast Air Quality Mgmt Dist</i> , 541 US 246	2003
105	<i>Nixon v Missouri Municipal League</i> , 541 US 125	2003
106	<i>Bates v Dow Agrosiences LLC</i> , 544 US 431	2004
107	<i>Mid-Con Freight Systems, Inc v Michigan Public Service Com'n</i> , 545 US 440	2004
108	<i>Wagon v Prairie Band Potawatomi Nation</i> , 546 US 95	2005

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No.	Case	Term
109	<i>Gonzales v Oregon</i> , 546 US 243	2005
110	<i>Buckeye Check Cashing v Cardegna</i> , 546 US 440	2005
111	<i>Merrill Lynch, Pierce, Penner & Smith Inc v Dabit</i> , 547 US 71	2005
112	<i>Watters v Wachovia Bank, NA</i> , 550 US 1	2006
113	<i>Rowe v New Hampshire Motor Transport Ass'n</i> , 552 US 364	2007
114	<i>Preston v Ferrer</i> , 552 US 346	2008
115	<i>Riegel v Medtronic, Inc</i> , 552 US 312	2008
116	<i>Chamber of Commerce of US v Brown</i> , 554 US 60	2008
117	<i>Altria Group, Inc v Good</i> , 555 US 70	2008
118	<i>Wyeth v Levine</i> , 555 US 555	2008
119	<i>Cuomo v Clearing House Ass'n, LLC</i> , 557 US 519	2008
120	<i>Bruesewitz v Wyeth</i> , 131 S Ct 1068	2010
121	<i>Williamson v Mazda Motor of America</i> , 131 S Ct 1131	2010
122	<i>AT&T Mobility v Concepcion</i> , 131 S Ct 1740	2010
123	<i>CSX Transp v Alabama</i> , 131 S Ct 1101	2010
124	<i>Chamber of Commerce v Whiting</i> , 131 S Ct 1968 (2011)	2010
125	<i>PLIVA v Mensing</i> , 131 S Ct 2567 (2011)	2010
126	<i>Kurns v Railroad Friction Products</i> , 132 S Ct 1261 (2012)	2011
127	<i>Nat'l Meat Association v Harris</i> , 132 S Ct 965	2011
128	<i>Arizona v United States</i> , 132 S Ct 2492	2011
129	<i>Mutual Pharmaceutical Co v Bartlett</i> , 133 S Ct 2466	2012
130	<i>Dan's City Used Cars v Pelkey</i> , 133 S Ct 1769	2012
131	<i>Arizona v The Inter Tribal Council of Arizona</i> , 133 S Ct 2247	2012
132	<i>Maracich v Spears</i> , 133 S Ct 2191 (2013)	2012
133	<i>American Trucking Association v Los Angeles</i> , 133 S Ct 2096	2012
134	<i>Hillman v Maretta</i> , 133 S Ct 1943	2012
135	<i>Wos v EMA</i> , 133 S Ct 1391	2012

APPENDIX B: CODING TORT PREEMPTION CASES

As noted in the text, we re-coded the entire case set along the “Tort v. Non-Tort/Regulatory” dimension. This Appendix explains our reasons and procedures. It also, and in the same breath, cautions against any excessive reliance on statistical results.

There are two ways of approaching the “torts” issue and of coding cases accordingly. One focuses on the form of preemption statutes and state law; the other, on ideology and interest group dynamics. The first, “formalist” approach goes primarily to the text of federal preemption provisions and their conflict (or not) with state common law: does a federal statute that prohibits states from administering any state “standard,” “requirement” or “law” that conflicts with or varies from federal law also preempt a state *common law* rule, standard, or requirement? The second, ideological or “interest group” approach goes not to legal forms but to pay-offs, or the form of relief sought by the anti-preemption party. To oversimplify: if a preemption case arises in a suit brought by (a) a private party that is (b) making a demand for money and the case is (c) *not* centered on the meaning of a contract or other written instrument, then it’s a “torts case.”

Neither approach is beyond cavil; both involve a great deal of judgment and, therefore, a risk of error and bias. The best we can do is to explain our reasoning in the close cases. *PRC* coded preemption cases principally with an eye toward formal categories, which at that time were still a matter of judicial and scholarly argument. But the doctrinal question has since been resolved: in principle, state common law requirements are no different from statutory requirements, and subject to the same preemption analysis.⁷⁵ The ideological dimension, in contrast, has assumed greater salience and interest. For that reason, we re-coded the cases accordingly.

As a result, nine cases from *PRC* shifted from being coded as a tort case to a non-tort/regulatory case. These included six labor cases

⁷⁵ See, for example, *Bates v Dow Agrosciences*, 544 US 431, 443 (2005); *Sprietsma v Mercury Marine*, 537 US 51, 69 (2002). “[T]he day is long past when the Court will entertain arguments that preemption of common-law tort judgments is unwarranted because the state regulations imposed by such judgments are different in kind from regulations of positive law.” See also Richard A. Samp, *Congressional Oversight of Supreme Court Preemption Decisions*, 32 Hamline L Rev 747, 756-57 (2009).

(including ERISA cases),⁷⁶ two economic regulation cases,⁷⁷ and one transportation and infrastructure case.⁷⁸ While these cases contain some claim that technically falls within the area of torts, those claims are best viewed as add-ons to what is essentially a cause of action based on, for examples, an employee benefits plan, a collective bargaining agreement, or a contract containing an arbitration clause.

Inversely, three cases from *PRC* went from being coded as non-tort cases to “tort” cases in this article. *Felder v. Casey* shifted from non-tort to tort for the reasons stated above: it was brought by a private party; not based on a written instrument, and the plaintiff ultimately sought a money judgment.⁷⁹ *American Dredging Co. v. Miller*,⁸⁰ a labor case, addressed the question of whether *forum non conveniens* is a procedural rule of general application under admiralty law. The case’s coding shifted from non-tort in *PRC* to tort in this article because the underlying claim was a Jones Act claim seeking a money judgment for a personal injury. *Smiley v. Citibank*⁸¹ concerning the “unconscionability” of credit card late payment fees under California law, was coded as a non-tort/regulatory case in *PRC*. But unconscionability doctrine has little to nothing to do with what a contract says and, instead, addresses whether the plain terms of a contract are void under public policy—an inquiry very much separate from determining what a writing means. Accordingly, we re-coded *Smiley* as a “torts” case.

⁷⁶ *Pilot Life Ins Co v Dedeaux*, 481 US 41 (1987); *Metropolitan Life Ins Co v Taylor*, 481 US 58 (1987); *International Brotherhood of Electrical Workers, AFL-CIO v Hechler*, 481 US 851 (1987); *Caterpillar, Inc v Williams*, 482 US 386 (1987); *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399 (1988); *Aetna Health, Inc v Davila*, 542 US 200 (2004).

⁷⁷ *Perry v Thomas*, 482 US 483 (1987); *American Ins Association v. Garamendi*, 539 US 396 (2003).

⁷⁸ *ATT v Central Office Telephone*, 524 US 214 (1998).

⁷⁹ *Felder v Casey*, 487 US 131 (1987). Our decision to code *Felder*—but not, say, *Haywood v Drown*, 556 US 729 (2009), presenting substantially the same legal question—as a “preemption” case in the first place is debatable, and it provides a fine illustration of the difficulties that arise in subjecting judicial reasoning and decisions to empirical analysis. As every Federal Courts student knows, the boundaries in this territory are rather fluid. We have sought to address the problem by *independently* coding cases along dimensions that involve discretionary judgment. Disagreements were resolved in what is best described as a series of mini-Fed Courts sessions. Other scholars might well make different calls; and, given the small numbers of cases and especially contested cases, there is no reason to think that our judgment calls and potential errors wash out in the end. We do believe, however, that our judgments are free from any systemic bias.

⁸⁰ *American Dredging Co v Miller*, 510 US 443 (1993).

⁸¹ *Smiley v Citibank*, 517 US 735 (1995).