University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2016

Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis

Michael Greve
George Mason University

Jonathan Klick
University of Pennsylvania Carey Law School

Michael A. Petrino
Kirkland & Ellis

J. P. Sevilla
George Mason University

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the Judges Commons, Legal History Commons, and the Legislation Commons

Repository Citation

Greve, Michael; Klick, Jonathan; Petrino, Michael A.; and Sevilla, J. P., "Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis" (2016). *Faculty Scholarship at Penn Law*. 1533.
https://scholarship.law.upenn.edu/faculty_scholarship/1533

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

PREEMPTION IN THE REHNQUIST AND ROBERTS COURTS: AN EMPIRICAL ANALYSIS

Michael S. Greve,
George Mason University School of Law

Jonathan Klick,
University of Pennsylvania Law School

Michael Petrino,
Kirkland & Ellis LLP

J.P. Sevilla,
George Mason University School of Law

George Mason University Law and Economics Research Paper Series

15-05

This paper is available on the Social Science Research Network
at http://ssrn.com/abstract=2567878

Summary

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.

Do Note Cite or Quote Without Permission

Preemption in the Rehnquist and Roberts Courts:

An Empirical Analysis

Michael S. Greve, Jonathan Klick, Michael Petrino, & J.P. Sevilla*

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

* Professor of Law, George Mason University School of Law; Professor of Law, University of Pennsylvania Law School; Partner, Kirkland & Ellis LLP; Levy Fellow, George Mason University School of Law. Earlier drafts were presented at workshops at Columbia Law School, University of Pennsylvania Law School, and GMU School of Law. We thank the participants for their helpful comments. Special thanks to Thomas W. Merrill, who suggested the "torts" analysis provided in the text, and to Ashley C. Parrish and Robert R. Gasaway for additional comments. Cynthia Hernandez and Erica N. Peterson provided exceptionally valuable research assistance.

[1] Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP.CT. ECON. REV. 43 (2006).

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 debate[3] 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).

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]

---

[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, e.g., William W. Buzbee, PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (Cambridge University Press, Dec. 15, 2008); FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 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 PEPP. L. REV. 1 (2006).

[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 U.S. 141 (1989). For discussion see Christina Bohannan, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616 (2008); Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. 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,

including pharmaceutical drugs and medical devices;[5] immigration;[6] banking and financial regulation;[7] and the Federal Arbitration Act.[8]

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]

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 HOUS. L. REV. 953 (2005).

[5] See, e.g., PLIVA v. Mensing, 131 S.Ct. 2567 (2011); Wyeth v. Levine, 555 U.S. 555 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312 (2008). For discussion see, e.g., Richard Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 K. 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 & 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., Dec. 2006 (discussing recent FDA regulatory actions intended to preempt state tort law claims against drug manufacturers); 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., Dec. 2006, at art. 5 (arguing in favor of FDA preemption of common law claims).

[6] See Arizona v. U.S., 132 S.Ct. 2492 (2012); Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011). For discussion, see e.g., 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).

[7] See Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519 (2009); Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007). For discussion see, e.g., Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301 (2012); Jared P. Roscoe, S*tate Courts and the Presumption Against Banking Preemption*, 67 N.Y.U. 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, & 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 POL'Y REP. 1 (2010); Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659 (2009).

[8] See, e.g., AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011); Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006). For discussion see, e.g., Peter Rutledge, ARBITRATION AND THE CONSTITUTION (Cambridge University Press, 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).

[9] Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. 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, e.g., Robert R. Gasaway and Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007); Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Richard A. Epstein & Michael S. Greve eds., 2007); 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*

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] as well as continued disagreement on the Court.[14]

Empirics. Following and sometimes relying on *PRC*, scholars have subjected preemption decisions to further empirical examination.[15] 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,[16] several of the authors' findings seem broadly consistent

---

National Legislative Process, 82 N.Y.U. L. REV. 1 (2007); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. 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 U.S. 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 on the Justice's former law clerks: Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

[13] See, e.g., 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 N.Y.U.J.L & LIBERTY 63 (2010).

[14] See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria Grp., Inc. v. Good*, 129 S. Ct. 538 (2008); *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). The most recent Supreme Court case in this vein, *CTS v. Waldburger*, 134 S. Ct. 2175 (2014), was decided after the conclusion of the Court's October 2012 Term (June 2013) and is therefore not part of the data set.

[15] See Note, New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions, 120 HARV. 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).

[16] Eskridge's valuable study, *supra* n. 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"

with those in *PRC* and here.[17] 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.[18] While much of the agitation has arisen over the Court's high-stakes constitutional decisions,[19] a steady stream of pro-preemption (and therefore often "pro-business") decisions has also figured quite prominently.[20] 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")[21] and, moreover, to examine a decade's worth of regulations for unwarranted preemption language.[22] That change, coupled with a number of Supreme Court rulings against federal

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.

[17] For example, Joondeph's study, *supra* n. xx 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: *PRC* at 56. The Roberts Court is a different story. *See infra*.

[18] *See, e.g.,* Richard A. Posner, Lee Epstein & William M. Landes, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008); Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38.

[19] *See, e.g. Citizens United v. FEC*, 558 U.S. 310 (2010).

[20] *E.g.,* Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38.

[21] Memorandum on Preemption, 2009 DAILY COME PRES. DOC. 384, at 1 (May 20, 2009), available at http://www.gpoaccess.gov/presdocs/2009/DCPD-200900384.pdf; see also Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, n.1 (2010).

[22] Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 339-340 (2010).

preemption, suggested that "[t]he preemption winds have shifted"[23] in a more state-friendly direction.

PRC articulated our misgivings about understanding preemption cases along a single "attitudinal," ideological dimension.[24] 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" 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,[25] 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."[26] We have followed the same methodology and coding procedures here, with very minor exceptions[27] 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.

---

[23] *Id.* at 340 (mentioning *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Wyeth v. Levine*, 555 U.S. 555 (2009); and *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009)). For a characteristically polemical discussion see Michael S. Greve, *Atlas Croaks. Supreme Court Shrugs*, 6 CHARLESTON L. REV. 15 (2011).

[24] *PRC* at 48, 86-88.

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

[26] *PRC*, Appendix B.

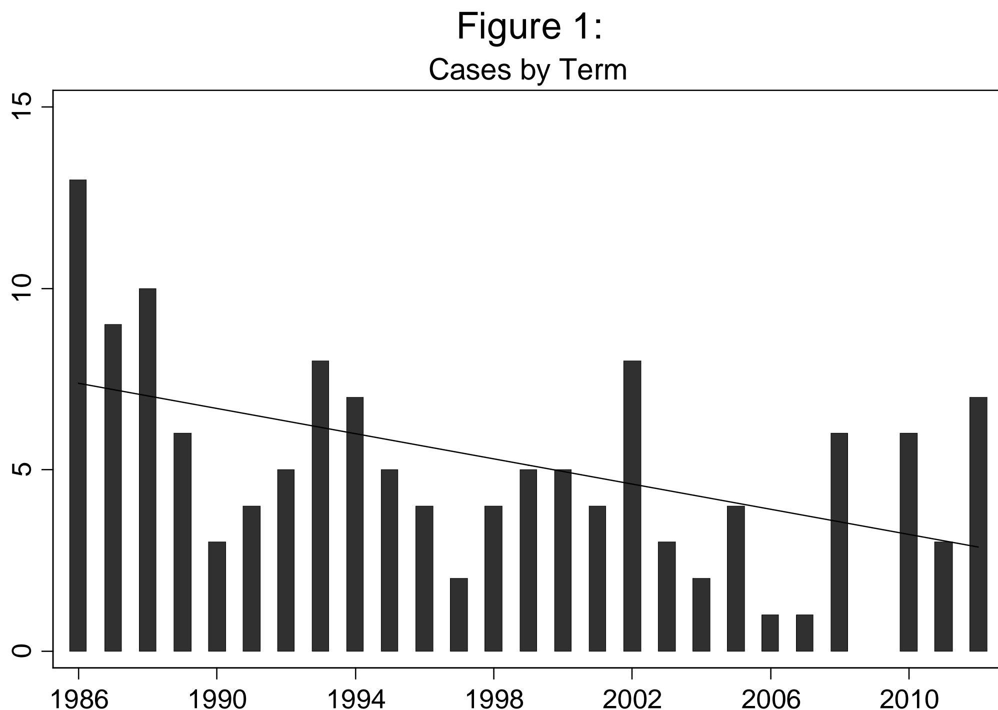
[27] A few cases were re-coded with respect to "subject-matter." The changes are too minor to affect any of the results reported here.

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). Appendix A shows all cases 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 seven 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. And 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]

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 below 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.

[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 Matter[29]

	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
Subtotal Regulatory	42	36	18	96
Taxation	5	1	1	7
Public Benefits	4	3	2	9
FAA	2	5	3	10
Other (incl. Indian cases) Subtotal Other	5 16	4 13	4 10	13 39
Total	58	49	28	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 holdings[30]—are shown below (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%,

[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.

[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. U.S.*, 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.

versus 50% on the Rehnquist Courts. The difference is quite substantial and is statistically significant at the 5% level.[31]

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

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.

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)
Total	55% (101.5)	57% (33.5)	55% (135)

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 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.

[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.

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

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 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 compromise 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).

[33] *PRC* at 52-53. 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. So 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] *PRC* at 52-53, 76.

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

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-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 questions[38] has prompted many observers to surmise, or allege, that the Court—or at any rate its

[35] In one sense, the cases *are* over all the marbles: Congress practically never overrides statutory preemption decisions. Note, 120 Harv. L. Rev. at 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 p. *14, infra*.

[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, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[38] Stoneridge Investment Partners v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008); Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005).

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

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

	Probability Contested		Probability of Preemption		Total
Court	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

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.

[39] See, e.g., David Zaring, *The Roberts Court's Business Jurisprudence*, THE CONGLOMERATE BLOG (Sept. 18, 2010), http://www.theconglomerate.org/2010/09/the-roberts-courts-business-jurisprudence.html; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

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

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

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

[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.

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 8 shows the distribution for plaintiffs and defendants; Table 9, for petitioners and respondents. Because the pattern has remained fairly constant over time, we do not show the distribution for the three Courts.

Table 8: Preemption Cases by Plaintiff and Defendant

	Defendant				
Plaintiff	Business	Private	State	Federal	Total
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 9: Preemption Cases by Petitioner and Respondent

	Respondent				
Petitioner	Business	Private	State	Federal	Total
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

As shown (Table 8), 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 9, 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 10 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.

Table 10: Petitioners' Unexpected Success Ratios

	Respondent			
Petitioner	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)

In another respect, however, the party constellation matters quite a bit. As shown in Table 11, pro-preemption outcomes are much more likely—or rather, *used* to be more likely—in cases

Table 11: Probabilities of Preemption, by Party Constellation[43]

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

[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.

[43] Table 11 excludes cases to which the federal government was a party and cases among state actors.

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 (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 12 below shows the updated information. (There has been no substantial 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.[45] 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.

[44] For a brief summary and case cites *see infra* n. 70 and accompanying text.

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

Table 12: State Amicus Participation Rates[46]

	Respondent			
Petitioner	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)

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 13, anti-preemption outcomes are in fact more likely in cases with mass (22 or more) state *amicus* briefs (though not in 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]

Table 13: 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)

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

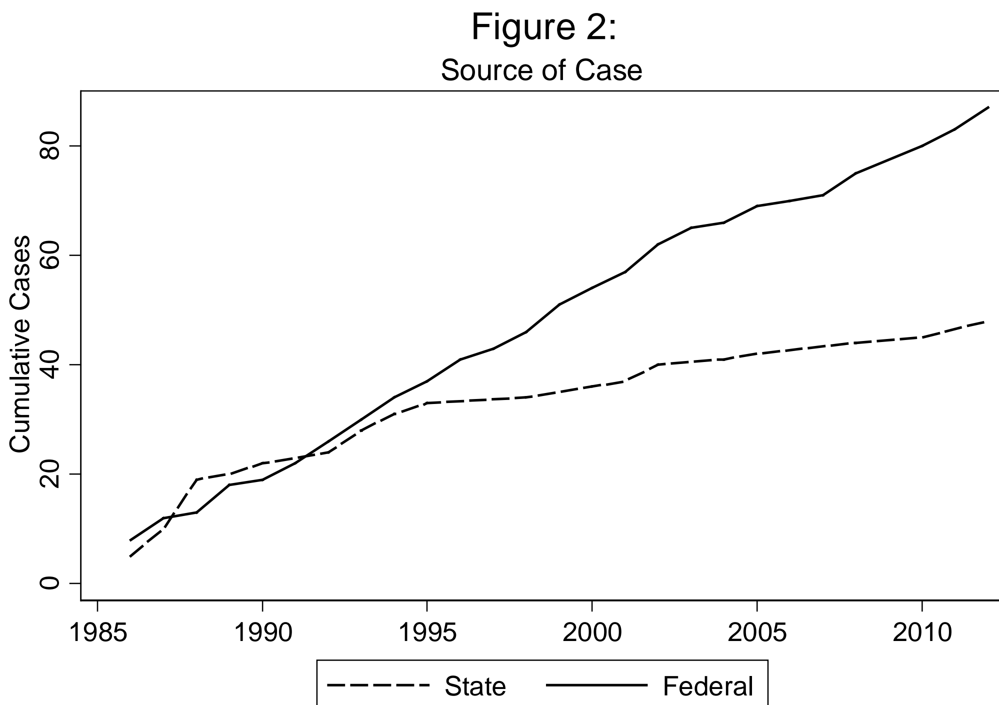
Certiorari grants to federal courts have the Supreme Court play a coordinating, "housekeeping" role atop of the federal judicial hierarchy. (Many of the cases will involve splits among the circuits.) The exercise of appellate jurisdiction over state courts, in contrast, has constitutional salience and 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,

[46] Tables 12 and 13 exclude cases to which the federal government or opposing state entities (*e.g.*, state versus local governments) were parties.

[47] *See* Tables 18(a), (b) *infra*.

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]

[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); T*he 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).

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 14(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.

Table 14(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 14(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 14(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 14(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)

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.

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

- 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. And 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:

---

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

[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 8.

[52] The basis of such suits is a matter of debate. On one theory, preemption claims against states are *Ex Parte Young*-style anticipatory defenses, and federal jurisdiction exists under 28 USC 1331 and the Declaratory Judgment Act, 28 USC 2201. Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983); Verizon Maryland, Inc. v. Public Service Comm'n of Maryland, 535 U.S. 635 (2002). On a different theory, the Supremacy Clause (Art. VI, Sec. 2) creates the cause of action. The question is centrally implicated in Exceptional Child Center v.

[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 U.S. 58 (1987); *Beneficial Nat'l Bank v. Anderson*, 593 U.S. 1 (2003).

Table 15: Lower Courts—Tort and Statutory Cases	FRC	SRC	Roberts	Total
Tort Cases				
Federal	6	12	8	26
State	5	4	5	14
Total Tort Cases	11	16	13	40
Non-Tort Cases				
Federal	24	24	13	61
State	23	9	2	34
Total Non-Tort Cases	47	33	15	95

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, 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 aren't 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 16 and 17, the new data confirm our earlier results.[54] The percentages do not differ substantially. Table 16 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 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: 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 17 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.

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

[55] These results are significant at a 1% level.

Table 17: Conditional Probabilities, Pro-Preemption Outcome

	OSG Party		
OSG Brief	R	D	Total
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)

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 18(a), (b). All else equal, 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]

Table 18(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]

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

[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 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, supra.

Table 18(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]

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.

[58] Jonathan H. Adler, Business, the Environment, and the Roberts Court: A Preliminary Assessment, 49 SANTA CLARA L. REV. 943 (2009).

A. The Court in Transition.

The transition from the "First" to the "Second" Rehnquist Court marked a generational shift. Justices whose basic intuitions for 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.[60]

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.[61] These cases are very contentious and tend to produce consistent (though not entirely stable) conservative-liberal "bloc voting."[62] 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]

[61] *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 U.S. 70 (2008); *Wyeth v. Levine*, 555 U.S. 555 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

[62] Four of the cases were contested, and no case went without a dissent. Justice Ginsburg dissented in *Riegel v. Medtronic, Inc.*, 552 U.S. 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. [63] The preemption ruling in *Watters* has been effectively reversed by provisions of the Dodd-Frank Act,[64] a voluminous statute whose complicated preemption provisions are bound to generate a great deal of litigation in years to come.[65]

- In three cases, all involving the State of Arizona, the Supreme Court addressed preemption questions in a fairly new venue—citizenship and immigration.[66] 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.[67]

- The Roberts Court decided three preemption cases involving the Federal Arbitration Act.[68] The most important of these cases, involving the FAA preemption of California's

[63] Watters v. Wachovia Bank, N.A, 550 U.S. 1 (2007); Cuomo v. Clearinghouse Ass'n, LLC, 557 U.S. 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.

[64] Dodd-Frank §§ 1044, 1046, 12 U.S.C. §§ 25b, 1465.

[65] *See, e.g.,* 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 N.C. BANKING INST. 161 (2012); Jeffrey Karek, Geoffrey Waguespack, & 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).

[66] *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. U.S.*, 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 U.S. 52 (1941).

[67] 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. U.S.*, 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, 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.

[68] *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008)*; Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006). The classification of *Buckeye* as a preemption case is a judgment

common law of unconscionability, was decided in favor of preemption by a sharply divided Court, split along conservative-liberal lines.[69]

- 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.[70] 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 19 shows the results for the sitting justices, ordered by likelihood of voting for preemption in contested cases:

Table 19

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

call. However, only Justice Thomas dissented (as he does in many FAA preemption cases). Inclusion of the case does not significantly affect the overall picture.

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

[70] In addition to the FAAAA cases, see *Nat'l Meat Association v. Harris,* 132 S.Ct. 965 (2011).

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,[71] 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 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 20 shows the sitting justices' votes with the majority in the twelve contested cases:

Table 17: 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%)

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 the majority in more than 7.5 of the twelve cases. The

[71] *See PRC*, at 83.

justices least likely to vote with the majority (excluding Justices Sotomayor and Kagan)[72] 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 21 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:

Table 21: 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	-.75				
	0.01	1.00	0.01	0.00	0.00				
Alito	0.40	0.35	0.57	-0.58	-.48	0.35			
	0.16	0.22	0.04	0.03	0.08	0.22			
Sotomayor	-.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

[72] The two justices' votes in Table 17 come with a very large asterisk: their unblemished pro-preemption record is attributable to pro-preemption votes in contested immigration cases.

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 18).[73] 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 justice's. 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.[74]

- On the conservative side, the picture is more complicated. Of the six possible pairings among the four justices, only 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.[75] 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.

---

[73] Another six pairs are significant at the 10% level.

[74] 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. *Cf.* 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 the strategic acumen honed in decades on the Court

[75] This intuition prompted our empirical project in the first place: *PRC* at 48.

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 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 extra-judicial 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	R.J. Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 130	1986
2	California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272	1986
3	324 Liquor Corp. v. Duffy 479 U.S. 335	1986
4	International Paper Co. v. Ouellette, 479 U.S. 481	1986
5	California Coastal Com'n v. Granite Rock Co., 480 U.S. 572	1986
6	Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41	1986
7	Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58	1986
8	CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69	1986
9	Rose v. Rose, 481 U.S. 619	1986
10	International Broth. Of Elec. Workers, AFL-CIO v. Hechler, 481 U.S. 851	1986
11	Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1	1986
12	Caterpillar Inc. v. Williams, 482 U.S. 386	1986
13	Perry v. Thomas, 482 U.S. 483	1986
14	Schneidewind v. ANR Pipeline Co., 485 U.S. 293	1987
15	Bennett v. Arkansas, 485 U.S. 395	1987
16	Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495	1987
17	City of New York v. F.C.C., 486 U.S. 57	1987
18	Goodyear Atomic Corp. v. Miller, 486 U.S. 174	1987
19	Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399	1987
20	Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825	1987
21	Felder v. Casey, 487 U.S. 131	1987
22	Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354	1987

No.	Case	Term
23	Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19	1988
24	Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141	1988
25	Volt Information Sciences, Inc. v. Board of Trustees Stanford, 489 U.S. 468	1988
26	Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas, 489 U.S. 493	1988
27	Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30	1988
28	California v. ARC America Corp., 490 U.S. 93	1988
29	Massachusetts v. Morash, 490 U.S. 107	1988
30	Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163	1988
31	Mansell v. Mansell, 490 U.S. 581	1988
32	ASARCO Inc. v. Kadish, 490 U.S. 605	1988
33	Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103	1989
34	Adams Fruit Company, Inc. v. Barrett, 494 U.S. 638	1989
35	United Steelworkers of America v. Rawson, 495 U.S. 362	1989
36	North Dakota v. U.S., 495 U.S. 423	1989
37	California v. F.E.R.C., 495 U.S. 490	1989
38	English v. General Elec. Co., 496 U.S. 72	1989
39	FMC Corp. v. Holliday, 498 U.S. 52	1990
40	Ingersoll-Rand Co. v. McClendon, 498 U.S. 133	1990
41	Wisconsin Public Intervenor v. Mortier, 501 U.S. 597	1990
42	Barker v. Kansas, 503 U.S. 594	1991
43	Morales v. Trans World Airlines, 504 U.S. 374	1991
44	Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88	1991
45	Cipollone v. Liggett Group, Inc., 505 U.S. 504	1991
46	District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125	1992

No.	Case	Term
47	Itel Containers Intern. Corp. v. Huddleston, 507 U.S. 60	1992
48	Building and Construction Traders Council v. Assoc. Builders and Contractors of Mass 507 U.S. 218	1992
49	CSX Transp., Inc. v. Easterwood, 507 U.S. 658	1992
50	U.S. Department of Treasury v. Fabe, 508 U.S. 491	1992
51	John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86	1993
52	Department of Revenue of Oregon v. ACI Industries, Inc., 510 U.S. 332	1993
53	Northwest Airlines v. County of Kent 510 U.S. 355	1993
54	American Dredging Co. v. Miller, 510 U.S. 443	1993
55	PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700	1993
56	Department of Taxation and Finance of New York v. Millhelm Attea & Bros., Inc., 512 U.S. 61	1993
57	Livadas v. Bradshaw, 512 U.S. 107	1993
58	Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246	1993
59	Nebraska Dept. of Revenue v. Loewenstein, 513 U.S. 123	1994
60	American Airlines, Inc. v. Wolens, 513 U.S. 219	1994
61	Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265	1994
62	Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52	1994
63	Anderson v. Edwards, 514 U.S. 143	1994
64	Freightliner Corp. v. Myrick, 514 U.S. 280	1994
65	New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645	1994
66	Dalton v. Little Rock Family Planning Services, 516 U.S. 474	1995
67	Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25	1995
68	Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681	1995
69	Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735	1995

No.	Case	Term
70	Medtronic, Inc. v. Lohr, 518 U.S. 470	1995
71	Atherton v. F.D.I.C., 519 U.S. 213	1996
72	California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316	1996
73	De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806	1996
74	Boggs v. Boggs, 520 U.S. 833	1996
75	Foster v. Love, 522 U.S. 67	1997
76	American Telegraph and Telephone Company v. Central Office Telephone, Inc., 524 U.S. 214	1997
77	El Al Israel Airlines, Ltd. V. Tsui Yuan Tseng, 525 U.S. 155	1998
78	Humana Inc. v. Forsyth, 525 U.S. 299	1998
79	Arizona Department of Revenue v. Blase Construction Company, Inc., 526 U.S. 32	1998
80	UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358	1998
81	U.S. v. Locke, 529 U.S. 89	1999
82	Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344	1999
83	Geier v. American Honda Motor Co. Inc., 529 U.S. 861	1999
84	Pegram v. Herdrich, 530 U.S. 211	1999
85	Crosby v. National Foreign Trade Council, 530 U.S. 363	1999
86	Dir. of Revenue v. CoBank ACB, 531 U.S. 316	2000
87	Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341	2000
88	Circuit City Stores, Inc. v. Adams, 532 U.S. 105	2000
89	Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141	2000
90	Lorillard Tobacco Co. v. Reilly, 533 U.S. 525	2000
91	Wisconsin Dept. of Health and Family Services v. Blumer, 534 U.S. 473	2001
92	Sprietsma v. Mercury Marine, 537 U.S. 51	2002

No.	Case	Term
93	New York v. F.E.R.C., 535 U.S. 1	2001
94	Rush v. Moran, 536 U.S. 355	2001
95	City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424	2001
96	Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329	2002
97	Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644	2002
98	Entergy La., Inc. v. La. PSC, 539 U.S. 39	2002
99	Ben. Nat'l Bank v. Anderson, 539 US 1	2002
100	American Ins. Assn. v. Garamendi, 539 U.S. 396	2002
101	Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444	2002
102	Hillside Dairy, Inc. v. Lyons, 539 U.S. 59	2002
103	Aetna Health Inc. v. Davila, 542 U.S. 200	2003
104	Engine Manufacturers Ass'n v. So. Coast Air Quality Mgmt Dist., 541 U.S. 246	2003
105	Nixon v. Missouri Municipal League, 541 U.S. 125	2003
106	Bates v. Dow Agrosciences LLC, 544 U.S. 431	2004
107	Mid-Con Freight Systems, Inc. v. Michigan Public Service Com'n, 545 U.S. 440	2004
108	Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95	2005
109	Gonzales v. Oregon, 546 U.S. 243	2005
110	Buckeye Check Cashing v. Cardegna, 546 U.S. 440	2005
111	Merrill Lynch, Pierce, Penner & Smith Inc. v. Dabit, 547 U.S. 71	2005
112	Watters v. Wachovia Bank, N.A., 550 U.S. 1	2006
113	Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364	2007
114	Preston v. Ferrer, 552 US. 346	2008
115	Riegel v. Medtronic, Inc., 552 U.S. 312	2008
116	Chamber of Commerce of U.S. v. Brown, 554 U.S. 60	2008

No.	Case	Term
117	Altria Group, Inc. v. Good, 555 U.S. 70	2008
118	Wyeth v. Levine, 555 U.S. 555	2008
119	Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519	2008
120	Bruesewitz v. Wyeth, 131 S.Ct. 1068	2010
121	Williamson v. Mazda Motor of America, 131 S.Ct. 1131	2010
122	AT&T Mobility v. Concepcion, 131 S. Ct. 1740	2010
123	CSX Transp. v. Alabama, 131 S. Ct. 1101	2010
124	Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011)	2010
125	PLIVA v. Mensing, 131 S.Ct. 2567 (2011)	2010
126	Kurns v. Railroad Friction Products, 132 S. Ct. 1261 (2012)	2011
127	Nat'l Meat Association v. Harris, 132 S.Ct. 965	2011
128	Arizona v. U.S., 132 S.Ct. 2492	2011
129	Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466	2012
130	Dan's City Used Cars v. Pelkey,133 S.Ct. 1769	2012
131	Arizona v. The Inter Tribal Council of Arizona, 133 S. Ct. 2247	2012
132	Maracich v. Spears, 133 S. Ct. 2191 (2013)	2012
133	American Trucking Association v. Los Angeles, 133 S.Ct. 2096	2012
134	Hillman v. Maretta, 133 S.Ct. 1943	2012
135	Wos. v. E.M.A., 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.[76] 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 (including ERISA cases),[77] two economic regulation cases,[78] and one transportation and infrastructure case.[79] 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.

---

[76] See, e.g., Bates v. Dow Agrosciences, 544 U.S. 431, 443 (2005); Sprietsma v. Mercury Marine, 537 U.S. 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).

[77] Pilot Life v. Dedeaux and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 41 (1987); Int'l Broth. of Elec. Workers, AFL-CIO v. Hechler, 481 U.S. 851 (1987); Caterpillar Inc. v. Williams, 482 U.S. 386 (1987); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988); Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).

[78] Perry v. Thomas, 482 U.S. 483 (1987); American Ins. Ass'n v. Garamendi, 539 US 396 (2003).

[79] ATT v. Central Office Telephone, 524 U.S. 214 (1998).

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 there ultimately sought a money judgment.[80] *American Dredging Co. v. Miller*[81], 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*[82] 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.

[80] *Felder v. Casey*, 487 U.S. 131 (1987). Our decision to code *Felder—but not*, say, *Haywood v. Drown*, 556 U.S. 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-FedCourts 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.

[81] 510 U.S. 443 (1993).

[82] 517 U.S. 735 (1995).