PREEMPTION IN THE REHNQUIST COURT: A PRELIMINARY EMPIRICAL ASSESSMENT

*****[1]

I. INTRODUCTION

The United States Supreme Court's decisions on the federal preemption of state law have emerged as a prominent field of study for legal scholars and political scientists from a broad range of perspectives.[2] This rise to prominence of a highly technical and often dull field of jurisprudence is due to a number of developments—increasingly frequent federal statutory preemptions,[3] the states' unprecedented aggressiveness in regulating business transactions, [4] in areas from health care provision[5] to banking[6] to

---

[1] For helpful comments and suggestions on an earlier draft, I am indebted to Eric Claeys, Robert Gasaway, Thomas Merrill, Dan Schweitzer, and Edward Warren. Kim Hendrickson capably supervised a changing team of research assistants and interns. Jonathan Klick did the statistical work on this project. Their ample contributions amply warrant their listing as co-authors. However, all errors remain mine.

[2] For a small sample of the voluminous literature see RODERICK M. HILLS, JR., AGAINST PREEMPTION: HOW FEDERALISM CAN IMPROVE THE NATIONAL POLITICAL PROCESS (U. Mich. John M. Olin Center for L. & Econ. Working Paper Series, Working Paper No. 16, 2003) (http://law.bepress.com/umichlwps/olin/art16); Richard Fallon, *The Conservative Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); Ernest Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L. J. 2085 (2000); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Brady Baybeck & William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases*, 30:3 PUBLIUS 73 (Summer 2000); Ernest Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999); David M. O'Brien, *The Rehnquist Court and Federal Preemption: In Search of a Theory*, 23 PUBLIUS 15 (Fall 1993); KENNETH STARR ET AL., THE LAW OF PREEMPTION (1991); S. Candice Hoke, *Preemption Pathologies and Civic Republican Virtues*, 71 B.U. L. REV. 685 (1991); and Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L. Q. 69 (1988). See also sources cited throughout this article.

[3] For (now somewhat dated) evidence see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES (1992).

[4] *See generally* Christopher Swope, *Made in Sacramento*, GOVERNING, July 2003, at 34–38.

antitrust,[7] that are also covered by federal laws; the expansion of corporate liability under state common law and the increased resort of those defendants to federal preemption defenses;[8] and, not least, the Rehnquist Court's discovery of federalism and states' rights.[9] Preemption cases have enormous consequences both for private interest groups (such as business and the plaintiffs' bar) and for federal-state relations.

Unfortunately, the preemption debate has been marred by misperceptions and a lack of reliable empirical data. Especially in the law reviews, extravagant attention has been lavished on a handful of landmark cases—which, for all their undeniable significance, may not be a reliable guide to the preemption universe. Studies of judicial behavior in this area, meanwhile, have relied on an inadequate empirical foundation. Even the most complete, up-to-date, and widely-used data set, the *United States Supreme*

---

[5] *See, e.g.*, Elaine Gareri Kenney, *For the Sake of Your Health: ERISA's Preemption Provisions, HMO Accountability, and Consumer Access to State Law Remedies*, 38 U.S.F.L. REV. 361 (2004); and Gregory J. Scandaglia & Therese L. Tully, *Express Preemption and Premarket Approval Under the Medical Device Amendments*, 59 FOOD & DRUG L.J. 245 (2004).

[6] *See, e.g.*, Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21 (2004).

[7] *See, e.g.*, Robert W. Hahn & Anne-Layne Farrar, The Case for Federal Preemption in Antitrust Enforcement, 18-SPG ANTITRUST 79 (2004).

[8] *See, e.g.*, Stacey Allan Carroll, *Federal Preemption of State Products Liability Claims*, 36 GA. L. REV. 797 (2002); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); Young, *supra* n. at 1383–1384 (noting that state common law has emerged as a central preemption concern); Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 120 (2002) (same); David S. Casey, Jr., *The Preemption Danger*, 40 TRIAL 9 (May 1, 2004) (lamenting "unprecedented effort to preempt the civil justice system in the states.").

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

Court Judicial Data Base,[10] contains only a sample of "preemption" cases—a good number of which do not conform to something a competent lawyer would recognize as "preemption."[11]

This Article presents an empirical overview of the Rehnquist Court's record on preemption—that is, the *universe* of preemption cases, rather than a sample. In addition, we provide some preliminary analysis and findings. Parts II and III describe, respectively, the case universe and the outcomes. Part IV discusses the role of the Supreme Court—more precisely, the Court's perception of its own role—in preemption litigation. Moving from description to analysis, Part V suggests that outcomes in preemption cases may be most readily explained as judicial responses to, or interpretations of, certain signals or "cues," such as the identity of the parties or the posture of a given case.[12] Two signals in particular prove significant: the presence of a state as a party to a preemption dispute, and the position of the Solicitor General. State *amicus* briefs and the partisan affiliation of the Solicitor General (Democrat or Republican) may also affect preemption case outcomes; however, we cannot show either variable to be statistically significant.

Part VI examines the justices' votes in preemption cases. It addresses an issue that (we strongly suspect) is already on many readers' minds—the discontinuity between the Rehnquist Court's federalism cases and its preemption decisions. The Rehnquist Court's

---

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

[11] See Appendix A, *infra*.

[12] The classic exposition of "cue theory" is Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory, in*, JUDICIAL DECISION MAKING 111 (Glendon Schubert ed., 1963). *See also* S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 7 L. & SOC. REV. 637 (1972); Virginia Armstrong & Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?* 15 POLITY 141 (1982); and sources cited infra n.

federalism decisions have, until very recently, worked a major doctrinal shift in federal-state relations, in favor of the states.[13] That shift has been the work of a stable bloc of five conservative justices, who have carried the federalism banner against a bloc of four liberal justices. In preemption law, in contrast, the justices often seem to "switch sides": liberals almost always vote "against the states" in federalism cases—and often against preemption, and thus "for the states," in preemption cases. Conservative justices often flip-flop in the opposite direction. We find substantial evidence to buttress the impression of preemption cases as a mirror image of pure federalism cases. But that picture is incomplete and in some ways misleading. In contrast to federalism law, we find no clear decisional trend in preemption law. Moreover, we find no firm voting blocs and no swing vote.

As its title suggests, our study is preliminary. First, a fully satisfactory account of the Rehnquist Court preemption record will require additional empirical evidence. We have collected but not yet evaluated some of that evidence, and we will note the lacunae throughout. Second, our principal purpose is descriptive. We do not develop or test a formal model of judicial decision-making on preemption, federalism, or anything else. The predominant, "attitudinal" model of judicial behavior essentially holds that judges vote their policy preferences.[14] Increasingly popular "strategic actor" models of judicial behavior proceed from the same premise but emphasize that judges must pursue those

---

[13] Recent decisions strongly suggest that the Court's federalism enthusiasm may have run its course. See esp. Nevada v. Hibbs, 538 U.S. 721 (2003); and Tennessee v. Lane, 124 S.Ct. 1978 (2004). Up to that point, however, the Rehnquist Court's jurisprudence was marked by a pronounced shift towards judicially enforceable protections for federalism and states' rights. See generally MICHAEL S. GREVE, REAL FEDERALISM (1999).

[14] The standard expositions of the "attitudinal model" of Supreme Court behavior are JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); and SEGAL & SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

preferences in a setting of institutional constraints, both internal (notably, the expected behavior of other judges on the same court) and external (such as Congress or administrative agencies).[15] A third, "legal" model of judicial behavior holds that judges will strive to follow the law, as embodied in statutes or precedents. A "cue" or signaling theory does not map easily onto any of these models, at least not in the primitive, intuitive form that we have chosen to employ.

Naturally, we would be gratified if our empirical account were to prompt more rigorous theoretical efforts to explain outcomes and judicial behavior in preemption cases. We suspect, though, that only a very sophisticated model will answer to the task. Preemption cases are multi-dimensional in at least two ways. First, they bring one conservative value (pro-business) in conflict with another conservative value (pro-state). The same is of course true of the corresponding liberal values. Second, preemption cases typically involve layers of legal issues—not only the federal-state balance but also statutory interpretation, the standard of review of administrative agency action, the role of economic reasoning in complex regulatory cases, and other matters. Look hard enough at a case that is conveniently subsumed under the general heading of "preemption": it often becomes difficult to tell what it is a case *of*.[16] These complexities will confound any

---

[15] *See* Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15:3 J.L. ECON. & ORG. 549 (1999); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); FORREST MALTZMAN, ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

[16] Prominently, the justices have disagreed on whether preemption cases have to do with "federalism" or rather should be understood as pure statutory construction cases. In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), for example, Justice Scalia (writing for the majority) expressed his puzzlement about the appearance of "federalism" arguments in Justice Breyer's dissent. AT&T Corp., 525 U.S. at 379 n.6 (Scalia, J.); at 412 (Breyer, J., dissenting). In *Geier v. Honda Motor Co*., 529 U.S. 861 (2000), it was Justice Stevens' turn to invoke federalism arguments against Justice Breyer's pro-preemption opinion for the Court—which declined to discuss "states' rights" issues. Geier, 529 U.S. at 886 (Stevens, J., dissenting).

simple behavioralist (attitudinal or strategic-actor model). In particular, they confound any simplistic effort to explain the discontinuity between the justices' votes in federalism and preemption cases as a triumph of pro- or business attitudes over opportunistically deployed federalism "principles."[17] A plausible (and normatively fair) explanation is bound to be much more complicated. The concluding Part VII sketches our thoughts on these questions.

II. THE PREEMPTION UNIVERSE

Our study differs from earlier efforts in two respects, both of which affect the findings. First, we have sought to identify the entire universe of Rehnquist Court preemption decisions, rather than merely a sample. Second, our study extends exclusively to *statutory* preemption (as opposed to constitutional preemption) and, in defining that universe, follows the lawyers' understanding of "preemption," rather than the looser definitions sometimes adopted by political scientists.[18] Our case search and examination, which is described in Appendix A, identified 105 preemption cases that were decided by written opinion(s). Appendix B lists those cases by Term, case name, and cite.

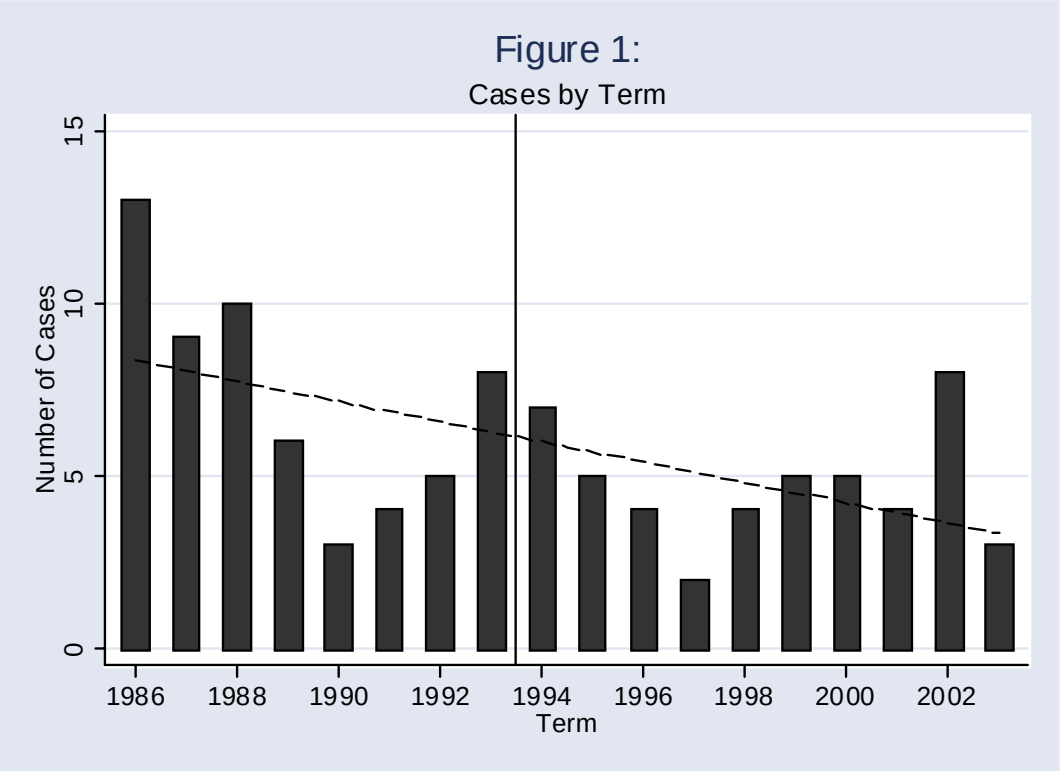
1. Case Volume

---

[17] *See, e.g.*, Baybeck & Lowry, *Federalism Outcomes*, at 74 (("Chief Justice Rehnquist and Antonin Scalia, both prominent advocates of states' rights, abandoned federalism and joined the majority in protecting Honda's interests" [in Geier v. Honda, 529 U.S. 861 (1999)]).

[18] *See* Appendix A.

Preemption cases range in frequency from two cases in the 1997-98 Term to a high of 13 (1986-87), with an average of slightly under six cases per Term. Figure (1) shows the distribution.



Following Thomas Merrill,[19] we distinguish between the "First" Rehnquist Court ("FRC") and the "Second" Rehnquist Court ("SRC"). As indicated by the vertical line in Figure (1), the First Rehnquist Court comprises the eight Terms between 1986-87 and 1993-94. The Second Rehnquist Court encompasses the ten Terms from 1994-95 to

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

2003-04. For that entire duration, the Court—following Justice Stephen Breyer's appointment in 1994—has been sitting in its current composition. The distinction has the incidental advantage of cutting the preemption case universe roughly in half. Comparisons between the FRC and SRC may help to detect shifts and changes in preemption law.[20]

The trendline in Figure (1) indicates that preemption cases have declined in frequency. The FRC decided 58 preemption cases, or slightly over seven cases per term. The SRC decided 47 cases, slightly under five cases per term. While this decline may appear significant, it mirrors the decline of the Rehnquist Court's docket and, more narrowly, its civil docket. For both the FRC and the SRC, preemption cases constituted roughly eight percent of the Court's civil docket.[21]

2. Subject Matter

We divided the case universe into seven subject-matter categories.[22] The number of cases in each group is shown in parentheses.

---

[20] *See infra* nn. and accompanying text.

[21] Over its eight terms, the FRC decided 1,011 cases, 724 of them civil, by written opinion. The SRC decided 823 total cases, 578 of them civil in its ten terms. Figures for 1986–2002 Terms compiled from *The Supreme Court, 19__ Term*, HARV. L. REV. (November, annual); 2003 Term calculations by the author's count.

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

- ***Labor and Employment* (32)**, including employment benefits (other than safety regulations). This category contains a very large number of ERISA cases.

- ***Economic Regulation* (17)**, such as the (typically, industry-specific) regulation of banking, insurance, and securities. The category *excludes*

- ***Transportation and Infrastructure* (15)**, which contains industry-specific laws and regulations that govern *network* industries, including telecommunications, railroads, electricity, airlines, and trucking.

- ***Health, Safety, and Environmental Regulation* (13)** encompasses all laws administered by, and regulations issued by, federal administrative agencies that are entrusted primarily (or exclusively) with the protection of public health and safety, including the EPA, OSHA, the FDA, and NHTSA.

- ***Public Benefits* (8)**, meaning benefits such as Social Security, Medicaid, and Veterans' Benefits.[23]

- ***Taxation* (6)**, as distinct from regulation.

- ***Other Cases* (14).** This category includes five cases concerning the preemptive force of the Federal Arbitration Act, four cases dealing with Indian affairs, and four other cases on a variety of issues from government contracting to elections.

The last three categories are self-explanatory, and pose no classification problems. The first four categories encompass the activities of the regulatory state and, collectively, comprised three-quarters of Supreme Court preemption disputes during both the FRC and the SRC. Table (1) shows the distribution.[24]

---

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

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

Table (1) – Preemption Cases by Subject-Matter

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

3. Torts

The preemption of state *common* law—as distinct from state or local statutes—has become a particularly contentious issue both among the justices and legal scholars.[25] Corporate interests look to federal preemption as a last line of defense against state courts and juries, while states (and many legal scholars) lament preemption as an unwarranted interference in an area of "traditional" state power. Landmark cases from *Cippolone v. Liggett*[26] to *Geier v. Honda Motor Company*[27] illustrate the salience of this question.

---

[25] *Supra* n. and accompanying text.

[26] 505 U.S. 504 (1991).

[27] 529 U.S. 861 (1999).

We identified 32 cases (out of 105) that deal with the federal preemption of state common law claims. Since those claims almost always sound in tort, we called the cases "tort cases." The aggregate count of tort cases arguably understates their significance, since all but two of them fall into one of the four regulatory categories.[28] In these areas, where the plaintiffs' bar meets the federal regulatory state, tort cases comprise nearly 40 percent of the case universe, with a slight relative increase for the SRC. Table (2) shows the rounded percentage of tort cases in each category (total number of cases in parentheses).

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

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

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

[28] The two remaining tort cases, classified as "Other," both arose under the Federal Arbitration Act. Mastrobuono v. Shearson Lehman, 514 U.S. 52 (1995); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

numbers suggest a (perhaps increasing) judicial hostility to state common law. That impression, however, is likely unwarranted. With only two exceptions, tort cases do not involve states as parties. We will argue below that the lack of state participation, rather than the nature of the state law claim (common law versus statutory), most likely explains the higher probability of preemption rulings in tort cases.[29]

4. Parties

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

It is tempting to think of preemption cases as disputes "between the feds and the states." But while that is true in an abstract legal sense, it is grossly misleading as a matter litigation economy. Since the point will prove crucial to an understanding of case outcomes, it bears emphasis: *the enforcement (or not) of federal preemption through litigation is to a large extent the work of business or other private parties.*

Table (3.a) shows the frequency with which the four categories of parties figured as plaintiffs and defendants in preemption cases that eventually wound their way into the Rehnquist Court. Table (3.b.) performs the same operation for petitioners and

---

[29] *See* Part V *infra*.

respondents. The shaded areas and **bold** numbers show the most common constellations of parties.[30]

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

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

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

	Respondent				
Petitioner	Business	Private	State	Federal	Total
Business	6	30	17	0	53
		50			
Private	6	8	4	1	19
			45		
State	14	10	3	4	31
Federal	0	0	2	0	2
Total	26	48	26	5	105

The Tables provide impressive evidence of the central role of private parties in preemption litigation. For example:

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

- Preemption cases are almost always *initiated* by a private party. In an overwhelming number of cases (94 out of 105), a business or other private party figured as the plaintiff.

- State governments participated as an original party to a preemption dispute in just over half of all cases (54). In only nine of those cases, however, did a state agency initiate the lawsuit. (Curiously, eight of those cases were decided by the FRC.)[31] Typically, state governments figure as *defendants* in preemption litigation.

- In the posture in which the cases reached the Supreme Court, a mere six cases (out of 105) involved both the federal and a state government as parties. Conversely, 50 cases involved exclusively private parties.

- It is not uncommon for the Supreme Court to encounter a state as a petitioner in a preemption case. However, in cases in which the Rehnquist Court granted *certiorari* and reached a decision on the merits, business petitions (53) far outnumber state petitions (31). Petitions by non-governmental parties (*i.e.*, "Private" and "Business" combined) constitute almost 70 percent of the case universe.

As shown in Part V. below, party constellations have a significant effect on preemption case outcomes. All else equal, rulings *against* preemption are much more likely in cases to which the state is a party than in Non-Government cases.

III. CASE OUTCOMES

1. Methodology

We coded the outcome in each preemption case, and each justice's vote in each case, as an outcome or vote *for* or *against* preemption. A few cases, and a larger number of judicial votes and opinions, defied such easy classification—typically, because the Supreme Court held a state law, court judgment, or cause of action to be "partially" preempted. In a few of these "mixed" cases, it proved possible to determine whether the

[31] With this one exception, the pattern shows little change between the FRC and the SRC. For that reason (and because the numbers become too small for meaningful statistical comparison), FRC and SRC numbers are not displayed here.

Court's ruling was *predominantly* (non-) preemptive, and we coded those cases accordingly. Case-by-case examination yielded an unambiguous outcome in 99 of the 105 cases, leaving six cases whose outcome could only be described as "mixed." In an additional five cases, a minority of justices submitted a "mixed" opinion. In coding these observations, we scored each case or vote as two separate observations and, for statistical purposes, weighted each observation at 50%.[32]

While not beyond criticism, this procedure is the least arbitrary way of dealing with the mixed cases. At one end, the option of making a series of "gut calls" and scoring the rulings as unambiguously for or against preemption would have involved a great deal of arbitrariness and, moreover, distorted what the justices *thought* they were doing in those cases: with one exception,[33] the mixed cases present separate state law claims and provisions, which the Court subjected to individualized preemption analysis and which yielded separate holdings. At the other end, simply scoring the cases twice (without weighting them)[34] would fail to take account of the possibility of strategic voting or "vote

---

[32] To illustrate: in *Cipollone v. Liggett*, 505 U.S. 504 (1992), a plurality of four justices (Stevens, Rehnquist, White, and O'Connor) held that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted some, but not all, tort liability claims under state law. Three justices (Blackmun, Kennedy, and Souter) held that all of the plaintiff's state law claims should be allowed to proceed. Two justices (Scalia and Thomas) opined that all of the plaintiff's claims were preempted. We scored the case and the votes twice, as follows (with "P" denoting a vote for preemption and "NP" a vote against):

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

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

[34] As some scholars have done in dealing with the problem of multiple majorities. See, e.g., Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 N.C.L. REV. 1225, 1240 (2000).

trading" in these cases.[35] Weighting the observations is a rough and ready means of dealing with possibly interdependent observations.[36]

A final option was to exclude mixed cases and votes. We rejected that course of action because it would have sacrificed a great deal of valuable information and, moreover, would have skewed the analysis. First, an examination of (often very similar) state law provisions or claims in one and the same case compels justices to articulate their preemption views with some care and specificity. For this reason, the mixed cases contain a disproportionate number of cases that appellate attorneys will readily recognize as precedent-setting and as highly instructive with respect to the individual justices' views. Second, the mixed cases fit a pattern that differs from the preemption universe. Four of the six mixed cases, and six of the eleven cases in which any justice submitted a mixed vote, involve the federal preemption of state *common law* and especially tort law, rather than state *statutes*.[37] Moreover, the cases sparked far more disagreement among the justices than did cases without mixed votes or verdicts. Six of the eleven cases, including two of the cases involving the preemption of common law claims, were "contested." The

---

[35] While interdependence may also occur when various provisions of state law are subjected to a preemption analysis under an identical federal statute in consecutive cases, the simultaneous examination of claims in a single case creates a greater possibility of strategic voting. For a simple example, justices be inclined in a difficult preemption case to "split the difference" between several state law claims. That is much harder to do in consecutive cases.

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

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

scholars' view of state common law preemption as an unsettled frontier of preemption law is readily explained, and substantially justified.

2. Conflict and Consensus

On the whole, the Rehnquist Court's preemption decisions have proven a fairly consensual business. Fully 54 of the 105 cases, or over half, were unanimous decisions. This level of consensus is higher than the general degree of unanimity on the Rehnquist Court, which is 40.3% for all cases.[38] The ratio has remained roughly constant: 29 of the FRC's 58 preemption cases (50%) were unanimous, and 25 of the SRC's 47 preemption decisions (53.2%) fit that description.

A strict definition of unanimity gives a somewhat misleading picture of the level of judicial conflict, especially in preemption cases. A single justice or two may hold and idiosyncratic views on a particular question or statute. For example, Justice Thomas, alone among all justices, has consistently argued that the Federal Arbitration Act lacks preemptive force.[39] Justice Stevens and Justice Souter also sometimes dissent from otherwise unanimous rulings for preemption.[40] But in none of those cases were the questions "close" for the Court as a whole. For a more nuanced assessment of the level of judicial (dis)agreement, we categorized outcomes as "consensual" or "contested," depending on the vote differential. "Consensual" cases are those with a vote differential

---

[38] Figures for 1986–2002 Terms compiled from "Table I (C)—Unanimity," *The Supreme Court, 19__ Term*, HARV. L. REV. (November, annual); 2003 Term calculations: author's count.

[39] Doctors Associates, Inc. v. Casarotto, 517 U.S. 681, 689 (1996); Mastrobuono v. Shearson Lehamn Hutton, 514 U.S. 52, 64 (1995).

[40] Justice Stevens has written five such dissents; Justice Souter, one (*Engine Mfrs. Ass'n v. So. Coast Air Quality Mgmt Dist*., 124 S.Ct. 1756, 1765 (2004) (Souter, J., dissenting). We have found only one lone dissent from an otherwise unanimous rulings *against* preemption: *Nixon v. Missouri Municipal League*, 124 S.Ct. 1555, 1566 (2004) (Stevens, J., dissenting).

of four or above—or, put differently, with no more than two dissenting votes (*e.g.*, 6-2 or 7-2). "Contested" cases are those with a vote differential of 3 or below (*e.g.*, 6-3). By that measure, one in four preemption cases proved contested. Table (4.a.) shows the distribution. In addition, the mixed cases yielded nine (near-) unanimous verdicts on a preemption question presented in those cases (five for the FRC, and four for the SRC). The weighted distribution is shown in Table (4.b.).

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

	Consensual			**Contested**	**Total**
	Unanimous	1–2 Dissents	*Subtotal*		
FRC	29	15	*44*	14	58
SRC	25	11	*36*	11	47
Total	54	26	*80*	25	105

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

	Consensual			**Contested**	**Total**
	Unanimous	1–2 Dissents	*Subtotal*		
FRC	30.5	16	*46.5*	11.5	58
SRC	25	13	*38*	9	47
Total	55.5	29	*84.5*	20.5	105

3. Outcomes

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

Table (5) – Probabilities of Pro-Preemption Ruling by Level of Dissension

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

Two observations leap out. First, preemption litigation in the Supreme Court has proven by and large a fifty-fifty proposition in both periods.[41] Preemption outcomes are slightly more probable in contested cases, although the number of cases is too small to attach much significance to this finding. Second, the picture strongly suggests continuity rather than change. In particular, and perhaps contrary to perceptions of the Court's increased solicitude for "states' rights," the Rehnquist Court does *not* appear to have become more hostile to federal preemption, at least not by a measure of case outcomes.

That simple measure, of course, may mask important differences in (for example) the selection of cases or the effect of particular rulings. Most important, preemption cases may be path-dependent, especially when they involve the same statute time and again.[42] With all appropriate caution, though, the picture suggests the following inference: In periods of dramatic legal change, the composition of case outcomes (here, for or against

---

[41] This finding is broadly consistent with earlier empirical assessments. *E.g.* O'Brien, *The Rehnquist Court and Federal Preemption*, at 22 (Table 3).

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

preemption) should be expected to change. A Supreme Court majority with the will and cohesion to work legal change will want to do so in a series of cases, and it will find the means to select suitable cases for review.[43] Preemption cases reflect no such pattern. To the extent that preemption law has changed, that change has been subterranean, or a game of inches—and perhaps both.

IV. WHAT ROLE FOR THE SUPREME COURT?

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

The *supremacy* conception would have the Supreme Court act as a guardian and enforcer of federal and especially congressional supremacy. If so, one should expect that the Court would disproportionately review, and disproportionately reverse, lower-court decisions *against* preemption. (Why grant *certiorari* in a case where lower courts have

---

[43] The Rehnquist Court's decisions on the states' sovereign immunity in the wake of *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1997), are an example: here, the Court decided in the states' favor in a quick succession of cases. *See* Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1488–91 (2003) (Appendix listing cases).

already enforced federal supremacy?) Further, one might suspect that the Supreme Court would disproportionately reverse anti-preemption rulings by *state* courts, which may have a higher propensity than federal courts to slight federal prerogatives.

A second conception would have the Supreme Court act as a kind of *error correction* agency in preemption cases (though not necessarily as a general proposition). Preemption analysis is essentially a matter of statutory interpretation. Assuming Congress had the constitutional authority to legislate, the only question is whether and to what extent Congress meant to preempt state and local law. To the extent possible, the Court should go about that task without interpretive presumptions that bias the result for or against Congress.[44] One eminently plausible presumption, however, is that Congress would want the preemptive scope and effect of its enactments to be both clear and uniform. This presumption counsels judicial aggressiveness in eliminating lower-court "splits" and erroneous rulings. On this view, one should expect a high reversal rate, with no necessary bias in a pro- or anti-preemption direction.

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

In an effort to obtain (albeit indirect) evidence on the Court's view of its role, we determined whether preemption cases arrived at the Supreme Court from a *state* court

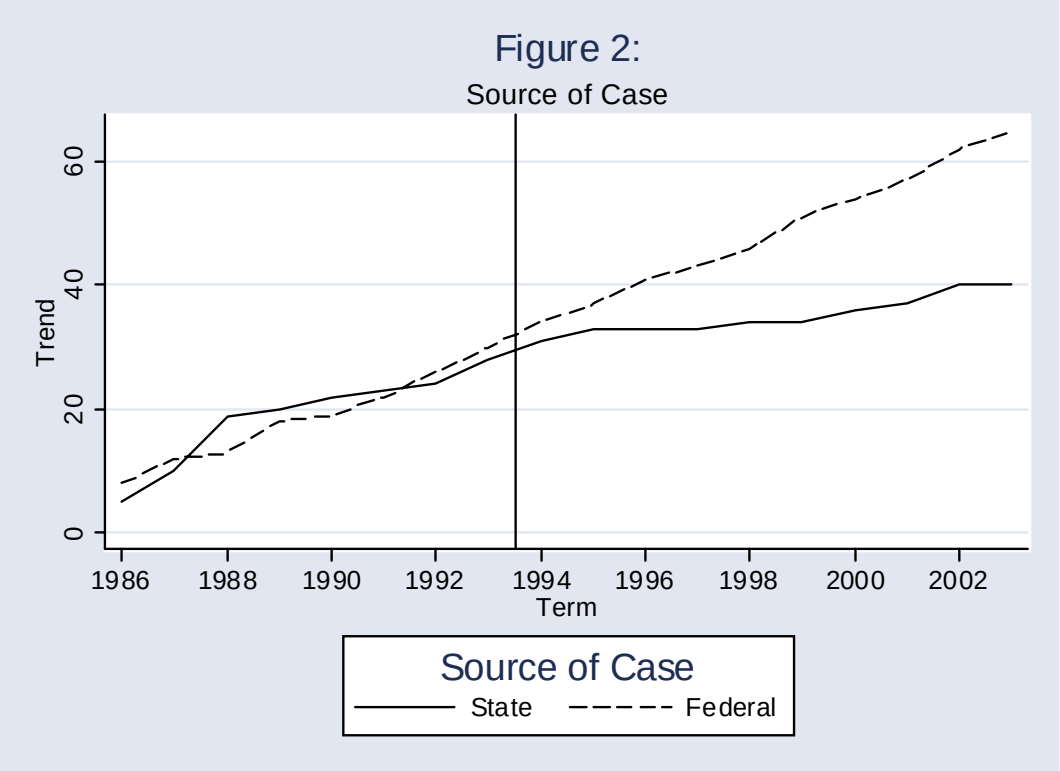
---

[44] *See* Viet Dinh, *Reassessing the Law of Preemption*, supra n. xx at 2087–88. On the Supreme Court, Justice Scalia is the most insistent advocate of this position *See, e.g.*, Cippolone v. Liggett, 505 U.S. 504, 544 (1992) (Scalia, J., diss.).

(usually a state supreme court) or a *federal* court. In addition, we determined whether the Supreme Court *affirmed* or *reversed* the lower court's ruling. Both variables suggest a pronounced shift in the Supreme Court's preoccupation. Those shifts, however, do not clearly support or refute any of our three stylized conceptions. Moreover, Figures (2) and (3) suggest that the observed changes in direction roughly coincide with the transition from the FRC to the SRC: the trendlines begin to diverge in the 1994 and 1995 Terms. We cannot think of any obvious explanation of why this should be so.

The Rehnquist Court granted *certiorari* to state courts in 40 cases and to lower federal courts, in 65 cases. This mix differs substantially from the composition of all civil cases decided by the Rehnquist Court: upwards of 84% of those cases—during the SRC, a whopping 89%—have come from federal rather than state courts.[45] On this dimension, moreover, preemption cases show a striking difference between the FRC and the SRC. The FRC granted an almost equal number of *certioraris* to state courts (28) and federal courts (30). The Second Rehnquist Court, in contrast, has focused its attention on *federal* courts: 35 *cert* grants to federal courts, and only 12 to state courts.

[45] During the FRC, 118 (or 16%) of 724 civil cases came from state courts. During the SRC, the numbers dropped to 63 (11%) of 578 civil cases. For the entire duration of the Rehnquist Court, the numbers work out to 181 (14%) of 1302 civil cases. Figures for 1986–2002 Terms compiled from *The Supreme Court, 19__ Term*, HARV. L. REV. (November, annual); 2003 Term calculations: author's count.

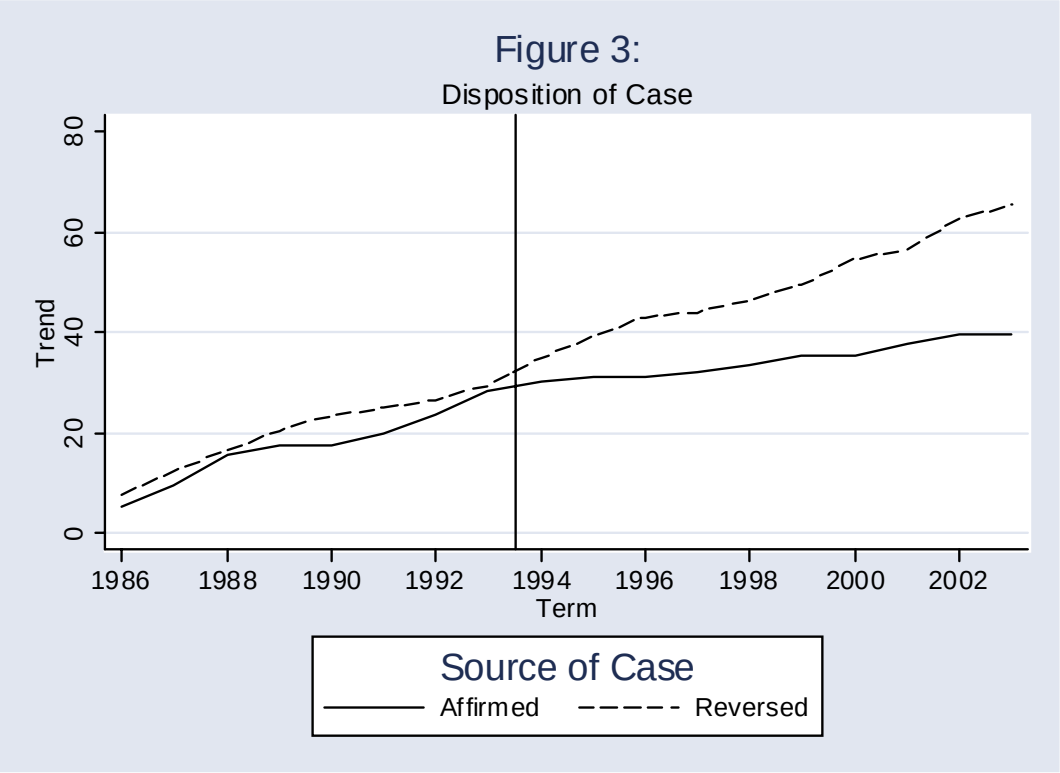


A similarly intriguing shift is observable in the reversal/ affirmance pattern. Overall, the Rehnquist Court reversed lower-court decisions in 63 cases and affirmed in 37. In the remaining five cases, the Supreme Court affirmed in part and reversed in part, with respect to different and separable preemption claims on which either the Supreme Court or the court below rendered a "mixed" verdict.[46] This ratio of roughly six reversals for every four affirmances is virtually identical to the Court's reversal rate for all cases over the period under consideration.[47] Again, though, the data suggest a marked shift

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

[47] THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS 228–229 (Lee Epstein et al. eds., 3rd ed. 2002) (showing reversal rate of 59% over the 1986-2001 period). As a subgroup, states and territories fared little better, with a 61.5% reversal rate before the Court. *Id.* at 710–711.

from the First to the Second Rehnquist Court: a near-balance (29:27, with two split reversal/ affirmance decisions) in the FRC, and a ratio of over 3:1 (34 reversals versus 10 affirmances, with three splits) for the SRC.



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

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

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

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

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

To what extent does the evidence support one of the three conceptions of the Supreme Court's role in preemption cases? Looking at Table (6.b.), the Rehnquist Court reviewed a much larger number of state court decisions *against* preemption (28) than state court decisions *for* preemption (12). In cases from federal courts, in contrast, lower court decisions for preemption outnumber those against (34.5 to 30.5). This observation may lend modest support to the *supremacy* conception. On the other hand, Table (6.a.) shows that state courts were more likely to be affirmed in cases where they had ruled against preemption (.45 affirmance, versus .33 affirmance in decisions for preemption). This observation, plus perhaps the larger number of federal court decisions under review, would seem to cut in the opposite direction.

Overall, cases over lower court rulings against preemption outnumber reviews of lower court decisions for preemption (58.5 versus 46.5), lending modest support to a supremacy view. Then again, the conditional probabilities of affirmance are comparable

for lower-court rulings for and against preemption. Sustained adherence to a supremacy conception should produce a higher number of reversals in cases where lower courts found no preemption.

Table (6.b.) provides one piece of evidence for a *federalist* conception—to wit, the Rehnquist Court's increased propensity to review preemption ruling by federal rather than state courts. The Court reviewed a roughly equal number of federal appellate decisions in both periods. It also reviewed six state court decisions in favor of preemption in each period. In sharp contrast, reviews of state court decisions against preemption dropped from 22 to six. One could say that these cases account for more than the entire drop in volume between the FRC (58 preemption cases) and the SRC (47). The evidence is equally supportive, however, of a marked shift towards an *error-correction* view. The SRC found precisely 1.5 cases (out of twelve) in which a state court had gotten it "right," and even the federal courts had better than .7 probability of being reversed—regardless of whether they ruled for or against preemption.

The data are consistent with our earlier suggestion of *plus ca change*: the change in the pattern of *certiorari* grants does not necessarily indicate, or translate into, a change in the Supreme Court's *direction* with respect to desired preemption outcomes. A significant shift in a pro- or anti-preemption direction should produce a string of decisions in that direction and a disproportionate number of reversals of lower court decisions in the opposite direction—until the lower courts take the hint. No such shift, however, is observable.

That said, the observed shifts between the FRC's and the SRC's *certiorari* patterns seem too substantial to be a mere coincidence. Naturally, we have toyed with

possible explanations—in particular, Thomas Merrill's suggestion that the high predictability of judicial votes on a Supreme Court with a stable composition will tend to shape judicial behavior and case outcomes.[48] That hypothesis might help to explain some of the observed shifts, such as the higher reversal rate under the SRC: if "error correction" is a basic function of (preemption) review, then the reversal rate should rise as the justices get better at predicting what all the other justices will view as an error. We decline to pursue these speculations here because they remain just that—speculations—without systematic information on the "supply" of preemption cases. In particular, we would like to know whether the pronounced shifts just described are attributable to a changed *cert* pool or to a different set of choices *from* that pool. We have begun to collect that information for analysis and will present the results in a forthcoming article.

.

V. OUTCOMES

1. A Signaling Theory of Preemption

In examining the variables that may explain the Supreme Court's decisions (for or against) in preemption cases, we follow scholars who have argued that the Supreme Court relies on presumptively reliable but highly informative signals, or "cues," such as the identity of the parties. While this theory has been developed, in increasingly sophisticated game-theoretic variations, primarily in the context of the *certiorari* process,[49] at least one scholar has fruitfully applied an informal signaling theory to

---

[48] *See supra* n. .

[49] *See, e.g.,* Gregory Caldeira & John Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82:4 AM. POL. SCI. REV. 1109 (Dec. 1988); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Charles E. Cameron et al., *Strategic*

Supreme Court merits decisions in dormant Commerce Clause cases[50] (which, as a species of federal common law preemption, bears affinity to statutory preemption and especially "implied" preemption).[51]

What gives signaling or "cue" theory its plausibility is the insight that the Supreme Court must economize on information. That recognition applies to merits as well as *certiorari* decisions, and it applies with particular force in the context of statutory preemption. First, preemption cases are a steady diet, which implies a premium on not having to think through each case from scratch. Second, the general heading of "preemption" encompasses a broad range of disparate cases involving tobacco advertising, automobile safety, medical devices, telecommunications pricing, outboard motors, and HMOs. The cases involve tangled regulatory schemes, whose political dynamics and economic consequences—it is safe to say—are usually a mystery to the justices. Since life is short, a sensible justice will attempt to reduce the complexity—*inter alia*, by relying on signals. Third, preemption cases pose a high risk of gamesmanship. When the ACLU pushes a First Amendment claim or the NAACP defends a civil rights law, what the Court sees is what it gets. In preemption cases, in contrast, solemn arguments about the sanctity of "our federalism" or "federal supremacy" are often proffered by business or trial lawyers who, in the ordinary course of their business, are rationally indifferent between the Constitution and a cauliflower. These parties'

Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions, 94:1 AM. POL. SCI. REV. 101 (Mar. 2000).

[50] Christopher Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 S.CT. ECON. REV. 233 (1999).

[51] *See infra* nn. And accompanying text.

arguments are bound to be strategic, and their alarms will often be false. That consideration, too, might induce a rational judge to look to more reliable signals.

Relying on previous studies in the field, we concentrate on the *identity of the parties* as "signals" and examine four hypotheses:

- ***State Parties.*** A state's complaint about unwarranted federal interference is substantially more authentic and credible than a private party's averment to the same effect.[52] Hence, rulings against preemption will be substantially more likely in cases to which a state is a party than in "Non-Government" cases—that is, cases among private parties.

- ***State* Amici.** In "Non-Government" cases, the presence of state *amici* should serve to "validate" federalism arguments and render rulings against preemption more likely.[53]

- ***The Solicitor General***. Empirical studies have consistently found that the participation and the legal position of the Office of the Solicitor General ("OSG") have a powerful effect on Supreme Court case outcomes.[54] We hypothesize that in statutory preemption cases, that effect will be pronounced and, more interestingly, asymmetric.[55] By virtue of its institutional position, the OSG is expected to

---

[52] *Cf.* Drahozal, supra n. (showing that dormant Commerce Clause claims by state parties are more successful than complaints by private parties and attributing the phenomenon to the greater authenticity and credibility of federalism complaints by state parties).

[53] While the evidence on the effectiveness of (state) *amicus* briefs is mixed, the authors of the most extensive and sophisticated study have identified some such effects: Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000) (showing that state *amicus* briefs affect outcomes when filed on behalf of respondents rather than petitioners).

[54] *Id.* at 774 ("The only finding that has been consistently replicated is that the Solicitor General enjoys a unique degree of success as an amicus filer."), 803–804. Strictly speaking, most studies show only that the OSG has an exceptionally high *success* ratio before the Supreme Court, which is very different from showing that OSG briefs have an *effect*. A facile inference from success to effect is precluded by a massive endogeneity problem: the institutional role of the OSG as a "Tenth Justice" and a genuine "friend of the Court" may induce its occupants to act, think, and argue like Supreme Court clerks. Such an office will obviously have a higher success ratio than parties with an agenda other than "getting the law right." Its *effects* could range from substantial to nil.

[55] The OSG should play a particularly salient role in preemption cases. Those cases turn on the interpretation of federal statutes and agency regulations, where the federal government possesses both special expertise and a high stake in the outcome. Our data confirm that surmise. See infra nn. And accompanying text.

defend federal prerogatives. An OSG position *for* preemption, in other words, is a kind of default position that conveys little (if any) additional information. In contrast, if the OSG *dis*claims preemption, its position should carry great weight with the Justices.

- ***OSG Partisan Affiliation***. We hypothesize that the Supreme Court will view Republican OSGs as more business-friendly, and therefore more supportive of preemption, than Democratic OSGs. Therefore, the effects of the OSG's position for or against preemption should be more strongly asymmetric for Republican than for Democratic OSGs.

This Part first presents the descriptive statistics on the effects of state participation, state *amicus* briefs, and the OSG's participation and partisan affiliation. We then present a simple regression analysis, which shows that the effects of state party participation and OSG participation are sizeable and statistically significant. The evidence on state *amicus* briefs is more mixed: while correlations suggest that such briefs may have the desired effect of making rulings in favor of preemption less likely, that effect appears to be neither large nor statistically significant. The same is true of the OSG's Partisan Affiliation: intriguing correlations, but no statistical significance. Nor could we find any other variable with a statistically significant effect on preemption case outcomes. The Part concludes with a brief suggestion for further research.

2. State Parties

Preemption cases typically take one of two forms:

- *State Participation*: A business or other private party sues a state government. The private plaintiff wields preemption as a sword against the state, and a pro-preemption ruling translates into a loss for the state. That is also true of the rare cases (five) in which a state government initiates a suit against a private party.

- *Non-Government*: A private party (such as a tort plaintiff) sues another private party (typically, a business). Here, defendants wield preemption as a shield against private state law claims. A ruling for preemption in a case brought by

> private plaintiffs translates into a win for business. No state participates directly in the litigation, but one might say that a pro-preemption outcome translates into an incidental or collateral loss to the state.

In the form in which the cases appeared before the Court—that is, as counted by "petitioners" and "respondents"—the Rehnquist Court has decided 45 "state party" cases and 50 "Non-Government" cases, accounting for all but ten of all 105 preemption cases.[56] Three of those ten cases involved disputes between state and local governments; in the remaining seven, the federal government was a party. Because these atypical cases are irrelevant to our analysis,[57] we omit them from the descriptive statistics (unless noted otherwise).

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

Table (7) – Probabilities of Preemption, by Party Constellation

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

Further evidence emerges by comparing states to other parties in their respective roles as petitioners and respondents. Recall that the reversal rate—that is to say, the rate

---

[56] *See* Table (3.b.), *supra*.

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

at which petitioners prevail—is about 61% for the Rehnquist Court, both for preemption cases and for all cases.[58] Table (8) below shows the principal preemption parties' "unexpected success ratios" in cases against one another—that is to say, the difference between the expected success rate (61%) and the parties' actual record.[59] Horizontally, a positive number means that the petitioner did that much better in preemption cases than the "average" petitioner. Read vertically, a positive number means that the respondent did that much *worse* than the average respondent. While the exercise involves uncomfortably small numbers of observations (in parentheses), it still holds an interesting suggestion.

---

[58] *Supra* n. xx and accompanying text. The precise reversal rate for preemption cases is 62.3%, but that miniscule difference does not affect the results here.

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

Table (8) – Petitioners' Unexpected Success Ratios

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

Business seems to do okay against Private Parties, but it cannot seem to catch a break against the States, regardless of its role as petitioner or respondent. *Private* parties figure too rarely as petitioners to put any confidence in the numbers, but they emerge (somewhat surprisingly) unscathed: in fact, they appear to do a bit better than the "average" party, both on the petitioner and the respondent side. The *States* do well against Business, and surprisingly poorly against Private Parties.

Contrary to suggestions that pro-preemption decisions are a kind of pro-business concession by otherwise federalism-minded justices,[60] Table (8) actually suggests an *anti*-business story. Liberal justices, that story goes (in the vernacular), dislike big business to begin with. Conservative justices do not share that antipathy. But neither do they view it as part of their job description to bail out corporate America, when a decent respect for federalism appears to command the opposite result. And so, when states insist

[60] *See, e.g.*, Baybeck & Lowery, *Federalism Outcomes and Ideological Preferences*, supra n. .

upon their right to regulate business over and above a federal baseline, the Court will give them their due.[61]

The fact remains that pro-preemption outcomes are substantially less likely in State Participation than in Non-Government Cases, which suggests that the presence of a state party serves as a signal.[62] It is possible that States Participation is an independent signal (and that the states' poor record against Private parties is a statistical fluke, caused by the small number of such cases). It is also possible that State Participation is (in a manner of speaking) the flipside of, or interdependent with, a Business Participation signal. The evidence appears to permit either explanation.

3. State *Amici*

a) Filing Pattern

We find extensive and still-growing state *amicus* participation in preemption cases—predictably, almost exclusively on the anti-preemption side.[63] States participated as *amici* in 64 of the 105 cases, or 60.9%.[64] The rate of state participation increased from

---

[61] An anti-business story is also consistent with the striking frequency of pro-preemption findings in Business v. Business and Private v. Private disputes, where that reflex (due to the party constellation) does not come into play. See supra n. xx.

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

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

[64] Arguably, these numbers understate the extent of state participation. We report exclusively *amicus* participation by states *as states*. Thus, our number exclude participation by local government agencies, state-level associations entrusted with public functions, and intergovernmental organizations (such as the National Association of Governors). We have collected but not yet analyzed that data.

58.6% of cases (34 in 58) for the FRC to 63.8% (32 in 47) for the SRC. State *amicus* briefs are typically joined by more than one state. Of the 64 cases in which any state participated as an *amicus*, fully 48 cases featured "mass briefs" with twelve or more signatories against preemption, including 15 cases in which 22 or more states participated. By these measures, too, state *amicus* participation has increased. Mass briefs were filed in 22 (37.9%) of preemption cases during the FRC; that figure increased to 26 (55.3 %) for the SRC. Table (9) shows the distribution.

Table (9) – State *Amicus* Participation in Preemption Cases

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

Table (10) shows the likelihood of a state *amicus* appearance for the major party constellations, depending on the parties' appearance as petitioner or respondent (total number of cases in parentheses). While "only" 52% of Non-Government preemption cases feature a state *amicus*, state *amici* participated in 71% of State-Party cases. It appears, moreover, that states prefer to submit *amicus* briefs for petitioners, rather than respondents.[65] When a sister state or a Private litigant presses an anti-preemption position against a Business respondent, states participate as *amici* in roughly nine out of ten cases.

[65] This finding is impressively confirmed by the data—not presented here—on the number of state *amici* and the frequency of mass briefs.

Conversely, when business petitioners insist on preemption, states will lend *amicus* support "only" in half of all cases—regardless of whether the respondent is one of their own, or a Private Party.

Table (10) – State *Amicus* Participation Rates

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

Scholars have argued that *amicus* briefs may serve the strategic objective of manipulating the "signals" for the Supreme Court.[66] From that vantage (and for that matter from any outcome-oriented perspective), the states' pattern of *amicus* participation in preemption cases looks suboptimal. First, one would expect the state "signal" to be more robust in Non-Government cases. In State-Party cases, state *amici* cannot send any signal that the Court has not already received from the party-state; they can at most heighten the intensity of that signal.[67] In Non-Government cases, in contrast, state *amici* could authenticate the "federalism" position urged by the anti-preemption party, which might otherwise look altogether opportunistic. The optimal strategy, then, would concentrate state *amicus* efforts on Non-Government cases. The observed pattern is the

[66] Caldeira & Wright, *Organized Interests*, *supra* n. xx; Lee Epstein, *Courts and Interest Groups, in*, THE AMERICAN COURTS: A CRITICAL ASSESSMENT (JOHN B. GATES & CHARLES A. JOHNSON EDS.) 335 (1991); and Cameron et al., *Strategic Auditing*, *supra* n. at 103.

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

opposite. Second, Kearney's and Merrill's study of *amicus* participation in Supreme Court merits decisions from 1946 to 1995 shows state *amici* have a statistically significant effect on outcomes when they participate on behalf of *respondents*, whereas no such effect could be shown for state *amicus* participation on behalf of petitioners.[68] If that is right, the states' preference for assisting petitioners rather than respondents in preemption cases again seems suboptimal.

At first impression, *inefficient* signaling casts doubt on the hypothesized signal: if the signal were worth something, parties would surely invest resources in getting it "right." Their failure to do so suggests that state *amicus* briefs (as other *amicus* briefs) principally serve the filers' organizational needs, as opposed to outcome-oriented objectives. That is a possible explanation—but not the only possible explanation. We will return to the question below, after examining the evidence.[69]

b) Outcomes

Table (11) shows the weighted conditional probabilities of a ruling *against* preemption—that is to say, the states' success ratio—for preemption cases, disaggregated into Non-Government cases and State Party cases and, further, into cases without state *amici*, some state *amici*, and "mass briefs." The numbers of cases appear in parentheses.[70]

---

[68] Kearney & Merrill, *The Influence of Amicus Curiae Briefs*, *supra* n. xx at 810-11.

[69] Infra nn. And accompanying text.

[70] For purposes at hand, we have removed not only the state-versus-state cases and the cases with a federal party but also, and for obvious reasons, the cases in which some states *favored* preemption (see *supra* n. xx).

Table (11) – State *Amici* and Anti-Preemption Outcomes

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

As already noted, rulings against preemption are more likely in cases to which a state is a party. It also appears that *mass* state *amicus* participation has a positive effect on state success in preemption litigation, whereas participation by only a few states does not. (To the limited extent that the small numbers permit any conclusion, briefs by a small number of state *amici* appear to make an anti-preemption outcome *less* likely.) Consistent with a signaling theory, the number of signatories may serve as a kind of proxy for the intensity of state concern.[71] In contrast, the correlations provide no evidence for our expectation that state *amicus* participation should be more effective in Non-Government cases than in State Party cases (where the "states' rights" signal will often be redundant). While we cannot reject that hypothesis outright,[72] the correlations suggest that stass mass briefs are more effective in State Party than in Non-Government cases. One possible explanation of the observed pattern is that mass state participation, contrary to our earlier

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

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

suggestion,[73] signals not only the intensity of state concern but also the *authenticity* of the states' position: it tends to show that the proffered position reflects the views of the states *as states*, rather than the (perhaps, parochial) interests of a few states (which may well differ from the interests of *other* states).

3. The Solicitor General

a) Filing Patterns

We predict that the effects of the OSG's position in preemption cases will be strong; asymmetric, in the sense that an OSG *amicus* filing against preemption will provide a stronger signal than a filing for preemption; and more strongly asymmetric for Republican than for Democratic OSGs.[74] The data support all three predictions, but the extent of that support varies.

We coded each OSG brief with respect to its preemption position. As with case outcomes and judicial votes, briefs urging partial preemption were recorded as two separate observations, with each observation weighted at 50 percent. Luckily (in light of the manifest interdependence problem), there were only three such briefs. The Supreme Court substantially adopted the OSG's position in all three cases,[75] a fact that provides a first glimpse of the OSG's prominent role and extraordinary success.

---

[73] Supra n. and accompanying text.

[74] *Supra* nn and accompanying text.

[75] *International Paper Co. v. Ouelette*, 479 U.S. 481 (1986); *CSX Transport Inc. v. Easterwood*, 507 U.S. 658 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1994). In one case (Mansell v. Mansell, 490 U.S. 581 (1989)), the OSG changed its position very late in the litigation; we coded the briefs as an Abstention.

In addition, we recorded whether the OSG brief in question was filed by a Solicitor serving a Democratic or Republican administration. 64 preemption cases fell into a Republican OSG period and 41 into a Democratic administration. The OSG submitted briefs in 80 of the 105 preemption cases decided by the Rehnquist Court. Excluding, as we have all along, the three state-to-state cases (which offer little insight into the matter) and the seven cases—four under Republican Solicitors, three under Democrats—to which the federal government was a party (where the OSG submitted a party rather than an *amicus* brief and *ipso facto* took a pro-preemption position), the OSG participated in 73 of 95 cases (72.6%). Table (12) shows the distribution.

Table (12) – OSG *Amicus* Preemption Briefs

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

While the small numbers provide ample reason for caution, it appears, first, that the OSG has taken a pro-preemption position in 39 of 95 preemption cases, or about 40 percent—a figure that, in light of the Office's institutional role, strikes us as remarkably low. Second, as one would expect,[76] Democratic OSGs appear more willing than Republican OSGs to take an *anti*-preemption position, both in State Party and Non-Government cases. Third, Republican OSGs have a higher propensity to abstain *in Non-*

[76] Supra n. and accompanying text.

Government preemption cases (but not in State Party cases). Republican OSGs sat out eleven of 26 Private cases; Democrat OSGs, only 3 of 21.[77]

b) Outcomes

Table (13) below shows the weighted conditional probabilities for pro-preemption outcomes. In interpreting the numbers, note that the OSG's success ratio for cases decided "Against Preemption" is the *obverse* of the probability of a pro-preemption outcome (the number shown). Overall, the OSG has a "batting average" of slightly over .800 in the preemption cases in which it chooses (or is asked to) participate—strikingly high, but comparable to the OSG's general success rate over time.[78]

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

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

As expected, the distribution is asymmetric both along the pro-/anti-preemption dimension and along the partisan dimension. Whereas an anti-preemption outcome is highly likely (.85) when the OSG argues *against* preemption, anti-preemption parties still have roughly a one-in-four chance of prevailing when the OSG argues *for* preemption—only marginally worse than their batting average in cases where the OSG abstains. The

---

[77] We checked whether Solicitors under different Republican administrations—Reagan, Bush I, Bush II—differed in this respect. The answer is "no."

[78] THE SUPREME COURT COMPENDIUM, supra n. xx at 675 (Table 7-16).

partisan asymmetries are stark. A Republican OSG signal in favor of preemption shows no difference to a simple Abstention, suggesting that the Supreme Court views a Republican pro-preemption stance as a kind of default position that carries little informational value. In contrast, a Democratic OSG's pro-preemption brief does appear to increase the likelihood of a ruling to that effect. Conversely, the Supreme Court appears to view a Democratic OSG's *anti*-preemption stance as a kind of default position, whereas Republican OSGs have a startling 1.000 batting record in arguing against preemption.

As suggested earlier,[79] it is difficult to show that OSG briefs have an actual *effect*. The Office may simply be in a better position than other litigants to predict the likely disposition of a given case—and, moreover, institutionally predisposed to act on those predictions. But a perfect endogeneity story fails to explain why Republican OSGs should be better at predicting the outcomes of one set of cases (those that go against preemption) than another set (pro-preemption rulings), while Democratic OSGs have the opposite tendency. It is much easier to tell a coherent signaling story that maps the results. Under any circumstances, the OSG will tend to defend federal prerogatives. But a Democratic OSG will face countervailing pressures from liberal constituencies that want the states to retain an ability to regulate on top of a federal baseline. Thus, while a Democratic OSG's disavowal of preemption certainly merits respect, it cannot simply be taken at face value. In contrast, when a Republican OSG disavows preemption, it opts against both its institutional interest and the administration's business clientele. Its

---

[79] Supra n. xx.

position can readily be taken as the best statement of the law. To all intents, the case is over.

5. Regression

a) Parties and Amici

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

	Coeff.	Std. Error	t	P>t
OSG No Preemption	-.53	.12	-4.48	0.00
State Party	-.15	.08	-1.79	0.08
State Amicus	.02	.09	0.19	0.85
Constant	.75	.09	8.03	0.00
Number of Observations: 104				
$R^2 = 0.33$				

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

	Coeff.	Std. Error	t	P>t
OSG No Preemption	-.27	.32	-0.84	0.41
State Party	-.49	.23	-2.12	0.05
State Amicus	.13	.27	0.48	0.64
Constant	.84	.24	3.53	0.00
Number of Observations: 21				
$R^2 = 0.28$				

Tables (14.a.) and (14.b.) show, for all cases[80] and contested cases respectively, the results for a regression with four independent variables: the position of the Office of

[80] As we have done throughout, we exclude the "State versus State" cases and the cases to which the federal government was a party.

the Solicitor General, pro- and anti-preemption; the presence of a state party; and the presence (yea or nay) of a state *amicus* against preemption.

As already suggested,[81] little difference (and no statistically significant difference) can be observed between an OSG Abstention and an OSG intervention in favor of preemption. The effect of the OSG "No Preemption" and State Participation variables is in the expected direction (*i.e.*, a lower likelihood of a ruling for preemption). For both variables, the effect is substantial and, moreover, statistically significant at a .10 level for "all cases"; for contested cases, the OSG variable loses significance (quite probably a victim of small numbers). The State *Amicus* variable has a small effect, which does not approach statistical significance and, moreover, points in the wrong direction. To all intents, the effect is nil. That result does not change when we look at mass briefs (versus few or no briefs), and it remains the same for any subset or configuration of cases. In short, we could find no specification under which state *amicus* participation makes a statistically significant difference.[82]

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

---

[81] Supra nn. and accompanying text.

[82] Conceivably, state *amicus* effects are masked by the Solicitor General's remarkable influence. *Cf.* Kearney & Merrill, *supra* n. xx at 799 (suggesting that the Solicitor General's success may mask effects of disparities of *amicus* support). But we doubt that that is what is going on here. If masking occurs due to high correlation, the standard error for both variables should go up in a multivariate regression. That is not happening.

b) Other Variables

In light of our earlier observations concerning the outcomes differences between "tort" and "statutory" preemption cases,[83] we experimented with specifications containing that variable. One specification is shown below.

Table (14.c.) – Regression Results, Including Tort Variable

	Coeff.	Std. Error	t	P>t
OSG No Preemption	-.53	.12	-4.49	0.00
State Party	-.11	.11	-1.06	0.29
State Amicus	.02	.09	0.23	0.82
Tort	.06	.11	.58	0.56
Constant	.71	.12	6.04	0.00
Number of Observations: 102				
R^2 = .36				

Here as in all other specifications, the tort variable has a small and statistically insignificant effect, and it fails to improve the fit of the model. Its principal effect is to render the State Party variable statistically insignificant. We are inclined to attribute that fact to a colinearity problem. As noted earlier,[84] only two tort cases involve a state party. While we cannot exclude the possibility that "torts" make a difference, we strongly suspect that it is the absence of a state party, rather than the nature of the cases, that explains the higher likelihood of preemption findings in tort cases.

---

[83] *Supra* nn. and accompanying text.

[84] Supra

In light of our surprising finding that Private litigants appear to do better against the States than do Business parties, we examined whether the presence of Business might render pro-preemption rulings less likely (all else considered). The effect does indeed run in that direction; but it is small and statistically insignificant.

Finally, we experimented with the possibility that the origin of a preemption case in state or federal court might have signal value.[85] The underlying intuition is that the Supreme Court might expect state courts to give short shrift to federal prerogatives. But even the correlations did not support that surmise, and neither did any regression. It stands to reason that the signal—if operative at all—will operate principally at the *certiorari* stage.

6. Future Research

If the signaling theory (or some strategic variation thereof) is approximately right, private litigants should eventually respond to emerging inefficiencies in the signaling "market." Their efforts can be observed and analyzed. Such studies might shed light on our tentative conclusions.

For Business, the principal objective should be to keep the OSG on the sidelines in cases where the Office might be inclined to argue against preemption. (As noted, the rewards of having the Solicitor support preemption in cases where he might be inclined to abstain appear to be negligible, especially under Republican administrations.) Symmetrical rewards should accrue to pro-regulatory constituencies and to the states from having the OSG—and especially a Republican OSG—argue *against* preemption in

[85] We also examined whether the numbers for federal court cases might be might be unduly influenced by Supreme Court reversals of the Ninth Circuit Court of Appeals. However, this is not the case.

a larger number of cases. Of course, everyone who has any business before the United States Supreme Court is already well aware of the OSG's inordinate influence. Interest groups do lobby the OSG—albeit with all the tact and circumspection that is indicated in lobbying an office that likes to be viewed as being above politics. (The states, which are naturally bi-partisan and, moreover, perceived as somewhat more dignified than ordinary lobbies, may enjoy an advantage.) An empirical examination of these interactions would make for a fascinating study, though not an easy one.

A more manageable (because directly observable) area of investigation is the states' *amicus* strategy. To be sure, our failure to find statistically significant effects for state *amicus* briefs may suggest that that such briefs tend to be filed to serve the filers' "consumption" interests (for example, a desire to "show the flag"), wholly apart from a realistic expectation of influencing the outcome. However, our finding is far from robust. In addition to small-numbers problems, our study omits possibly important variables, such as participation by other *amici* that may mask or mute the effects of state participation.[86] (We have collected but not yet analyzed that information.) And at least some snippets of evidence suggest that the states do pay attention to production values. For example, states are much more likely to file *amicus* briefs in contested than in uncontested cases. (While state *amicus* participation in uncontested cases lies consistently in the 60% range, the rate for contested cases is 70% for the FRC and approaches 80% for the SRC.)[87] Similarly, due to the coordinating activities of the National Association of

---

[86] *Cf.* Kearney & Merrill, *supra* n. xx, at 821–822 (suggesting an "arms race" explanation of rising *amicus* participation and arguing that the resulting symmetry of *amicus* filings may obscure their effect.)

[87] If *amicus* briefs can be expected to make a difference in any set of cases, it should be in contested rather than "clear" cases. Of course, it is also possible that *amicus* briefs turn what would otherwise have been a (near-) unanimous case into a contested case. But we have no empirical evidence to support this proposition.

Attorneys General (NAAG), the states have professionalized their *amicus* activities and substantially increased state participation rates.[88] Especially if we are right in suspecting that mass state participation may signal the authenticity of state concern as well as its intensity,[89] NAAG coordination may very well be an effective investment

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

From the states' vantage, the existing pattern of *amicus* participation may very well be rational. Such participation is bound to depend not only on the odds of producing a favorable outcome but also on transaction costs and consumption values. In State Party cases, NAAG intervention and coordination is typically prompted by a request from the party-state—meaning that the first move has been made, by a trustworthy party.[90] *Sua sponte* coordination by NAAG, or NAAG coordination at the request of a third (private) party, would likely involve far higher transaction costs. Moreover, much as non-profit

---

[88] See ERIC N. WALTERNBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 47–51 (1999); Cornell Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J. L. & PUB. POL'Y 17 (2001). The authors show (*id.* at 23, 30) that state concerns over *amicus* "overload" in 1980s prompted NAAG 's increased use of joint briefs, but they suggest that the sheer number of briefs may be more influential than number of states on a single brief. Since our data simply add up the number of states, they do not permit a test of that hypothesis.

[89] See supra

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

firms participate as *amici* for reasons of organization maintenance,[91] state attorneys general may support a sister-state for reasons of collegiality and its returns—which, *unlike outcome-related returns*, can be internalized by the office-holder. Given these constraints, the states' *amicus* strategy looks quite focused.[92]

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

---

[91] *See, e.g.*, Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 675–676 (1993)

[92] In particular, one can argue that the states' *amicus* participation in Non-Government preemption cases is actually remarkably high. A comparison to comparable settings—for example, the (we predict, virtually non-existent) participation of business lobbies in cases that do not directly affect corporate interests—would likely validate that judgment.

VI. HOW THE JUSTICES VOTE

Statutory preemption cases are often viewed as a species of "federalism." From that vantage, preemption cases present a conundrum, nicely captured by the *United States Supreme Court Judicial Data Base*. That widely used data set includes preemption cases under the general issue area of "federalism."[93] Within that issue area, it codes a "pro-federal" or "anti-state" outcome or vote as "liberal."[94] But whatever plausibility that coding may have in the context of straightforward federalism cases, it makes no sense in preemption cases, where a "liberal" vote for the federal government (and against the states) is also a vote for "big business" (and against pro-regulatory constituencies that want states to regulate above the federal baseline)—an attitude that the *Judicial Database* in many other contexts codes as "conservative."[95] In preemption cases, conservative attitudes (pro-state, pro-business) conflict, as do the corresponding liberal attitudes.

How do the justices respond to that conflict? The common view is that conservative (pro-state) and liberal (nationalist) attitudes "flip" in preemption cases. The bloc of five conservative justices that, for most of the period here under consideration, has carried the federalism banner (for example, in Commerce Clause, Fourteenth Amendment, and Eleventh Amendment cases)[96] votes for preemption and *against* the states. Conversely, the liberal bloc that has resolutely opposed the Rehnquist Court's federalism votes *for* the states in preemption cases. This Part examines whether, and to

---

93 Spaeth, Documentation *supra* n. xx at 50 (issue area: Federalism; issue codes: 910, 911).

94 *Id.* at 51, 53.

95 *Id.* at 52 (associating the "anti-business" position as "liberal" and the reverse as "conservative").

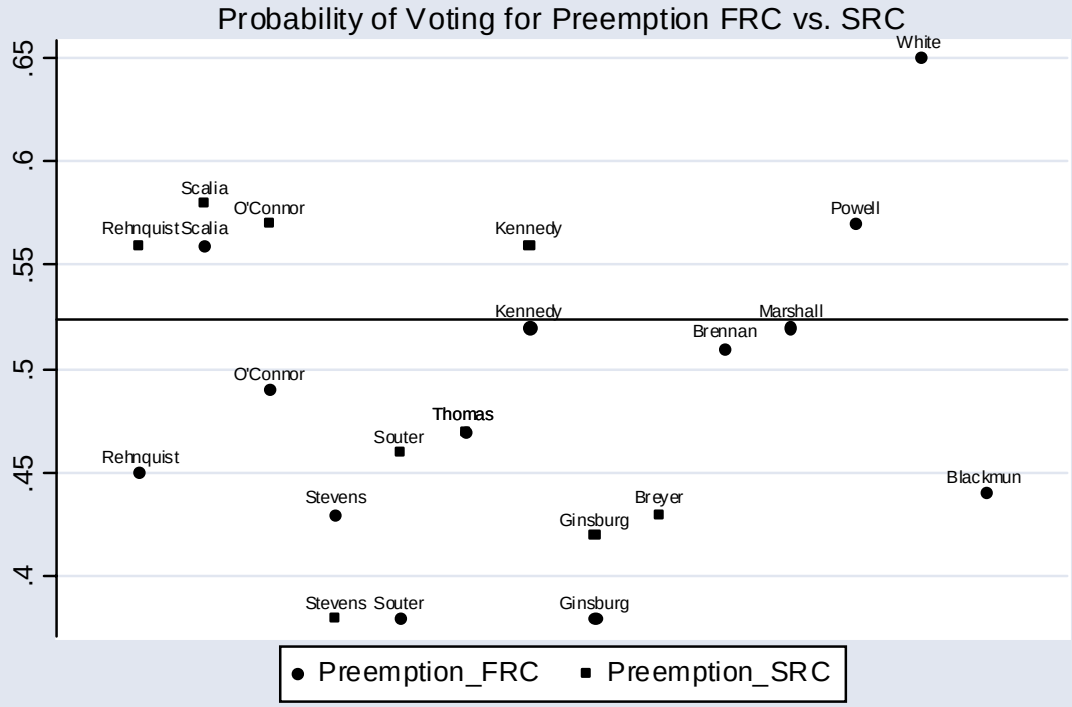
96 All of the landmark cases cited supra n. were decided by the same 5-4 majority of justices.

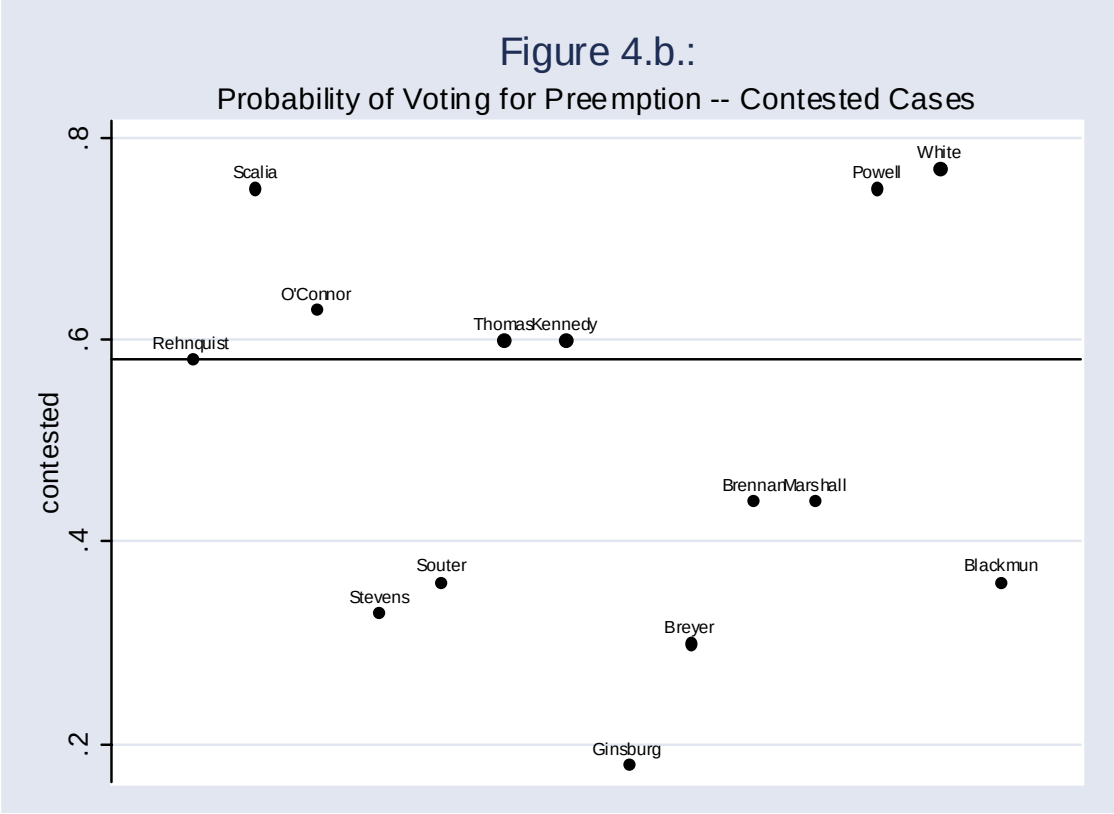
what extent, the justices' voting record conforms to the common view of a massive discontinuity—or, more colloquially, a judicial flip-flop—between federalism cases and preemption cases. We find substantial evidence to that effect. However, preemption case law is not an exact mirror image of the Rehnquist Court's federalism: the voting alignments are substantially more fluid.

1. Votes

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

Figure 4.a.:

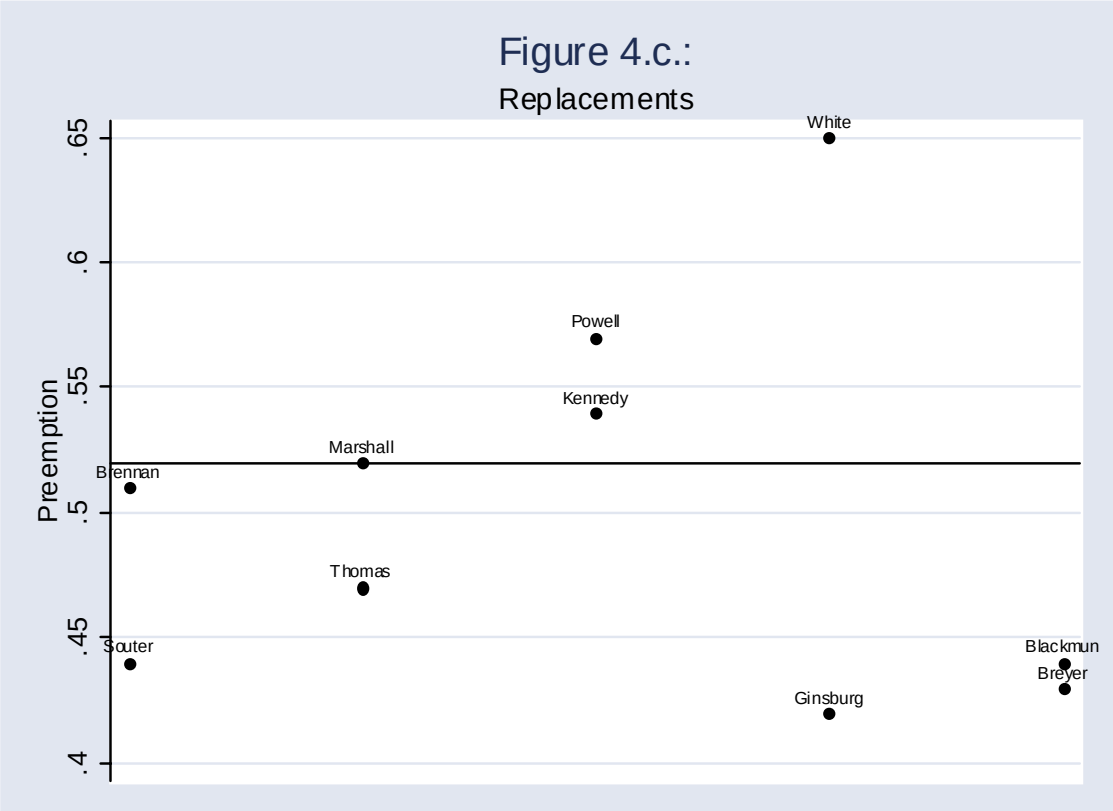




Most justices are about as likely to vote for (or against) preemption as the Court as a whole. Since four out of five preemption cases are (nearly) unanimous, it would be odd if it were otherwise. In contested cases, the conditional probabilities of a pro-preemption vote diverge more sharply. The prominent outliers—that is, justices with a record of substantial divergence from the Court average—are Justice White on the pro-preemption side and Justices Breyer, Ginsburg, Souter, and Stevens on the anti-preemption side. In contested cases, Justice Scalia's record is distinctly more pro-preemption than that of the Court, especially during the SRC.

A comparison between the FRC and the SRC shows striking personnel changes and a hardening of positions both on the pro- and the anti-preemption side. Figure (4.c.) plots the "lifetime preemption averages" for the former justices and their replacements.

All of the justices appointed to the Rehnquist Court (Thomas, Kennedy, Souter, Ginsburg, Breyer) are substantially more hostile to preemption claims than the justices whom they replaced.



At the same time, another glance at Figures (4.a.) and (4.b.) shows that Justice Souter's and Justice Stevens's anti-preemption positions have hardened. (In contested cases, Justice Souter has turned as hostile to preemption as Justice Stevens.) In this light, it is somewhat surprising that the Court as a whole has failed to move towards a more pro-state, anti-preemption position, at least by a simple measure of outcomes. Part of the explanation is that four conservative justices (Chief Justice Rehnquist and Justices Scalia,

Kennedy, and O'Connor) appear to have turned more preemption-friendly in both all and in contested cases.

The conventional spatial array of the SRC has Justice Stevens at one (liberal) pole, followed in order by Ginsburg, Breyer, Souter, O'Connor, Kennedy, Rehnquist, Scalia, and Thomas.[97] With the conspicuous exception of Justice Thomas, the justices' voting record in preemption cases matches this array: as we move from liberal to conservative, the preemption "scores" go up, with a noticeable discontinuity between the liberals on one side and moderates and conservatives (excepting Thomas) on the other.

Table (15) – Pro-Preemption Votes

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

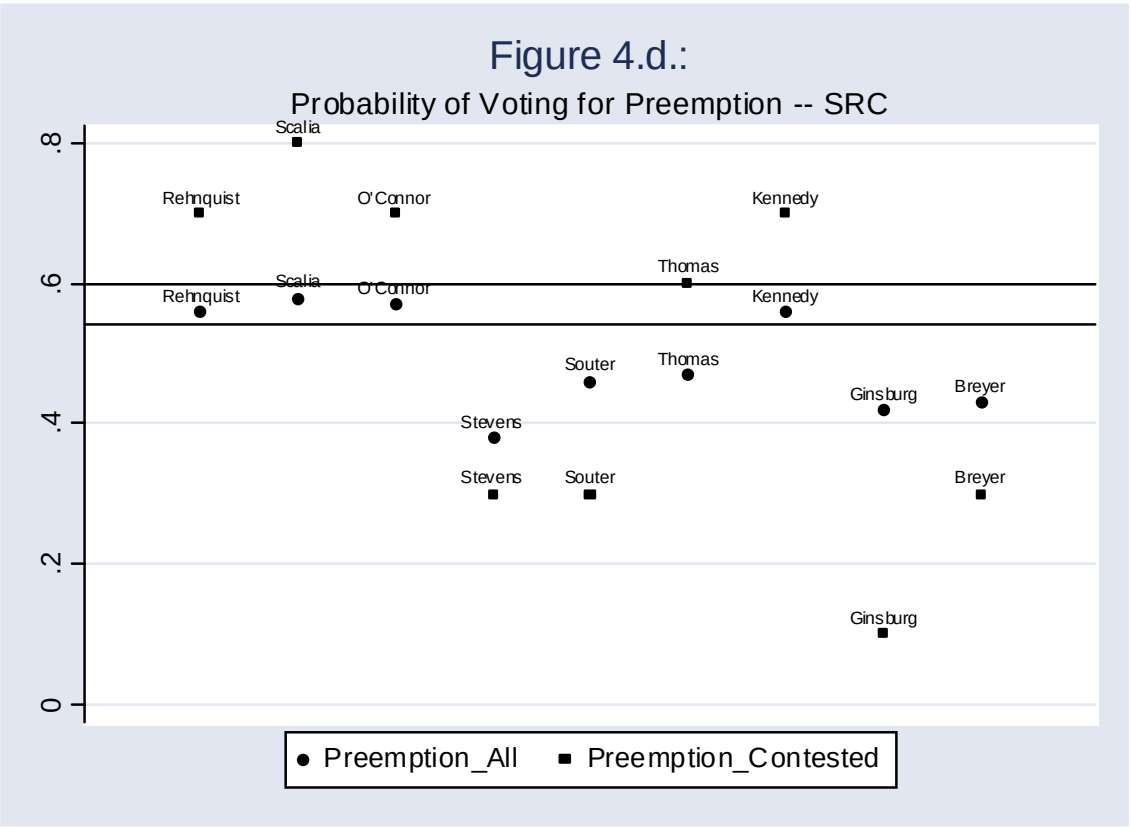
2. Blocs? Swing Votes?

The analysis so far suggests the emergence of a conservative bloc for preemption (Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia) and an equally cohesive bloc of liberal anti-preemption justices (Breyer, Ginsburg, Souter, and Stevens).

[97] See Andrew D. Martin & Kevin M. Quinn, Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999, 10 Pol. Analysis 134 *passim* (2002).

That impression seems confirmed in Figure (4.d.), which plots the LRC justices' voting records in all cases and in contested cases: in the contested cases, the blocs seem to harden.

Figure 4.d.:



The coalitions here, of course, look like the mirror image of the pro-state and anti-state blocs in straightforward federalism cases, with this qualification: Justice Thomas appears to play the role of the swing vote that, in federalism cases, falls to Justice Kennedy or Justice O'Connor. A closer examination of contested preemption cases, however, reveals a more complicated picture.

Table (16.a.) below shows the number of times each justice voted with the majority on contested preemption issues during the SRC. At first impression, the Table

appears to confirm the ideological division. Note, though, the conspicuous lack of zeroes and the paucity of "perfect scores": there appears to be no single "swing vote" that controls the outcomes. In any given case, though, it appears possible to pick up a vote from this or that "unlikely" justice.

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

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

Table (16.b.) provides better evidence in support of that observation. It shows the likelihood of justices voting with one another in contested preemption cases (SRC only). Only eleven of the 36 paired observations are significant at a .10 level; and, six of those eleven observation bear a negative sign (indicating a statistically significant likelihood that the paired justices will be found on *opposite* sides).[98] If we cannot easily find matching pairs, we certainly cannot find blocs.

[98] The observations here are weighted. For *un*weighted observations, no pairing shows significance.

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

	Rehnquist	Scalia	O'Connor	Stevens	Kennedy	Souter	Thomas	Ginsburg	Breyer
Rehnquist	1.00								
Scalia	-0.33 0.35	1.00							
O'Connor	0.45 0.19	-0.33 0.35	1.00						
Stevens	-1.00 0.00	0.33 0.35	-0.45 0.19	1.00					
Kennedy	0.72 0.01	-0.33 0.35	0.17 0.64	-0.72 0.02	1.00				
Souter	-0.45 0.19	-0.27 0.46	-0.45 0.20	0.45 0.20	-0.17 0.64	1.00			
Thomas	-0.06 0.88	0.60 0.07	-0.55 0.10	0.06 0.88	-0.06 0.88	0.06 0.88	1.00		
Ginsburg	-.57 0.09	0.19 0.60	-0.57 0.09	0.57 0.09	-0.57 0.09	0.57 0.09	0.32 0.37	1.00	
Breyer	-0.09 0.80	-0.19 0.60	-0.09 0.81	0.09 .080	-0.09 .081	0.61 0.06	-0.32 0.37	.050 0.14	1.00
Supreme Court	0.01 0.97	0.12 0.74	0.01 0.97	-0.01 0.97	0.27 0.45	0.49 0.15	0.20 0.57	0.28 0.43	0.56 0.09

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

VII. CONCLUSION

Our principal purpose has been descriptive: we have sought to provide an accurate and complete picture of the Rehnquist Court's statutory preemption decisions. Our *explanation* has been tentative and unsystematic—nine parts intuition and one part lack of rigor, one might say. Some of the intriguing aspects of the Rehnquist Court's preemption performance—notably, the startling changes in the mix of preemption cases from the First to the Second Rehnquist Court[99]—we cannot explain at all. With respect to case outcomes, the intuitive from of "cue" or signaling theory that we have employed does not map easily onto any of the standard models (or any of their sophisticated variations)—attitudinal, strategic, or legal. Under any plausible theory, a judge will have to use cues or signals to screen and organize information. But that tells us nothing about the progeny or tendency of the screening devices. Some may be ruthlessly attitudinal ("I will always vote against a big business party"); others may be legal ("I will follow the Solicitor General unless I have a powerful reason to distrust his averments"); still others may be highly ambiguous ("I will trust states but not private litigants when it comes to federalism arguments").

We hope that our preliminary analysis will prompt more ambitious theoretical efforts, and we ourselves plan to conduct more rigorous analyses. There is a powerful reason, though, to approach preemption cases with theoretical humility. In contrast to the sorts of cases that have been the subject-matter of the vast bulk of the theoretical

---

[99] See supra nn. and accompanying text.

literature, preemption cases are multi-dimensional, both in that they bring judicial attitudes in conflict and in that they involve multiple layers of legal argument, from statutory interpretation to delegation to federalism. Even a ruthlessly "attitudinal" or "strategic judge—one who consistently votes to maximize his political preferences—would confront difficult trade-offs in this environment. Scholars have observed that preemption cases are unlikely to yield clear confirmation for either an "attitudinal" or a "legal" model of judicial behavior.[100]

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

---

[100] Bill Swinford & Eric N. Waltenburg, *The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc*, 28:2 Publius 25 (Spring 1998).

theory just sketched) count as a major victory for the attitudinal model—a conclusive demonstration that "concepts of states' rights and national supremacy are used opportunistically, when convenient, to defend specific rulings, but not as guiding principles for decision-making."[101]

This seemingly robust result, though, is produced by re-designating one set of attitudes (pro- or anti-state, which the canonical *Supreme Court Judicial Database* unequivocally codes as an attitudinal variable)[102] *as a legal principle*, while letting the second, conflicting set (pro- or anti-business) continue to operate as an attitude. This is a slight of hand. Either the federalism variable remains an attitude—in which case the true test for an attitudinal or strategic model is to explain how justices resolve conflicts among those attitudes. Or else, the federalism variable becomes a legal principle. In that case, one has to allow that the legal arguments that support the principle also define its reach. Put less abstractly: one has to allow for the possibility that a federalism principle may not cover statutory preemption cases at all—and that it may explain *why* those cases have nothing to do with federalism.[103]

To be sure, an ostensibly legal distinction may itself be based on attitudinal or strategic considerations—most obviously perhaps, by a desire to shield business from the potential impact of the Rehnquist Court's states' rights enthusiasm. But a slightly broader

---

[101] Baybeck & Lowry, *Federalism Outcomes*, supra n. at 96. The authors claim that statutory preemption cases provide a unique test for the attitudinal model because "constitutional issues (as opposed to regulation) are more complex, and any model would have to factor in issues related to constitutional law." Id. at 84. Believing that statutory preemption cases involve no such inconvenient distractions, the authors construct a model with two binary variables (states' rights' versus nationalist; liberal versus conservative) and confidently reach the conclusion quoted in the text. *Id*. at 96

[102] Supra n. .

[103] For a few suggestions to that effect see Michael S. Greve, Federalism's Frontier, supra n. at 116-17. Cf. also supra n. and cases cited id.

view—beyond "pure" federalism cases and preemption—suggests that this inference, too, is at best premature. Justice Stevens is the most aggressive advocate of a "dormant" Commerce Clause, which would—despite complete congressional silence—bar state regulation to the detriment of sister-states. Justice Scalia, for his part, has denounced that form of implied (constitutional) preemption as an extra-constitutional invention and as something akin to free-market sloganeering.[104] Yet when it comes to "implied" federal preemption—that is, cases where Congress has mumbled, as distinct from remaining entirely silent—Justice Stevens emerges as a defender of state prerogatives, and Justice Scalia often takes the opposite tack. One could argue that both justices are being incoherent—that one cannot have a robust implied preemption doctrine without a dormant Commerce Clause, or (conversely) that a dormant Commerce Clause well-nigh compels a recognition of implied preemption. Quite obviously, though, the perceived discontinuity on either side cannot be attributed to pro- or anti-business attitudes.

Beyond our general call for theoretical caution in this area, we hazard one last guess: perhaps, the messy stability of preemption law has to do with the fact that that body of law *lacks* any systematic connection to federalism values. True, the justices' analysis often purports to be guided by generalized federalism presumptions—prominently, a presumption against implying federal preemption in areas of "traditional

---

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

state authority."[105] However, nothing in the existing doctrinal framework bears a connection to a traditional, constitutional federalism that would let the states govern their own internal affairs (for example, on labor relations), while entrusting the federal government will the all-important task of preventing interstate discrimination and aggression (for example, in the form of regulatory and tax exports). A serious reflection on the constitutional equilibrium might bring more coherence to preemption law, and it might reduce the perceived discontinuities between federalism and preemption law. It would ultimately have to rest, however, on constitutional intuitions that the Rehnquist Court has largely failed to articulate—at least with any kind of clarity—even in constitutional cases. Having failed to do so, the Court has nothing to fall back on in preemption cases but manipulable presumptions and contestable interpretations of statutory language and congressional intent—and signals.

---

[105] The origin of this oft-quoted presumption is *Rice v. Santa Fe Elevator*, 331 U.S. 218, 229 (1947) ("the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

Appendix A

Preemption Case Search and Selection Criteria

In an effort to survey the entire universe of preemption cases (rather than a sample), we conducted a LEXIS basic keyword search for all Supreme Court cases from 1986 to the present with the words "preemption," "preempt," or "preempted." Conducted in October 2003, that search generated 129 cases, 116 of which were decided during William Rehnquist's tenure as Chief Justice. Predictably, that broad search proved over-inclusive; a review of the opinions identified 81 genuine statutory preemption cases.

We identified an additional 24 cases through less systematic means, such as reviews of the pertinent legal literature. We also cross-checked our case set against earlier studies of the topic[106] and against the *United States Supreme Court Judicial Database*.[107] Finally, three preemption cases were decided during the 2003-2004, after our LEXIS search. We coded and added these cases in July 2004.

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

- Cases in which Section 1983 serves to enforce constitutional rights. While Section 1983 is of course a "statute," the inclusion of cases where that

---

106 O'Brien, *The Rehnquist Court and Federal Preemption*, *supra* n.xx; and ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM, *supra* n.xx at 107–09 (1999).

107 The *United States Supreme Court Judicial Database*, issue codes 910 and 91, yields 76 preemption cases for the 1986–2002 Terms, eight of which are not true preemption cases. In addition to the remaining 62 matches with our cases, we identified another 34 statutory preemption cases during the period.

provision is used to enforce substantive constitutional rights would have swept up an enormous number of cases that are fundamentally "about" those rights, rather than the nature and scope of statutory preemption.[108]

- Cases involving the imposition of *affirmative obligations* on states, typically under a federal statute conferring private rights of action. [109]

- Cases involving federal *common law* preemption,[110] such as constitutional canons of construction governing Indian affairs[111] and, most important, the dormant Commerce Clause. However, we included the handful of cases involving preemption under U.S. treaties or executive agreements with foreign nations.[112]

- Cases involving the (state or federal) judiciary's authority to enforce arguably preemptive federal rules. Cases concerning federal abstention or the concurrent authority of state courts to enforce federal law fall into this category.[113]

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

---

[108] Our cases include one decision about the preemptive scope of Section 1983 itself: *Felder v. Casey*, 487 U.S. 131 (1988).

[109] For example, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) is sometimes read as a preemption case and included in preemption case samples (*e.g.*, O'Brien, *The Rehnquist Court and Federal Preemption* at 24–25). By our criteria, *Gregory* is *not* a preemption case.

[110] *E.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994); Boyle v. United Technologies, 487 U.S. 500 (1988).

[111] *E.g.*, California v. Cabazon, 480 U.S. 202 (1987) (counted in other samples as a preemption case).

[112] *E.g.*, American Airlines v. Wolens, 513 U.S. 219 (1995) (Warsaw Convention); American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) (executive agreements or "policies").

[113] The *Judicial Database* includes some such cases under "preemption." *E.g.*, Tafflin v. Levitt, 493 U.S. 455 (1990) (concurrent state court jurisdiction over RICO actions); Yellow Freight v. Donnelly, 494 U.S. 820 (1989) (concurrent state court jurisdiction in Title VII actions).

statute but *is* preempted under the dormant Commerce Clause would be coded as a decision or vote *against* preemption.

Appendix B
Preemption in the Rehnquist Court

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

1989 Adams Fruit Company, Inc. v. Barrett, 494 U.S. 638 (1990)
1989 United Steelworkers of America v. Rawson, 495 U.S. 362 (1990)
1989 North Dakota v. U.S., 495 U.S. 423 (1990)
1989 California v. F.E.R.C., 495 U.S. 490 (1990)
1989 English v. General Elec. Co., 496 U.S. 72 (1990)

1990 FMC Corp. v. Holliday, 498 U.S. 52 (1990)
1990 Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)
1990 Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991)

1991 Barker v. Kansas, 503 U.S. 594 (1992)
1991 Morales v. Trans World Airlines, 504 U.S. 374 (1992)
1991 Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992)
1991 Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)

1992 District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992)
1992 Itel Containers Intern. Corp. v. Huddleston, 507 U.S. 60 (1993)
1992 Building and Con. Traders v. Builders and Contractors of Mass 507 U.S. 218 (1993)
1992 CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)
1992 U.S. Department of Treasury v. Fabe, 508 U.S. 491 (1993)

1993 John Hancock Mut. Life Ins. V. Harris Trust & Sav. Bank, 510 U.S. 86 (1993)
1993 Department of Revenue of Oregon v. ACI Industries, Inc., 510 U.S. 332 (1994)
1993 Northwest Airlines v. County of Kent 510 U.S. 355 (1994)
1993 American Dredging Co. v. Miller, 510 U.S. 443 (1994)
1993 PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994)
1993 Dpt of Taxation and Finance of NY v. Millhelm Attea & Bros., Inc., 512 U.S. 61 (1994)
1993 Livadas v. Bradshaw, 512 U.S. 107 (1994)
1993 Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)

Late Rehnquist Court:

1994 Nebraska Dept. of Revenue v. Loewenstein, 513 U.S. 123 (1994)
1994 American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)
1994 Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995)
1994 Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995)
1994 Anderson v. Edwards, 514 U.S. 143 (1995)
1994 Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)
1994 New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)

1995 Dalton v. Little Rock Family Planning Services, 516 U.S. 474 (1996)
1995 Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996)
1995 Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996)
1995 Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996)
1995 Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)

1996 Atherton v. F.D.I.C., 519 U.S. 213 (1996)
1996 Ca Div. of Labor Standards Enft v. Dillingham Const., N.A., Inc., 519 U.S. 316 (1997)
1996 De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997)
1996 Boggs v. Boggs, 520 U.S. 833 (1997)

1997 Foster v. Love, 522 U.S. 67 (1997)
1997 ATT v. Central Office Telephone, Inc., 524 U.S. 214 (1998)

1998 El Al Israel Airlines, Ltd. V. Tsui Yuan Tseng, 525 U.S. 155 (1999)
1998 Humana Inc. v. Forsyth, 525 U.S. 299 (1999)
1998 AZ Department of Revenue v. Blaze Construction Company, 526 U.S. 32 (1999)
1998 UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358 (1999)

1999 U.S. v. Locke, 529 U.S. 89 (2000)
1999 Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344 (2000)
1999 Geier v. American Honda Motor Co. Inc., 529 U.S. 861 (2000)
1999 Pegram v. Herdrich, 530 U.S. 211 (2000)
1999 Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)

2000 Dir. of Revenue v. CoBank ACB, 531 U.S. 316 (2001)
2000 Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341 (2001)
2000 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)
2000 Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001)
2000 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)

2001 Wisconsin Dept. of Health and Family Services v. Blumer, 534 U.S. 473 (2002)
2001 New York v. F.E.R.C., 535 U.S. 1 (2002)
2001 Rush v. Moran, 536 U.S. 355 (2002)
2001 City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002)

2002 Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)
2002 Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)
2002 Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)
2002 Entergy La., Inc. v. La. PSC, 539 U.S. 39 (2003)
2002 Ben. Nat'l Bank v. Anderson, 539 U.S. 1 (2003)
2002 American Ins. Assn. v. Garamendi 123 S.Ct 2374 (2003)

2002 Green Tree Fin. Corp. v. Bazzle 123 S. Ct 2402 (2003)
2002 Hillside Dairy, Inc. v. Lyons 539 U.S. 59 (2003)

2003 Aetna Health Inc. v. Davila 124 S. Ct 2488
2003 Engine Manufacturers Ass'n v. So. Coast Air Quality Mgmt Dist. 124 S. Ct. 1756
2003 Nixon v. Missouri Municipal League 124 S. Ct 1555