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The Partisan Dimensions of Federal Preemption in the United States Courts of Appeals

Bradley W. Joondeph, Santa Clara University School of Law

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Bradley W. Joondeph∗

Introduction

Judicial decisions resolving disputes over the federal preemption of state law raise some interesting questions about the significance of partisan affiliations in the federal courts. First, many people do not consider preemption a particularly ideological issue, at least in comparison to many others addressed by the federal judiciary.1 Thus, it is not obvious that the voting patterns of federal judges appointed by Republican and Democratic presidents should differ measurably in this domain.2 Second, even if preemption questions do, in fact, strike some ideological chords, there are crosscurrents within the Republican and Democratic parties that render the directionality of that impact uncertain. Republicans might gravitate towards the preemption of state law—and Democrats might shy away from it—because its immediate consequence is typically to reduce the level of regulation imposed

∗ Professor of Law, Santa Clara University. I am grateful to David Ball, David Friedman, Kyle Graham, Deep Gulasekaram, Susie Morse, Michelle Oberman, Terri Peretti, David Sloss, Bill Sundstrom, Jerry Uelmen, Steve Wasby, David Yosifon, and Corey Yung for their helpful comments at various stages of this project, as well as all the participants in faculty workshops at the University of California-Davis School of Law and Santa Clara University School of Law. This study would not have been possible without the long hours of outstanding research assistance provided by Brian Diaz, Meredith Edwards, Mahmoud Fadli, Leslie Huang, Eric Lightman, Felicia O’Connor, and, most especially, Jennifer McAllister and Lara Muller. An earlier version of this article was presented at the annual meeting of the Midwest Political Science Association, April 24, 2010, in Chicago.

1 For example, a widely publicized recent study of the influence of political ideology on federal court of appeals judges’ voting patterns examined 24 distinct categories of cases. See Cass R. Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary 17–18 (2006). The authors, however, did not examine cases involving federal preemption, at least as a distinct category. See id.

2 The Sunstein et al. study, for instance, found no statistically significant difference in the voting patterns of Republican and Democrat courts of appeals judges in five categories of cases that would seem more politically salient than federal preemption: criminal appeals, the Commerce Clause, the Takings Clause, challenges to punitive damage awards, and standing. See id. at 48–54.
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on private businesses (and to negate state-law remedies available to those alleging injuries caused by those businesses). At the same time, many Republicans might oppose preemption—and many Democrats might favor it—for broader, structural reasons: The federal preemption of state law tends to reduce the policy autonomy of state governments, centralize power in the national government, and impose a greater level of national uniformity (and perhaps, depending on your view, rationality) in legal standards. In short, the partisan valence of federal preemption, if such a valence exists at all, is not readily apparent.³

This paper explores some of these empirical uncertainties surrounding the political dimensions of preemption in the federal courts. More concretely, it presents a statistical study of the preemption decisions of the United States Courts of Appeals over the past five years. I chose the circuit courts (rather than the Supreme Court of the United States) for two principal reasons. First, the Courts of Appeals collectively decide thousands of cases each year, permitting the compilation of a much larger data set, which in turn facilitates more robust statistical conclusions. Second, the cases decided by the Supreme Court are, as a group, much more controversial and politically charged than those in the federal system as a whole.⁴ Thus, drawing general inferences about judicial behavior from the voting patterns of Supreme Court justices can be highly problematic.

To conduct my study, then, I created a unique data set that includes every preemption decision rendered by the United States Courts of Appeals from January 1, 2005, to December 31, 2009, a total of 560 decisions and just over 1,700 judicial votes. And these data tell a story consisting of two distinct parts. The first part is that preemption disputes seem to produce a large measure of judicial consensus. In the full universe of cases, there is only a slight difference between Republican and Democratic appointees: Republican judges voted for outcomes favoring the preemption of state law at a rate exceeding Democratic

³ Cf. Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 DUKE L.J. 75, 133–62 (2001) (discussing the historical reasons that federalism, as a constitutional principle, should have no particular political valence).
⁴ See Barry Friedman, Taking Law Seriously, 4 PERSPECTIVES ON POLITICS 261, 265 (2006).
judges by a margin of roughly 2.6 percent overall, and roughly 5 percent in published decisions.\(^5\) While these differences may not be trivial, they are not statistically significant.\(^6\) Moreover, this overall similarity was not the product of Republicans and Democrats disagreeing in different clusters of cases, such that their aggregate voting records masked fairly frequent clashes. Rather, more than 94 percent of the circuit courts’ published preemption decisions (and more than 95 percent of all preemption decisions) were unanimous, a rate that exceeds our best estimates of the mean for Court of Appeals decisions as a whole.\(^7\) Preemption therefore differs from many other legal issues (such as abortion, the death penalty, environmental regulation, gender discrimination, and disability discrimination, to name a few) where recent investigations have found significant partisan disparities in the voting records of federal circuit judges.

The second part of the story is that, despite this general consensus, there remains an important difference between Republican and Democratic appointees. Specifically, in the most contested preemption cases—those in which at least one Republican and one Democrat served on the panel, and at least one judge dissented—Republican appointees were more than three times as likely as Democratic appointees to vote in favor of preemption (roughly 73 percent versus 21 percent).

Thus, the complete picture of preemption decisions in the Courts of Appeals is intriguing, if somewhat unsurprising. As a general matter, preemption cases do not provoke

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\(^5\) For the sake of simplicity, I refer to judges appointed by Republican presidents as “Republican judges” or “Republicans,” and judges appointed by Democratic presidents as “Democratic judges” or “Democrats.” Of course, some judges are cross-party appointments, though this has become increasingly uncommon for federal circuit court judgements.

\(^6\) To determine statistical significance, I used a two-tailed, difference of proportions z-test. The finding that the difference in voting records between Republicans and Democrats was not statistically significant (at a 95 percent level of confidence) means that there is a greater than 5 percent chance that we would obtain the observed difference between Republicans and Democrats even if the null hypothesis—that there is no difference between Republican and Democratic judges on the issue of preemption—is true. This does not mean, however, that there is a greater than 5 percent chance that the null hypothesis is true.

\(^7\) Though there does not appear to be a hard figure, most observers believe the rate of unanimity in Court of Appeals cases in published decisions is roughly 90%. See Brian Z. Tamanaha, *Devising Rule of Law Baselines: The Next Step in Quantitative Studies of Judging*, available at http://ssrn.com/abstract=1547981.
much fissure among federal circuit judges; the vast majority of cases are decided unanimously, such that a judge's party affiliation lacks much value in predicting how she will vote in the randomly selected case. But in particular circumstances—especially the small subset of preemption cases where judges disagree on the result—party affiliation appears to be highly predictive of how that disagreement will play out. In these marginal cases—where the accepted sources of legal authority fail to control the outcome, and the norms of consensus and collegiality among circuit judges are insufficient to restrain dissent—the pattern is unmistakable: Republicans are far more likely than Democrats to favor the federal preemption of state law.

I. Federal preemption

The second clause of Article VI of the Constitution, better known as the Supremacy Clause, reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\(^8\)

The Supreme Court has long understood this language as dictating that, when federal law and a state law conflict, the state law—whether in the form of a state constitutional provision, statute, administrative regulation, or common law rule of liability—is inoperable.\(^9\)

For instance, in the famous 1824 decision of *Gibbons v. Ogden*,\(^10\) the Court held that the

\(^8\) U.S. CONST. art. VI.
\(^10\) 22 U.S. (9 Wheat.) 1 (1824).
Federal Navigation Act of 1793 preempted a series of New York statutes that had granted two businessmen, Robert Livingston and Robert Fulton, a thirty-year monopoly on the operation of all steamboats in New York waters.\textsuperscript{11} As Chief Justice Marshall reasoned, in cases where “acts of the State Legislatures, . . . though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States,” the “act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”\textsuperscript{12}

These basic understandings of the Supremacy Clause and the doctrine of preemption still govern today, though modern Supreme Court decisions have tended to sort preemption cases into a handful of different categories. One such category is \textit{express} preemption, instances in which Congress has demarcated the breadth of a federal statute’s preemptive reach through an explicit statutory provision.\textsuperscript{13} In these cases, the question turns on whether the statute’s preemption clause covers the state statute, regulation, or common law rule of liability at issue. More commonly, appellate litigation involves questions of \textit{implied} preemption, instances in which Congress’s intent to displace state law might logically be inferred from the terms of the federal statute. The Supreme Court has identified three general bases for drawing such an inference: (1) \textit{impossibility} preemption, when it is physically impossible for the regulated party to comply simultaneously with state and federal law\textsuperscript{14}; (2) \textit{field} preemption, when Congress has regulated a field so extensively that it has left

\begin{footnotesize}
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\item See Lucas A. Powe, Jr., \textit{The Supreme Court and the American Elite, 1789–2008} 75–76 (2009).
\item Gibbons, 22 U.S. (9 Wheat.) at 211.
\item See, e.g., Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 (2000) (“We will find preemption where it is impossible for a private party to comply with both state and federal
\end{enumerate}
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no room for state-law supplementation; and (3) frustration of purpose (or obstacle) preemption, when the state law at issue frustrates the purposes of (or stands as an obstacle to the objectives of) the relevant federal regulatory scheme, taken as a whole.

While these categories may be helpful in distinguishing the various means by which Congress can signal the scope of its preemptive intent, they ultimately carry no independent legal significance. As the Supreme Court has explained on several occasions, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” More precisely, the question is always whether Congress intended its regulatory scheme to displace the sort of state law at issue, regardless of whether Congress indicated that intent in express or implied terms.

Given the inherently statute-specific nature of any preemption controversy, particular preemption decisions tend to be narrow in their scope and limited in their ramifications. As a result, unless the federal or state law at issue is particularly important or happens to touch on a politically controversial topic, preemption cases receive relatively scant public attention. Of course, there are important exceptions. Some recent preemption

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15 See, e.g., Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (“Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field.”); Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (“We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively.”); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1941) (citing Hines v. Davidowitz, 312 U.S. 52 (1941)) (“the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”).

16 See, e.g., Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

disputes have concerned the states’ leeway to regulate in the field of immigration and
naturalization; to use their investment and procurement practices to express their moral
objections to the human rights records of foreign regimes; to regulate automobile emissions
in an effort to reduce greenhouse gases; and to regulate the labeling and marketing of
tobacco products, especially to minors.

But such cases are not the norm. More common are cases like *Sprietsma v. Mercury
Marine*, where the Supreme Court decided that the Federal Boat Safety Act of 1971 (and
the actions of the Coast Guard in administering the Act) did not preempt a state common-
law tort action claiming that a particular power boat motor was unreasonably dangerous for
lacking a propeller guard. Or *Norfolk Southern Ry. Co. v. Shanklin*, in which the Court
held that the Federal Railroad Safety Act of 1970, in conjunction with a Federal Highway
Administration regulation promulgated under the Act, preempted a state tort action alleging
that the railroad failed to maintain adequate warning devices at a particular grade crossing

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18 *See, e.g.*, Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008), *cert. granted sub nom.*, Chamber of Commerce v. Candelaria, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115) (holding that the Legal Arizona Workers Act, which forbids employers from hiring undocumented workers as a condition of retaining their business licenses and which requires employers to use the E-Verify system for validating the immigration status of their employees, is not preempted by federal law); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (holding that the federal Immigration Reform and Control Act preempted a city ordinance that prohibited employing, “harboring,” or renting housing to undocumented aliens); Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009); James C. McKinley, Jr., *U.S. Lays Out Case Against Arizona Law*, N.Y. TIMES, July 22, 2010 (describing the Justice Department’s arguments before a district court, in seeking a preliminary injunction, that Arizona’s SB1070 is preempted by federal statutes governing immigration and naturalization).


20 *See* Miguel Bustillo, *Stakes High as State Targets Greenhouse Gas from Cars*, L.A. TIMES, Sept. 23, 2004, at A1 (describing a California law that imposes such regulations, and the car industry’s plan to enjoin enforcement on the ground that the law is preempted by federal fuel economy standards).


23 Id. at 62–70.

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in rural Tennessee. In other words, the garden variety preemption decision is rather mundane.

The overall trajectory of preemption decisions is a different matter. As many scholars have noted, federal preemption as a general issue is quite important to the balance of federal and state power in our constitutional system. The fields regulated by the federal government have grown dramatically over the last century, such that federal law now reaches into most corners of national life. From crime to environmental protection to corporate governance, federal law regulates private conduct that generally was subject only to state control for the Nation’s first 150 years. Granted, some of the Supreme Court’s recent decisions have narrowed the breadth of Congress’s legislative powers. But they have done so only at the outermost edges. Congress can still regulate any activity that is economic or commercial in nature, as well as a good deal of activity that is not.

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25 Id. at 347.
26 See, e.g., Erwin Chemerinsky, Empowering the States When It Matters, 69 BROOK. L. REV. 1313, 1326 (2004) (“Preempting state laws limits the ability of states to make choices that are responsive to their residents’ desires, to experiment, and to advance liberty and freedom within their boundaries. Simply put, a broad vision of inferred preemption invalidates beneficial state laws.”); Brian Galle, Is Local Consumer Protection Law a Better Redistributive Mechanism Than the Tax System?, 65 N.Y.U. ANN. SURV. AM. L. 525, 525 (2010) (“Preemption decisions are, at their core, a choice about which tier of government should have policy-making authority”); Gillian Metzger, Administrative Law as the New Federalism, 57 DUKE L.J. 2023, 2025–26 (2008) (“Administrative preemption threatens to impose significant burdens on the ability of states to exercise independent regulatory authority, a core concern of federalism.”); Ernest Young, The Rehnquist Court’s Two Federalisms, 83 TEX. L. REV 1, 31 (2004) (“Preemption cases are the quintessential autonomy cases. They concern whether the states can regulate third parties within their own jurisdiction, pursuant to their own view of the public interest, or whether that authority will be displaced by federal control.”).
28 As the Court clarified in Gonzales v. Raich, 545 U.S. 1 (2005), noneconomic, noncommercial, purely intrastate activities are still subject to federal regulation if Congress rationally “concludes that failure to regulate that class of activity would undercut” a larger, comprehensive scheme that, taken as a whole, plainly regulates interstate commerce. Id. at 18. Moreover, Congress can cure any constitutionally deficient statute by adding a “jurisdictional element”—language that ensures, on a case-by-case basis, that the regulated activity has a sufficient connection to interstate commerce. See Morrison, 529 U.S. at 613;
Thus, the vast majority of human activity in the United States is regulable by both the federal government and the states. This means that the willingness of courts to conclude that federal law displaces state law on the same subject is quite important to the breadth and depth of the states’ residuary powers, and hence to the constitutional values that federalism is supposed to promote. As Justice Breyer has observed,

in today’s world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress’ commerce power at the edges, or to protect a State’s treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.29

While the values of federalism lurk in every preemption case—at least at the level of structural principle—the more immediate, substantive consequences often involve the stringency of government regulation imposed on private businesses. To be sure, preemption cases encompass a wide variety of topics, many of which have little or nothing to do with economic regulation.30 But the prototypical preemption dispute presents the judge with a choice between holding (a) that a given aspect of a business’s activities is regulated exclusively by federal law, or (b) that the activity is regulated by both federal and state law.

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Lopez, 514 U.S. at 561. In fact, this is precisely what happened in the wake of the Court’s decision in Lopez. A year later, Congress amended the Gun-Free School Zones Act to add eleven words to 18 U.S.C. §922(q)(2)(A), defining the relevant offense as the knowing possession of “a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Pub. L. 104–208, 110 Stat. 3009, §657 (Sept. 30, 1996), codified at 18 U.S.C. §922(q)(2)(A) (emphasis added).


30 See, e.g., Wisconsin Dept. of Health & Fam. Servs. v. Blumer, 534 U.S. 473 (2002) (addressing whether the “spousal impoverishment” provisions of the Medicare Catastrophic Coverage Act preempted a state’s “income-first” approach to determining Medicaid eligibility, which required that potential income transfers from the institutionalized spouse be considered part of the “community spouse’s income” for purposes of determining whether a higher community spouse resource allowance was necessary); California Pharmacists Ass’n v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010) (addressing whether a provision of the federal Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), preempts a state law reducing Medicaid reimbursement rates for health care providers).
In other words, the question is usually how much regulation will govern a particular aspect of private enterprise. Can a state impose common-law tort liability on a pharmaceutical manufacturer for distributing a drug whose label has been approved by the Food and Drug Administration, or is the FDA's regulation of the drug's marketing exclusive?\(^{31}\) Can a state hold a tobacco manufacturer liable for fraudulent misrepresentation in connection with the sale of “light cigarettes,” or is the Federal Cigarette Labeling Act the only regulation with which it must comply?\(^{32}\) Can a state court declare unconscionable all contracts that forbid class-wide arbitration, or is such a state common-law rule incompatible with the Federal Arbitration Act?\(^{33}\) In substantive, practical terms, preemption cases typically require judges to choose between results producing more or less regulation of commercial activity.

It is these immediate practical consequences that render the partisan valence of federal preemption uncertain. On the one hand, political conservatives (and thus members of the Republican Party), as a matter of constitutional structure, tend to prefer a smaller federal government and greater policy autonomy for the states.\(^{34}\) By contrast, Democrats have often opposed these ideas (at least as a matter of judicial enforcement\(^{35}\) and been more comfortable affording Congress a wide berth in the exercise of its legislative powers. Thus, it is conceivable that Democrats would be more likely than Republicans to favor the federal preemption of state law. Indeed, along the dimension of state autonomy, this would match the behavior of Supreme Court in its recent spate of federalism decisions concerning the limits on Congress’s enumerated powers—cases involving the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment. Here, the Court’s more conservative justices have consistently favored outcomes enhancing the


\(^{33}\) See Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), cert. granted, 2010 WL 303962 (May 24, 2010).

\(^{34}\) This has been reflected in Republican Party platforms over the past 30 years. See Bradley W. Joondeph, Federalism, the Rehnquist Court, and the Modern Republican Party, 87 Ore. L. Rev. 117, 158–60 (2008); J. Mitchell Pickerill & Cornell W. Clayton, The Rehnquist Court and the Political Dynamics of Federalism, 2 Persp. On Pol. 233, 238 (2004).

\(^{35}\) See Pickerill & Clayton, supra note 34, at 238.
sovereignty or policy autonomy of the states, while the more liberal justices have embraced a broader vision of national power.\textsuperscript{36}

On the other hand, decisions favoring federal preemption tend to reduce the stringency of government regulation imposed on private businesses. And a centerpiece of modern Republican philosophy has been a faith in free markets—a conviction that private ordering tends to better serve social welfare than government regulation.\textsuperscript{37} Preemption usually constrains the capacity of state or local governments to regulate particular business activities more rigorously than the federal government, and it often eliminates a means of redress under state tort law for persons alleging injuries from those activities. It is no secret that the Democratic Party has generally favored the preservation of such state-level regulation, particularly in the form of tort actions initiated by plaintiffs’ attorneys.\textsuperscript{38} Thus, it is likewise conceivable that Republican appointees would vote in favor of preemption more frequently than Democratic appointees.

Hence, the partisan dimensions of preemption controversies in the federal courts are not facially obvious. Ideological currents pull in both directions. And this uncertainty raises some interesting empirical questions. Specifically, is there a meaningful difference in the voting records of Republican and Democratic appellate judges in cases asking whether federal law preempts state law? And if so, what is the nature and size of that difference?

\textsuperscript{36} See id. at 138–47.
\textsuperscript{37} See id.
\textsuperscript{38} For example, Democrats in Congress have consistently resisted federal legislative efforts to cap damage awards in various types of tort actions, such as medical malpractice. See, e.g., Sheryl Gay Stolberg, \textit{Senate Democrats Block Caps for Malpractice}, N.Y. TIMES, Feb 25, 2004; Sheryl Gay Stolberg, \textit{Class-Action Legislation Fails in Senate}, N.Y. TIMES, Oct 23, 2003.
II. Federal Preemption in the United States Court of Appeals

A. Politics, judicial decision making, and the Courts of Appeals

At least in the field of political science, scholars have long recognized a measurable association between appellate judges’ political affiliations and their decision making. The principal reason is that the resolution of many legal questions requires the exercise of discretion. The authoritative sources of law—the relevant text, history, tradition, precedent, and the like—are often too indeterminate to dictate singularly correct answers. This indeterminacy leaves judges with considerable freedom to wander, unencumbered by authoritative instructions. And in exercising this discretion, judges—like all human beings—are inevitably influenced by their own predispositions, their deeply ingrained beliefs and values, no matter their subjective intentions. In the process, a judge’s own policy preferences affect her behavior, even when she sincerely believes she is merely acting as “a servant of the law.”

To be sure, it remains an open question as to exactly how much of the variance in judicial behavior is explained by a judge’s personal ideology—that is, we are still trying to pin down what proportion of judicial decision making is “law,” what proportion is “politics,” and what proportion is attributable to still other factors. Moreover, investigators are not always precise in how they define “politics” in this context. A “political” influence on judging might refer to the personal, political ideology of the judge; or the policy priorities of the political coalition that placed the judge in office; or external, political pressures brought to bear on a judge after she has taken office; or a variety of other mechanisms by which the American political system, writ large, shapes the agenda and decision making of the

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judiciary.\textsuperscript{41} No doubt, the interactions between law and politics are varied and complex. But these complications do not obscure a basic truth: The empirical evidence of a connection between judges' political affiliations and their voting records on the bench is simply overwhelming. As a prominent political scientist recently explained, “an extensive body of research confirms that a judge's personal political attitudes strongly influence his or her decisions.”\textsuperscript{42}

Much of the research documenting this association has focused on the Supreme Court, precisely the place we would expect to see it most readily. Because the Court's merits docket is almost completely discretionary, the justices generally grant review only of those cases presenting questions on which lower courts have disagreed. As a result, the issues invariably are quite difficult, with persuasive legal arguments on both sides. And this means that the justices enjoy a great deal of discretion—much more discretion in deciding legal questions than any other judges in the American legal system. The Court's power to control its merits docket also means that it generally decides cases that are, comparatively speaking, controversial and politically salient. Thus, the subject matter of the issues that the Court takes on makes it more likely that the justices' ideological leanings will come to the fore and influence their decision making.

By contrast, United States Court of Appeals judges face more institutional constraints, and their typical decision lacks much political significance. Federal circuit courts are required to review every appeal taken from a final judgment issued by a United States District Court. And in deciding these cases, they are hemmed in by a thicker web of

\textsuperscript{41} See id. at 348–70.
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precedent, consisting not just Supreme Court decisions (which are more binding on the Courts of Appeals than on the Court itself) but also the circuit court’s own decisions and, to a large degree, the decisions of its sister circuits. In the mine run of cases, these constraints make the behavior of circuit court judges, comparatively speaking, less susceptible to the influence of their ideological preferences.

But this is not to say that Court of Appeals judges lack discretion on questions of law, or that their decisions are unaffected by their political commitments. Scores of studies have established a significant correlation between the political affiliations of circuit court judges and their voting behavior. Consider the following:

* Thirty-five years ago, Sheldon Goldman established that the party of the appointing president explained a substantial portion of the variance in circuit judges’ voting records on several issues, including criminal procedure, civil liberties, and labor. 43

* In an important 1998 study, Tracey George found, among other things, that “the majority of circuit judges participating in en banc cases vote their sincere policy preferences, or ideology, without constraint from their colleagues or the Supreme Court.” 44

* A widely discussed book by Cass Sunstein and three co-authors, published in 2006, found statistically significant differences in the voting records of Republican and Democratic circuit judges in eighteen discrete categories of cases, ranging from state immunity from damages actions under the Eleventh Amendment to actions by the Environmental Protection Agency to restrictions on campaign financing. 45

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45 SUNSTEIN ET AL., supra note 1, at 17–57. The full list of issue areas in which the investigators found statistically significant differences between republicans and Democrats is as follows: gay and lesbian rights, affirmative action, those implicating the National Environmental Policy Act, capital punishment, state immunity under the Eleventh Amendment, those challenging the decisions of the National Labor Relations Board, sex discrimination, disability discrimination, abortion, campaign finance, piercing the corporate veil, those involving the Environmental Protection Agency, obscenity, Title VII of the Civil Rights Act, affirmative action, those implicating the National Environmental Policy Act, capital punishment, state immunity under the Eleventh Amendment, those challenging the decisions of the National Labor Relations Board, sex discrimination, disability discrimination, abortion, campaign finance, piercing the corporate veil, and those involving the Environmental Protection Agency, obscenity.
* Frank Cross’s 2007 book, *Decision Making in the U.S. Court of Appeals*, presented a thorough examination of several potential influences on circuit court decisions and concluded that, using a variety of approaches to test the question, “[t]he results are fairly consistent in showing some effect of ideology that is typically a statistically significant association.”

This list only scratches the surface. Scores of other studies have established similar patterns across a wide variety of legal subjects.

To my knowledge, though, no scholar has yet examined whether this association extends to cases involving the federal preemption of state law—and if so, in which direction the connection runs. The omission is unfortunate, given (1) the significance of preemption cases as a proportion of the Courts of Appeals’ dockets, and (2) the importance of these decisions (at least in aggregate) to the federal-state balance in our constitutional system. This study endeavors to fill this gap, at least in part.

**B. Study design**

The central purpose of the study was to assess whether there is a significant difference in the voting records of Republican and Democratic appointees to the United

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47 S e e, e.g., F r a n k  B. C r o s s & E m e r s o n  H. T i l l e r, J u d i c i a l  P a r t i s a n s h i p  a n d  O b e d i e n c e  t o  L e g a l  D o c t r i n e: W h i s t l e b l o w i n g  o n  t h e  F e d e r a l  C o u r t s  o f  A p p e a l s, 107  Y A L E.  L.J.  2155 (1998); D o n a l d  R. S o n g e r & M a r t h a  H u m p h r i e s  G i n n, A s s e s s i n g  t h e  I m p a c t  o f  P r e s i d e n t i a l  a n d  H o m e  S t a t e  I n f l u e n c e s  o n  J u d i c i a l  D e c i s i o n m a k i n g  i n  t h e  U n i t e d  S t a t e s  C o u r t s  o f  A p p e a l s, 5 5  P O L.  R E S.  Q.  299 (2002); R i c h a r d  L. R e v e s z, E n v i r o n m e n t a l  R e g u l a t i o n,  I d e o l o g y,  a n d  t h e  D.C.  C i r c u i t, 8 3  V A.  L.  R E V.  1717 (1997); D a n i e l  R.  P i n e l l o, L i n k i n g  P a r t y  t o  J u d i c i a l  I d e o l o g y  i n  A m e r i c a n  C o u r t s: A  M e t a- a n a l y s i s, 2 0  J U S T.  S Y S.  J.  219 (1999); R o b e r t  A.  C a r p  e t  a l., T h e  V o t i n g  B e h a v i o r  o f  J u d g e s  A p p o i n t e d  b y  P r e s i d e n t  B u s h, 7 6  J U D I C A T U R E  298 (1993); J o n  G o t t s c h a l l, R e g a n ’ s  A p p o i n t m e n t s  t o  t h e  U.S.  C o u r t s  o f  A p p e a l s: T h e  C o n t i n u a t i o n  o f  a  J u d i c i a l  R e v o l u t i o n, 7 0  J U D I C A T U R E  48 (1986); J e f f r e y  S e g a l  e t  a l., D e c i s i o n - m a k i n g  o n  t h e  U.S.  C o u r t s  o f  A p p e a l s, i n  C o n t e m p l a t i n g  C o u r t s (L.  E p s t e i n  e t  a l.  e d s.  1 9 9 5); C.E. S m i t h, P o l a r i z a t i o n  a n d  C h a n g e  i n  t h e  F e d e r a l  C o u r t s: E n B a n c  D e c i s i o n s  i n  t h e  U.S.  C o u r t s  o f  A p p e a l s, 7 4  J U D I C A T U R E  133 (1990); R. S t i d h a m  e t  a l., T h e  V o t i n g  B e h a v i o r  o f  P r e s i d e n t  C l i n t o n ’ s  J u d i c i a l  A p p o i n t m e n t s, 8 0  J U D I C A T U R E  16 (1996).
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States Courts of Appeals in preemption cases. To pursue this objective, I (with the help of several research assistants) created a unique data set consisting of every preemption decision rendered by one of the thirteen federal circuit courts from January 1, 2005, to December 31, 2009. Each decision was coded for, inter alia, six dependent variables: (1) the court deciding the case, (2) the participating judges, (3) the president who appointed each of the judges, (4) whether the decision was unanimous, (5) the partisan composition of the panel, and (6) whether the decision was published. The independent variable was the direction of each judge’s vote: whether it supported or rejected the outcome resulting in the federal preemption of state law.

The data set is unique in two respects. First, it has culled the decisions based on whether the preemption of state law by a federal statute or regulation was at issue. Other

48 For purposes of the study, I defined a “preemption case” as any decision on the merits in which the circuit court resolved whether a federal statute, or a regulation promulgated by a federal agency pursuant to such a statute, precluded the application of a state statute, state regulation, state common law rule of liability, or state constitutional provision. This is not the only possible conception of federal preemption; it might also include, for instance, cases in which states are forbidden from regulating in a certain field (for instance, foreign affairs) because the subject matter is constitutionally allocated to the national government. My definition, though, captures the typical preemption case, and thus includes the overwhelming majority of decisions that one might describe as involving federal preemption.

49 The cases included in the study were identified in the following manner:

• First, I conducted searches in Westlaw’s United States Courts of Appeals database (CTA) or the court-specific databases (e.g., CTA1 for the United States Court of Appeals for the First Circuit) searching for forms of the word “preempt” or preemption” in the headnotes of the opinion. Thus, I ran the query “he(preempt! pre-empt!“ with the relevant date restriction.

• Second, I or one of my research assistants examined the content of each opinion generated by the query to determine whether the court’s holding—its ultimate legal judgment in the case—concerned the federal preemption of state law, as defined above. In many instances it did not, as the opinion simply referred to preemption without actually deciding a preemption issue. Such cases were excluded from the data set.

• Third, I or one of my research assistants coded the opinions for the relevant independent variables and the dependant variable, entering this information into Excel spreadsheets.

• Finally, I reexamined the data and the text of several opinions for coding errors, making corrections and adjustments as warranted.

50 I selected the time frame of the study largely for purposes of convenience. The object of the study was to evaluate how federal judges are voting currently, so I wanted the cases to be as recent as possible. Five years of decisions was roughly what I and my research assistants had the capacity to review and code.

51 The data set is freely available for download as an Excel spreadsheet here: http://claranet.scu.edu/eres/coursepage.aspx?cid=2931&page=docs#.
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United States Court of Appeals databases, though offering a wealth of useful ways to study the circuit courts, have not coded decisions for this characteristic. Second, this data set is comprehensive over the period of inquiry. It includes all 560 preemption decisions issued by the federal circuit courts in the years 2005 through 2009.

Because the question I sought to answer was whether two independent proportions were meaningfully different—one proportion being the percentage of votes by Republican appointees favoring preemption, the other being the percentage of similar votes by Democratic appointees—I employed a two-tailed, two-sample z-test to measure the statistical significance of the observed differences. The null hypothesis was that Republicans and Democrats do not differ from one another in their preferences for the federal preemption of state law. As a baseline, I used a 95 percent level of confidence as a threshold for significance; thus, a finding of statistical significance means that if the null hypothesis is true, there is less than a 5 percent chance that we would see the observed difference.

Several cases included in the data set raised multiple preemption issues within the same decision. New Hampshire Motor Transport Ass'n v. Rowe\(^{52}\) is a good example. There, a trade association representing air and motor carriers sued the Attorney General of Maine seeking a declaration that the Maine Tobacco Delivery Law, which required persons delivering tobacco products directly to consumers to take several precautions to ensure that the products were not being purchased by minors, was preempted by the Federal Aviation Administration Authorization Act of 1994.\(^{53}\) The Court of Appeals for the First Circuit held that (1) those requirements in Maine's law concerning the method by which carriers must deliver packages that might affect the timeliness of deliveries were preempted, but that (2) the Maine law's ban on the knowing delivery of tobacco products to minors was not.\(^{54}\) In such instances, I coded a judge who favored preemption on some but not all of the issues as lodging half of a vote for each result. No doubt, there are other defensible ways of coding

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\(^{52}\) 448 F.3d 66 (1st Cir. 2006), overruled in part, 552 U.S. 364 (2004).
\(^{53}\) Id. at 69.
\(^{54}\) Id. at 82.
such votes. But this approach is consistent with the methodology of other empirical studies of judicial behavior in preemption cases, and it avoids overemphasizing particular preemption decisions that happen to raise multiple issues.

A final point about methodology: Because the study attempts to draw conclusions about the judges' behavior by tallying their votes favoring one outcome or another, it suffers from the shortcomings inherent in any vote-counting, outcome-focused approach. First, it ignores what the judges actually wrote in their opinions. And the content of the opinions can be just as important—sometimes much more important—than whether the judgment under review was affirmed, reversed, or vacated. Second, it places equal weight on each decision, even though some cases are clearly more significant than others. But these weaknesses should not be overstated. Outcomes may be a crude measure of the judiciary's decisional output, but they can still reveal a great deal about the patterns of judicial behavior. Moreover, focusing on outcomes allows us to record the judges' positions quite objectively, reducing the potential for bias in our data collection. While outcome-based studies certainly cannot answer all of the interesting questions about judicial decision making, they nonetheless can shed significant light on the subject.

55 For instance, one could treat each individual preemption issue (or claim) as a separate decision, and thus a distinct vote.
57 On the weaknesses inherent in such studies, see Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, The Reagan Revolution in the Network of Law, 57 EMORY L.J. 1227, 1235 (2008); Friedman, supra note 4, at 265–266.
58 See Friedman, supra note 4, at 265–266 (discussing the importance of the content of Supreme Court's opinions in evaluating the significance of the Court's work).
59 See Cross, Smith & Tomarchio, supra note 57, at 1235.
60 See Friedman, supra note 4, at 265–266.
61 See Howard Gillman, What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decisionmaking, 26 L. & SOC. INQUIRY 465, 494–495 (2001) (describing the importance of such studies, even if they should be supplemented with historical and interpretivist inquiries).
C. Results

From January 1, 2005, to December 31, 2009, the United States Courts of Appeals decided 560 cases addressing whether federal law preempted state law, 420 of which resulted in published opinions and 140 of which were decided by unpublished disposition. More than 99 percent of these cases (551) were decided by three-judge panels; three were decided en banc, and six were decided by just two judges (either because the third judge did not reach the preemption question on the merits, or because a judge passed away between oral argument and the decision’s release). In this full universe of preemption decisions, the difference in the voting records of Republican and Democratic appointees was only slight. Judges appointed by Republican presidents voted in favor of preemption more frequently than judges appointed by Democratic presidents, but only by a margin of roughly 2.6 percent (57.35% versus 54.71%), a difference that was not statistically significant.\(^{62}\) In published decisions, the difference between Republicans and Democrats was slightly larger (about 5.1 percent), but it, too, lacked statistical significance at a 95 percent level of confidence.\(^{63}\) (Both Republican and Democratic judges were much more likely to find in favor of preemption in cases decided with unpublished dispositions than in those decided with published opinions.)

\(^{62}\) The Z value for the difference between these two proportions is 1.077, well below the threshold for statistical significance.

\(^{63}\) The Z value for these two proportions is 1.672, yielding a confidence level of 90.5 percent. This means that, if the null hypothesis (that Republicans and Democrats are identical in how they vote in preemption cases) is true, there is a 9.5 percent chance that we would see the observed difference.
Importantly, this partisan similarity in overall voting records was not the product of
Republican and Democratic appointees voting differently in different groups of decisions—
those where, alternatively, Republicans and Democrats favored preemption
disproportionately, such that their divergent voting patterns canceled each other out in
aggregate. Rather, preemption appears to be an area of above-average consensus on the
Courts of Appeals. Of the 560 cases in the data set, 533 (more than 95 percent) involved no
dissent, at least on the question of preemption. Even when the panel was of mixed-party
composition—comprising at least one Republican appointee and one Democratic appointee—
more than 94.5 of the cases were resolved unanimously.

<table>
<thead>
<tr>
<th></th>
<th>Republican appointees</th>
<th>Democratic appointees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All preemption decisions</strong> N=560</td>
<td>57.35% N=1014</td>
<td>54.71% N=690</td>
</tr>
<tr>
<td><strong>Published preemption decisions</strong> N=420</td>
<td>53.70% N=783</td>
<td>48.62% N=506</td>
</tr>
<tr>
<td><strong>Unpublished preemption decisions</strong> N=140</td>
<td>69.70% N=231</td>
<td>71.47% N=184</td>
</tr>
</tbody>
</table>

Table 1

Percentage of votes by United States Court of Appeals judges in favor of preemption, 2005–2009
Table 2
Rates of unanimity in different categories of preemption decisions handed down by the United States Courts of Appeals, 2005–2009

<table>
<thead>
<tr>
<th>Category</th>
<th>Proportion of cases decided unanimously</th>
</tr>
</thead>
<tbody>
<tr>
<td>All decisions</td>
<td>95.18% N=560</td>
</tr>
<tr>
<td>Published decisions</td>
<td>94.29% N=420</td>
</tr>
<tr>
<td>Unpublished decisions</td>
<td>97.87% N=140</td>
</tr>
<tr>
<td>Decisions by mixed-party panels</td>
<td>94.53% N=384</td>
</tr>
<tr>
<td>Decisions by same-party panels</td>
<td>96.59% N=176</td>
</tr>
</tbody>
</table>

Though disagreement in preemption decisions was rare, it occurred disproportionately in cases decided by mixed-party panels. That is, while most mixed-party panels were unanimous, they were also the place where disagreement was more likely to occur. Given the small number of non-unanimous decisions, however, the difference between the proportion of non-unanimous opinions decided by mixed-party panels and the proportion of all decisions decided by mixed-party panels was not statistically significant.64

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64 The Z value for the difference between these proportions is 1.118.
Table 3

Proportions of United States Court of Appeals preemption decisions decided by ideologically homogenous and ideologically mixed panels, 2005–2009

<table>
<thead>
<tr>
<th></th>
<th>Proportion of all decisions N=560</th>
<th>Proportion of non-unanimous decisions N=27</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mixed-party panels</td>
<td>68.57%</td>
<td>77.78%</td>
</tr>
<tr>
<td>N=384</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Same-party panels</td>
<td>31.43%</td>
<td>22.22%</td>
</tr>
<tr>
<td>N=176</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Though the overall partisan differences were quite small, when we focus on this small proportion of preemption decisions where at least one judge registered a dissent, we find a stark divide between Republicans and Democrats. It was even more pronounced (though just slightly so) in those non-unanimous decisions where at least one Republican and one Democrat served on the panel—cases in which Republicans and Democrats were exposed to precisely the same case stimuli. Here, Republican appointees were roughly 3.5 times more likely than Democrats to vote in favor of preemption. These differences are statistically significant at a 99 percent level of confidence.65

65 The Z value for the difference of the proportions in all non-unanimous cases is 3.908. The Z value for the difference of the proportions in non-unanimous cases in which at least one republican and one Democrat participated is 4.025. With respect to both, if the null hypothesis is true (no difference between Republicans and Democrats), there is a less than 1 percent chance that we would see the observed difference.
Table 4
Percentage of votes by United States Court of Appeals judges in favor of preemption in non-unanimous decisions, 2005–2009

<table>
<thead>
<tr>
<th></th>
<th>Republican appointees</th>
<th>Democratic appointees</th>
</tr>
</thead>
<tbody>
<tr>
<td>All non-unanimous decisions</td>
<td>69.32% N=27</td>
<td>23.47% N=49</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-unanimous decisions with mixed-party panels</td>
<td>72.86% N=21</td>
<td>21.25% N=40</td>
</tr>
</tbody>
</table>

As to the legal content of these cases, the question presented in all 21 non-unanimous mixed-party decisions, in one way or another, involved the validity of a state regulation imposed on private business activity. For example, *Retail Industry Leaders Ass’n v. Fielder* addressed whether the Earned Retirement Income Security Act (ERISA) preempted Maryland’s Fair Share Health Care Fund Act, requiring businesses that employed more than 10,000 employees and that spent less than 8 percent of their total compensation costs on health insurance to pay a specified premium to the state. Similarly, *Colaccio v. Apotex, Inc.* concerned whether the FDA’s regulatory actions impliedly preempted state product liability actions against pharmaceutical manufacturers for their failure to warn of an increased risk of adult suicide associated with their drug. Table 5 lists all 21 non-unanimous mixed-panel decisions and the issues they resolved.

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66 475 F.3d 180 (4th Cir. 2007).
67 521 F.3d 253 (3rd Cir. 2008).
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Table 5
Non-unanimous preemption decisions in which at least one Republican and one Democrat participated, 2005–2009

<table>
<thead>
<tr>
<th>Case name</th>
<th>Court</th>
<th>Year</th>
<th>Question presented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greene v. B.F. Goodrich Avionics Systems, Inc.</td>
<td>CA6</td>
<td>2005</td>
<td>Whether federal aviation safety law preempts a state-law failure-to-warn claim against the manufacturer of an allegedly defectively designed gyroscope.</td>
</tr>
<tr>
<td>Empire Health Choice Assurance, Inc. v. McVeigh</td>
<td>CA2</td>
<td>2005</td>
<td>Whether the Federal Employees Health Benefits Act preemption clause grants subject matter jurisdiction to federal district courts in a contract dispute between two private parties where one party’s anticipated defenses are subject to preemption.</td>
</tr>
<tr>
<td>Air Conditioning &amp; Refrig. Inst. v. Energy Res. Conv. &amp; Dev. Comm’n</td>
<td>CA9</td>
<td>2005</td>
<td>Whether federal law preempts state appliance regulations requiring manufacturers to submit data about their appliances, mark their appliances with basic information, and be subject to enforcement rules.</td>
</tr>
<tr>
<td>Sherwood Partners, Inc. v. Lycos, Inc.</td>
<td>CA9</td>
<td>2005</td>
<td>Whether the federal Bankruptcy Code preempts a state law giving an assignee selected by the debtor the power to void preferential transfers that could not be voided by an unsecured creditor.</td>
</tr>
<tr>
<td>Varghese v. Honeywell International</td>
<td>CA4</td>
<td>2005</td>
<td>Whether a party may raise ERISA preemption claims on appeal following a full trial when the party failed to raise those claims at trial.</td>
</tr>
<tr>
<td>Levine v. United Healthcare Corp.</td>
<td>CA3</td>
<td>2005</td>
<td>Whether ERISA’s saving clause applies to a state law that permits the inclusion of reimbursement and subrogation clauses in health insurance contracts.</td>
</tr>
<tr>
<td>BankWest, Inc. v. Baker</td>
<td>CA6</td>
<td>2005</td>
<td>Whether the Federal Deposit Insurance Act preempts a state law that prohibits payday stores from acting as agents for out-of-state banks charging in excess of a state-mandated interest cap if the store has a predominate economic interest in the loan revenues.</td>
</tr>
<tr>
<td>Riegel v. Medtronic, Inc.</td>
<td>CA2</td>
<td>2006</td>
<td>Whether the Medical Device Amendments to the FDCA preempt common-law tort claims against the manufacturer of an allegedly defective medical device.</td>
</tr>
<tr>
<td>Chamber of Commerce v. Lockyer</td>
<td>CA9</td>
<td>2006</td>
<td>Whether the National Labor Relations Act preempts state-law restrictions on a private company’s use of state funds for union-related speech.</td>
</tr>
<tr>
<td>Peace v. American General Life Ins. Co.</td>
<td>CA5</td>
<td>2006</td>
<td>Whether ERISA preempts a breach of contract claim by an employee against his employer for failing to provide a single-premium annuity.</td>
</tr>
<tr>
<td>Erpelding v. Delaware Charter Guar. &amp; Trust Co.</td>
<td>CA9</td>
<td>2006</td>
<td>Whether the defendant was an ERISA fiduciary, such that ERISA would preempt state-law claims against the benefit plan administrator.</td>
</tr>
<tr>
<td>Retail Ind. Leaders Assn. v. Fielder</td>
<td>CA4</td>
<td>2007</td>
<td>Whether ERISA preempts a state law requiring businesses of 10,000 or more employees to expend a fixed percentage of total wages on health insurance.</td>
</tr>
<tr>
<td>House v. American United Life Ins. Co.</td>
<td>CA5</td>
<td>2007</td>
<td>Whether ERISA preempts a state law’s imposition of penalties or award of attorney’s fees in connection with a claim arising under the disability policy of an employee benefit plan.</td>
</tr>
<tr>
<td>Clearing House Assoc. v. Cuomo</td>
<td>CA2</td>
<td>2007</td>
<td>Whether OCC regulations interpreting the visitorial powers provision of the National Bank Act preempted state investigation and enforcement of national banks’ compliance with otherwise non-preempted state laws.</td>
</tr>
<tr>
<td>Discover Bank v. Vaden</td>
<td>CA4</td>
<td>2007</td>
<td>Whether the Federal Deposit Insurance Act completely preempts state usury law claims of a cardholder against a state chartered, federally insured bank.</td>
</tr>
<tr>
<td>Wah Chang v. Duke Energy Trading &amp; Marketing, LLC</td>
<td>CA9</td>
<td>2007</td>
<td>Whether the “filed rate doctrine” precludes state-law claims that challenge the practices of companies connected with their charging of FERC-approved electricity rates.</td>
</tr>
</tbody>
</table>
If we widen our lens back out to the full universe of preemption decisions, we see little difference among the judges’ voting records based on the identity of the appointing president, a finding that is unsurprising given the general lack of partisan disparities. In the full run of cases, judges appointed by Presidents Carter and Clinton voted in favor of preemption at lower rates than judges appointed by Presidents Reagan, George H.W. Bush, and George W. Bush, but only by small margins—differences that are not statistically significant, even at a 90 percent level of confidence. It is noteworthy, however, that although Clinton appointees were largely indistinguishable from Republican appointees overall, they were quite different in non-unanimous cases, casting only 15 percent of such votes in favor of preemption. The same was true of George W. Bush appointees, but in the opposite direction; they voted for preemption at a rate of 82 percent in non-unanimous cases. The sample sizes for these last two groups—Clinton and George W. Bush appointees in non-unanimous cases—are very small, so we should not infer much from them. Nevertheless, these data are consistent with what we see elsewhere: a very significant partisan split at the margin, despite broad consensus on the issue writ large.

68 The largest difference was that between Carter appointees (53.19 percent) and George W. Bush appointees (58.44 percent), and the Z value for this difference is only 1.193.
Comparing the voting records of Republicans and Democrats across various panel compositions also illustrates the large degree of partisan consensus in preemption decisions. Regardless of the partisan makeup of the panel, Republicans and Democrats voted in favor of preemption at very similar rates. With the exception of en banc and two-judge panel decisions—categories for which the number of decisions was extremely small—Republican and Democratic judges did not differ in any particular panel composition by more than 3.5 percent. Indeed, Republicans on all-Republican panels voted in favor of preemption at a rate nearly identical to that of Democrats on all-Democrat panels (51.28 percent versus 48.86 percent). The one possible indication of partisan influence is the apparent shift in the behavior of Democrats. That is, Democrats seemed more likely to vote against preemption as
the panel became more Democratic, a pattern suggesting the existence of ideological “panel
effects”—the tendency of like-minded individuals, when deliberating in an ideologically
homogenous group, to reinforce one another’s biases. For reasons discussed in Part III.C
infra, however, these apparent panel effects are likely a mirage, the coincidental product of
factors unrelated to the panel’s composition.
Table 7
Percentage of votes by United States Court of Appeals judges in favor of preemption, organized by panel composition, 2005–2009

<table>
<thead>
<tr>
<th>Partisan composition of panel</th>
<th>Republican appointees</th>
<th>Democratic appointees</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Republicans</td>
<td>51.28%</td>
<td>——</td>
</tr>
<tr>
<td>N=130</td>
<td>N=390</td>
<td></td>
</tr>
<tr>
<td>2 Republicans and 1 Democrat</td>
<td>63.00%</td>
<td>60.76%</td>
</tr>
<tr>
<td>N=223</td>
<td>N=446</td>
<td>N=223</td>
</tr>
<tr>
<td>1 Republican and 2 Democrats</td>
<td>60.06%</td>
<td>56.66%</td>
</tr>
<tr>
<td>N=154</td>
<td>N=154</td>
<td>N=308</td>
</tr>
<tr>
<td>3 Democrats</td>
<td>——</td>
<td>48.86</td>
</tr>
<tr>
<td>N=44</td>
<td></td>
<td>N=132</td>
</tr>
<tr>
<td>En banc</td>
<td>18.75%</td>
<td>0.00%</td>
</tr>
<tr>
<td>N=3</td>
<td>N=16</td>
<td>N=24</td>
</tr>
<tr>
<td>2-judge panels</td>
<td>62.50%</td>
<td>75.00%</td>
</tr>
<tr>
<td>N=6</td>
<td>N=8</td>
<td>N=4</td>
</tr>
</tbody>
</table>
Finally, sorting the data by the court of decision reveals some interesting variances, though the small sample sizes should make us cautious in drawing conclusions. In a majority of the circuits (7 of 13), Democrats actually voted in favor of preemption more frequently than Republicans, and in two courts (the First and Tenth Circuits) by a wide margin. Moreover, Democrats on some courts (such as the Eighth Circuit) were more likely to vote in favor of preemption than Republicans on most other courts. And Republicans on some courts (such as the First and Sixth Circuits) were more likely to vote against preemption than Democrats on most other courts. Given its size, the Ninth Circuit accounted for almost one fourth of the Courts of Appeals’ preemption decisions over this time frame (133 of the 560). And perhaps unsurprisingly, Ninth Circuit judges voted in favor of preemption much less frequently than the overall average; the rate for the Ninth Circuit was 49.76 percent, compared to 58.45 percent for all other judges combined, a difference that was statistically significant at a 99 percent level of confidence.69

69 The Z value for this difference is 3.099.
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Table 8
Proportion of votes in favor of preemption by court of decision

<table>
<thead>
<tr>
<th>Court of Decision</th>
<th>Total</th>
<th>Republicans</th>
<th>Democrats</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Circuit</td>
<td>48.21%</td>
<td>41.80%</td>
<td>65.22%</td>
</tr>
<tr>
<td>N=28</td>
<td>N=84</td>
<td>N=61</td>
<td>N=23</td>
</tr>
<tr>
<td>Second Circuit</td>
<td>60.97%</td>
<td>67.28%</td>
<td>54.05%</td>
</tr>
<tr>
<td>N=52</td>
<td>N=155</td>
<td>N=81</td>
<td>N=74</td>
</tr>
<tr>
<td>Third Circuit</td>
<td>65.95%</td>
<td>75.00%</td>
<td>52.17%</td>
</tr>
<tr>
<td>N=39</td>
<td>N=116</td>
<td>N=70</td>
<td>N=46</td>
</tr>
<tr>
<td>Fourth Circuit</td>
<td>53.85%</td>
<td>57.63%</td>
<td>42.11%</td>
</tr>
<tr>
<td>N=26</td>
<td>N=78</td>
<td>N=59</td>
<td>N=19</td>
</tr>
<tr>
<td>Fifth Circuit</td>
<td>50.27%</td>
<td>48.85%</td>
<td>53.45%</td>
</tr>
<tr>
<td>N=63</td>
<td>N=188</td>
<td>(N=130)</td>
<td>N=58</td>
</tr>
<tr>
<td>Sixth Circuit</td>
<td>48.67%</td>
<td>44.50%</td>
<td>54.43%</td>
</tr>
<tr>
<td>N=60</td>
<td>N=188</td>
<td>N=109</td>
<td>N=79</td>
</tr>
<tr>
<td>Seventh Circuit</td>
<td>62.82%</td>
<td>67.06%</td>
<td>51.56%</td>
</tr>
<tr>
<td>N=39</td>
<td>N=117</td>
<td>N=85</td>
<td>N=32</td>
</tr>
<tr>
<td>Eighth Circuit</td>
<td>69.41%</td>
<td>68.70%</td>
<td>71.16%</td>
</tr>
<tr>
<td>N=51</td>
<td>N=152</td>
<td>N=115</td>
<td>N=37</td>
</tr>
<tr>
<td>Ninth Circuit</td>
<td>49.76%</td>
<td>51.18%</td>
<td>48.79%</td>
</tr>
<tr>
<td>N=133</td>
<td>N=419</td>
<td>N=170</td>
<td>N=249</td>
</tr>
<tr>
<td>Tenth Circuit</td>
<td>53.33%</td>
<td>45.37%</td>
<td>73.81%</td>
</tr>
<tr>
<td>N=25</td>
<td>N=75</td>
<td>N=54</td>
<td>N=21</td>
</tr>
<tr>
<td>Eleventh Circuit</td>
<td>64.20%</td>
<td>62.77%</td>
<td>66.18%</td>
</tr>
<tr>
<td>N=27</td>
<td>N=81</td>
<td>N=47</td>
<td>N=34</td>
</tr>
<tr>
<td>D.C. Circuit</td>
<td>83.33%</td>
<td>85.00%</td>
<td>75.00%</td>
</tr>
<tr>
<td>N=8</td>
<td>N=24</td>
<td>N=20</td>
<td>N=4</td>
</tr>
<tr>
<td>Federal Circuit</td>
<td>76.92%</td>
<td>69.23%</td>
<td>84.62%</td>
</tr>
<tr>
<td>N=9</td>
<td>N=26</td>
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Overall, these data reveal several interesting patterns, but two core themes stand above the others. The first is one of bipartisan consensus. In the vast majority of preemption decisions, United States Court of Appeals judges were unanimous. Indeed, the rate of unanimity in preemption cases (over 95 percent) exceeds most estimates for the rate at which the circuit courts decide cases unanimously in general. While Republicans voted in favor of preemption at a rate exceeding that for Democrats, the margin was slight (around 2.6 percent). Thus, preemption is unlike a number of other legal issues handled by the Courts of Appeals, for which recent studies have found significant partisan voting differences.70

The second theme concerns what happened at the margin—cases in which the lack of controlling legal authority, and perhaps the underlying subject matter of the dispute, led to judicial disagreement. Though the proportion of preemption cases fitting this description was small, these decisions revealed a sizable partisan divide: Republicans were far more likely than Democrats to vote in favor of preemption. Thus, while consensus generally carried the day, when it did not, the disagreement almost always entailed Republican judges voting in favor of preemption and Democratic judges voting against it.

Aside from these basic conclusions, three other findings warrant brief discussion as well: (1) the consistency of these results with the recent behavior of the Supreme Court; (2) the differences in voting patterns across the federal circuit courts; and (3) the possible “panel

70 For instance, the Sunstein et al. study found statistically significant differences in the voting patterns of Republican and Democratic judges on the Court of Appeals in 23 different issue areas: affirmative action, the National Environmental Policy Act, capital punishment, the abrogation of Eleventh Amendment immunity, decisions by the National Labor Relations Board, sex discrimination, the Americans with Disabilities Act, abortion, campaign finance, piercing the corporate veil, cases involving the Environmental Protection Agency, obscenity, Title VII of the Civil Rights Act of 1964, racial segregation, cases involving the Federal Communications Commission, the Contracts Clause, and First Amendment challenges to commercial speech. See SUNSTEIN ET AL., supra note 1, at 21–40, 54–57.
effects” reflected in the voting patterns, at least among Democrats. The following section takes up these topics in turn.

A. **Comparison to the Supreme Court**

One point worth noting is that the story of preemption in the Courts of Appeals, at least in its broad outlines, is quite similar to that at the Supreme Court over its past eighteen terms. From October Term 1991 (when Justice Thomas joined the Court) through October Term 2008 (ending in June 2009), the Supreme Court decided 64 preemption cases on the merits following full briefing and oral argument. The justices were unanimous in 31 of these decisions (48.4 percent), a rate well above that for its merits docket as a whole (somewhere between 32 and 42 percent, depending on how one classifies decisions in which a justice concurs only in the judgment). Of course, a 48 percent unanimity rate falls well below that for preemption decisions in the Courts of Appeals, owing to the nature of Supreme Court’s merits docket; again, the Court typically hears only the most difficult cases, ones raising questions on which the lower courts have disagreed. But the spread between the

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71 Using the same methodology as that for creating the Court of Appeals database, I created a comprehensive data set of every Supreme Court preemption decision handed down between October 1991 and June 2009. The data set is available for download as an Excel file here: http://claranet.scu.edu/eres/coursepage.aspx?cid=2931&page=docs#.

Court’s rate of unanimity in preemption cases and that for its merits docket as whole suggests that preemption has provoked a below-average level of division among the justices.

At the same time, in those preemption cases where at least one justice dissented, Republican appointees favored preemption more frequently than Democratic appointees, and by a significant margin. Justices appointed by Republican presidents (Chief Justices Rehnquist and Roberts and Associate Justices Blackmun, Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, and Alito) voted in favor of preemption at a rate of 51.0 percent in non-unanimous cases, while justices appointed by Democratic presidents (Associate Justices White, Breyer, and Ginsburg) did so at a rate of only 32.5 percent. Moreover, if we categorize the justices based on their widely acknowledged ideological leanings—that is, if we describe Justices Blackmun, Stevens, and Souter as liberals, despite their party affiliations at the time of their appointments—the fissure is even more substantial. The Court’s more conservative justices voted in favor of preemption in non-unanimous cases at a rate of 59.0 percent, while the more liberal justices voted for preemption at a rate of only 32.9 percent. Both of these differences—that between Republican and Democratic appointees, and that between more conservative and more liberal justices—are statistically significant at a 99 percent level of confidence.73

Thus, preemption cases at the Supreme Court have played out in much the same way as they have in the Courts of Appeals. In general, preemption has been a source of less friction than the average issue on the Court’s docket. But when the justices have disagreed, Republicans (and conservatives) have favored preemption more frequently than Democrats (and liberals).

73 The Z value for the difference between Republican and Democratic appointees is 2.598. The Z value for the difference between conservative and liberal justices is 4.5.
B. **Differences across the Courts of Appeals**

Another pattern worth noting concerns the differences in voting patterns across the different Courts of Appeals. For instance, judges on the D.C. Circuit and the Eighth Circuit were quite friendly to claims of preemption, voting in favor of preemption at rates of 83 percent and 69 percent, respectively. In contrast, judges on the Sixth Circuit (49 percent) and the Ninth Circuit (50 percent) were relatively hostile to preemption. Even more interestingly, Democrats on some Courts of Appeals voted in favor of preemption more frequently than most court-specific groups of Republicans, and Republicans on some Courts of Appeals voted against preemption more frequently than most court-level groups of Democrats. Democrats on the Tenth Circuit, for example, voted in favor of preemption more frequently than Republicans on any court other than those on the D.C. and Federal Circuits, both of which handed down only a handful of preemption decisions. Thus, among courts that decided at least ten preemption cases between 2005 and 2009, the group of judges singularly most apt to vote in favor of preemption was Democrats on the Tenth Circuit. Meanwhile, Republicans on the First Circuit were less likely to vote in favor of preemption (42 percent) than any other discrete group of judges on any Court of Appeals.

Because the number of cases decided by any one circuit was rather small (between 8 and 133), many of these disparities may just be noise in the data. Nonetheless, the results suggest an intriguing possibility: that the court on which a judge sits may be a critical variable in predicting her voting record in preemption decisions—and perhaps a more significant variable than the national political party with which she is affiliated. For instance, that a judge sits on the Ninth Circuit may tell us more about how likely she is to favor preemption than that she was appointed by a Republican president. A rigorous examination of this possibility is beyond the scope of this paper, but it seems a promising avenue for further research, both for preemption cases specifically and for circuit court decision making more generally.
C. **Possible panel effects**

Finally, the data (at least at first blush) seem to reveal some ideological “panel effects” in voting patterns—more specifically, panel effects among Democratic appointees. As Table 7 illustrates, the rate at which Democrats voted in favor of preemption declined as the panel composition became more Democratic: 60.8 percent when serving on one-Democrat panels, 56.7 percent when serving on two-Democrat panels, and 48.9 percent when serving on all-Democrat panels. More generally, Democratic judges voted in favor of preemption at a rate of 55.5 percent when serving on panels with at least one Republican appointee (compared to a rate of only 48.9 percent for all-Democrat panels).74 These figures suggest that Democratic appointees may have behaved differently when surrounded by like-minded colleagues. That is, the absence of a potential dissenting voice may have led Democratic judges to indulge their political preferences more freely and frequently. Such a pattern would be consistent with other recent studies of judicial voting records on the Courts of Appeals, several of which have found ideological panel effects across a variety of issues.75 Moreover, the idea that judges might behave differently when surrounded exclusively by like-minded colleagues—that ideological diversity (or the existence of a potential whistle-

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74 The rate for Democrats voting for preemption on all mixed-party panels (55.5 percent) is below that for Democrats on one-Democrat panels (61 percent) and on two-Democrat panels (57 percent) because it also includes decisions from two-judge and en banc panels. In the three en banc decisions included in the study, Democrats voted against preemption by a combined margin of 22 to 0.

blower) might produce more compromise, while ideological homogeneity might lead to group polarization—is well grounded in a large body of research.\textsuperscript{76}

A more careful parsing of the data, however, reveals that these apparent panel effects in preemption decisions are probably illusory. First, given the small number of all-Democrat panel decisions (44 in total), the difference in voting rates for Democrats on mixed-party panels and all-Democrat panels referenced above (55.5 percent versus 48.9 percent) is not statistically significant, even at a lenient 90 percent level of confidence.\textsuperscript{77} Second, and more importantly, a grossly disproportionate number of the all-Democrat panel decisions (31 of the 44) were handed down by the Ninth Circuit. This is simply because the Ninth Circuit is so much larger than the other circuits (with 29 active judgeships\textsuperscript{78}), thus producing a much higher number of one-party panels. And as described earlier, the Ninth Circuit was significantly more likely than the average circuit court to reject preemption claims. The confluence of these two facts—that most all-Democrat decisions were from the Ninth Circuit, and that the Ninth Circuit was generally averse to preemption—depressed the voting rate in favor of preemption for all-Democrat panels, pushing it well below the average for Democrats overall. But this is not because judges behaved differently depending on the panel composition. Indeed, if we isolate the Ninth Circuit’s decisions and divide them by panel composition, we see that Democratic appointees were more likely to vote in favor of preemption when they served on all-Democrat panels than when they served on mixed-party panels (51.7 percent versus 46.1 percent). In other words, what looks like a panel effect when examining the full data set is really a “Ninth Circuit effect”—a coincidental byproduct of the Ninth Circuit being both large and comparatively hostile to preemption.

Of course, these data cannot establish that partisan panel effects do not exist in preemption decisions; a more comprehensive study, evaluating more variables over a longer

\textsuperscript{76} For a general discussion of the phenomenon as it applies to appellate judges, see Cass R. Stunstein, David Schkade & Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 Va. L. Rev. 301, 337–47 (2004).
\textsuperscript{77} The Z value for this difference is 1.374.
\textsuperscript{78} See 28 U.S.C. §44(a) (2010).
time frame, might uncover such an influence. Rather, my point is that the findings presented here do not support such a hypothesis, despite the initial appearances. What seems like a shift in behavior by Democratic appointees is actually the result of factors unrelated to the panel’s partisan composition.

Conclusion

Again, the study presented here yields two core findings. First, although many issues seem to have become ideological battlegrounds in the circuit courts, federal preemption is not one of them. One could certainly imagine a different state of affairs. Given the significance of preemption, both in terms of constitutional principles and practical consequences, it could be a source of substantial friction between Republicans and Democrats. But it is not. The accepted sources of legal authority, or perhaps the norms of consensus and collegiality on the Courts of Appeals, have largely controlled judges’ choices.

Second, to the extent the issue of preemption does carry a partisan valence, that valence is one in which Republican judges tend to vote in favor of preemption and Democratic judges tend to vote against it. This might be because, within the Republican Party, those who care deeply about reducing economic regulation have been more successful than conservatives of other stripes in shaping their party’s judicial nominations. Or it might be because those within the Democratic Party committed to preserving state-level regulation of private business activity (particularly through tort liability) have been successful in shaping their party’s judicial nominations. Or it might be a combination of the two—or some other phenomenon altogether. Regardless, in the few preemption cases where at least one judge dissented, Republican circuit judges were much more apt to vote in favor of preemption than Democrats.

These basic findings may only confirm what many already suspected. But in doing so, they still tell us something useful. By shedding light on the partisan dimensions to
preemption disputes within the federal courts, they enhance our understanding of how our
system of constitutional federalism actually functions in practice. More broadly, these
findings provide one more reference point in our ongoing assessment of the various ways in
which political forces shape—or fail to shape—the behavior of judges.