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

Bradley W. Joondeph*

Introduction

Judicial decisions resolving disputes over the federal preemption of state law raise some interesting questions about the role of politics 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. Conservatives might gravitate towards the preemption of state law—and liberals might shy away from it—because its immediate consequence is often to reduce the level of regulation imposed on private businesses (and to negate state-law remedies available to those alleging injuries caused by those businesses).

* 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, Gerry Uelman, and David Yosifon 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, and, most especially, Jennifer McAllister and Lara Muller.

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, ranging from abortion to gay and lesbian rights to challenges to environmental regulations. *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.

At the same time, many conservatives might oppose preemption—and many liberals 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 rationality) in legal standards. In short, the political valence of federal preemption is not readily apparent, at least on its face.³

This paper seeks to explore these empirical uncertainties—to measure the nature and extent of the current political dimensions of preemption in the federal appellate courts. More concretely, it presents a statistical study of the published 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 that reach the Supreme Court are typically much more controversial and politically salient than the average case in the federal system as a whole.⁴ Thus, drawing inferences about judicial behavior more generally 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 published preemption decision rendered by the United States Courts of Appeals from January 1, 2005, to December 31, 2009, a total of 420 decisions and almost 1,300 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 5 percent.⁵ This difference is not trivial, but it is not statistically significant at a 95 percent level of confidence.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 were unanimous, a rate that exceeds our best estimates of the mean for published 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 investigators have recently 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 remain some important differences between Republican and Democratic appointees. A finer parsing of the data reveals that, when the judicial panel was ideologically homogenous (either all-Republican or all-Democrat), Republicans were substantially more likely than Democrats to vote in favor of preemption (roughly 50 percent versus 35 percent). Moreover, 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 72 percent versus 22 percent).

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 judgeships.

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>.

Thus, the full picture of preemption decisions in the Courts of Appeals is intriguing, if somewhat unsurprising. In general, preemption cases do not provoke much ideological 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 are insufficient to restrain judicial 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

⁸ U.S. CONST. art. VI.

⁹ See, e.g., *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“since our decision in [*M’Culloch*], it has been settled that state law that conflicts with federal law is “without effect”) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

For instance, in the famous 1824 decision of *Gibbons v. Ogden*,¹⁰ the Court held that the Federal Navigation Act of 1793 preempted a New York state statute that had granted two businessmen a monopoly for the operation of all steamboats in New York waters. 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.”¹¹

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 *express* preemption, instances in which Congress has demarcated the breadth of a federal statute’s preemptive reach through an explicit statutory provision.¹² 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 *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) *impossibility* preemption, when it is physically impossible for the regulated party to comply simultaneously with state and federal law; (2) *field* preemption, when Congress has regulated a field so extensively that it has left 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.

¹⁰ 22 U.S. (9 Wheat.) 1 (1824).

¹¹ *Id.* at 211.

¹² Section 1144(a) of the Earned Retirement Income Security Act (ERISA) is a typical. It provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. §1144(a).

While these categories may be helpful in distinguishing the various means by which Congress might indicate the scope of its preemptive intent, they ultimately have no independent legal significance. As the Supreme Court has acknowledged on several occasions, the “ultimate touchstone” in every preemption case is Congress’s intent. More precisely, the question is always whether Congress intended its regulatory scheme to displace the sort of state law in question, 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 significance. 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 generally lack much salience. Of course, there are important exceptions. Some recent preemption 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 relatively few and far between. 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 for damages alleging that the railroad failed to maintain adequate warning devices at a particular grade crossing in rural Tennessee. In other words, the garden variety preemption decision is rather mundane and case-specific.

The overall trajectory of preemption decisions is another 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.¹³ The fields regulated by the federal government have grown dramatically over the last century, such that federal law now reaches into almost every corner 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 of that authority. Congress can still regulate any activity that is economic or commercial in nature, as well as a good deal of activity that is not.¹⁴

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 frequency with which courts 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 thus 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

¹³ See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Gillian Metzger, *Administrative Law as the New Federalism*; Ernest Young, *The Rehnquist Court's Two Federalisms*, TEX. L. REV.

¹⁴ 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 *United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). 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).

in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.¹⁵

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 level or stringency of governmental regulation imposed on private businesses. To be sure, preemption cases encompass a wide variety of topics, many of which have nothing to do with economic regulation. 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. In other words, the question is how much regulation will govern a particular manifestation of private enterprise. Can a state impose common-law tort liability on a pharmaceutical manufacturer for the marketing of 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? Can a state hold a tobacco manufacturer liable for fraudulent misrepresentation in connection with the manufacturer’s sale of “light cigarettes,” or is the Federal Cigarette Labeling Act the only regulation with which it must comply? In immediate, substantive terms, preemption cases typically require judges to choose between differing levels of government regulation.

It is these substantive, practical consequences that render the political valence of federal preemption uncertain. On the one hand, political conservatives (and thus members of the Republican Party), as a matter of constitutional structure, seem to prefer a smaller federal government and greater policy autonomy for the states.¹⁶ By contrast, Democrats have often opposed these ideas, at least as a matter of judicial enforcement, and have 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

¹⁵ *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–161 (2001) (Breyer, J., dissenting) (citations omitted).

¹⁶ 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).

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 promoting state sovereignty or state policy autonomy, while the more liberal justices have embraced a broader vision of national power.¹⁷

On the other hand, decisions favoring federal preemption tend to reduce the level and 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.¹⁸ Preemption usually limits or eliminates 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 injury from those activities. It is no secret that the Democratic Party has generally favored the preservation such state-level regulation, particularly in the form of tort actions initiated by plaintiffs' attorneys. Thus, it is likewise conceivable that Republican judges would vote in favor of preemption more frequently than Democratic judges.

Hence, the political 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. In fine, 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?

¹⁷ *See id.* at 138–47.

¹⁸ *See id.*

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.¹⁹ The basic 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 objectively 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—cannot help but resort to their own predispositions, their deeply ingrained beliefs and values, if only subconsciously. In the process, a judge's own policy preferences invariably influence 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 other factors. Moreover, investigators are not always precise in how they define “politics” in this context.²⁰ The influence of “politics” 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 assumed office; or a variety of other mechanisms by which the American political system, writ large, shapes the agenda and decision making of the judiciary.²¹ But these complications do not obscure a very basic truth: The empirical evidence of a connection between judges' political affiliation and their voting records on the

¹⁹ See TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 101–131 (1999).

²⁰ See Bradley W. Joondeph, *The Many Meanings of “Politics” in Judicial Decision Making*, U.M.K.C. L. REV. (2009).

²¹ See *id.*

bench is simply overwhelming. Republican judges vote more frequently for politically conservative legal outcomes than Democratic judges. As a prominent political scientist recently wrote, “[n]o serious scholar of the judiciary denies that the decisions of judges, especially at the Supreme Court level, are at least partially influenced by the judges’ ideology.”²²

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 plausible 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 are more hemmed in by controlling legal authority, and their typical decision lacks much (if any) political salience. Federal circuit courts are required to review every appeal taken from a final judgment issued by a United States District Court, and they face a thicker web of binding legal 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 full run of cases, these institutional

²² Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 237 (Cornell W. Clayton & Howard Gillman eds., 1999). See also Frank Cross, *Decision Making in the United States Courts of Appeals*, 91 CAL. L. REV. 1457, 1482 (2003) (“The weight of empirical evidence clearly reveals some role for ideology in judicial decisionmaking.”).

constraints make the behavior of circuit court judges, again comparatively speaking, less susceptible to the influence of their ideological preferences.

But this is not to say that Court of Appeals judges lack discretion in their decision making, 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 in several issue areas, including criminal procedure, civil liberties, and labor.²³

* 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."²⁴

* A widely discussed 2006 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.²⁵

* 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

²³ Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 501 (1975).

²⁴ Tracey George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1684 (1998).

²⁵ SUNSTEIN ET AL, *supra* note ___, 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, racial desegregation, those challenging actions by the Federal Communications Commission, Contracts Clause, and commercial speech cases under the First Amendment.

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.”²⁶

This list only scratches the surface. Scores of other studies have established similar patterns across a wide variety of issues.²⁷

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 the significance of preemption cases as a proportion of the Courts of Appeals dockets, as well as the importance of these decisions (at least in aggregate) to the federal-state balance in our constitutional system. This study marks a step towards filling that gap.

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 States Courts of Appeals in preemption cases.²⁸ To pursue this objective, I (with the help of

²⁶ FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 38 (2007).

²⁷ See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155 (1998); Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 *POL. RES. Q.* 299 (2002); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717 (1997); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 *JUST. SYS. J.* 219 (1999); Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 *JUDICATURE* 298 (1993); Jon Gottschall, *Reagan’s Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 *JUDICATURE* 48 (1986).

²⁸ 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, instances 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

several research assistants) created a unique data set consisting of every published preemption decision rendered by one of the thirteen federal circuit courts²⁹ from January 1, 2005, to December 31, 2009.³⁰ Each decision was coded for, *inter alia*, five 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, and (5) the partisan composition of the panel. The independent variable was whether the direction of each judge's vote: whether it supported or rejected the outcome resulting in the federal preemption of state law.³¹

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 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 420 published preemption decision handed down by a federal circuit court in the years 2005 through 2009.

the overwhelming majority of decisions that one might describe as involving federal preemption.

²⁹ 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! preempt)" 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.

³⁰ 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 in the time available.

³¹ The data set (and the accompanying code book) is freely available for download as an Excel spreadsheet at the following web site: CITE.

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. 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*³² 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 certain steps intended to ensure that the products were not being purchased by minors, was preempted by the Federal Aviation Administration Authorization Act of 1994. 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. 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 such votes.³³ 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.

³² 448 F.3d 66 (1st Cir. 2006), *overruled in part*, 552 U.S. 364 (2004).

³³ For instance, one could treat each individual preemption issue (or claim) as a separate decision, and thus a distinct vote.

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.³⁴ 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.³⁵ 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,³⁶ but they can still tell us a great deal about 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. Thus, while outcome-based studies cannot answer all of the interesting questions,³⁷ they can still shed significant light on judicial decision making.³⁸

C. Results

From January 1, 2005, to December 31, 2009, the United States Courts of Appeals issued 420 published decisions addressing a dispute as to whether federal law preempted state law, 417 of which were decided by three-judge panels and three of which were decided *en banc*. In this full universe of decisions, the difference in the voting records of Republican and Democratic appointees was relatively small. Judges appointed by Republican presidents

³⁴ On the weaknesses inherent in such studies, see Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *The Reagan Revolution in the Network of Law*, at 7–8 (2006) (working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909217); Friedman, *supra* note ___, at 265–266.

³⁵ See Friedman, *supra* note ___, at 265–266 (discussing the importance of the content of Supreme Court's opinions in evaluating the significance of the Court's work).

³⁶ See Cross, Smith & Tomarchio, *supra* note ___, at 7.

³⁷ See Friedman, *supra* note ___, at 265–266.

³⁸ 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).

voted in favor of preemption more frequently than judges appointed by Democratic presidents, but only by a margin of roughly 5 percent (53.70% versus 48.71%). This difference is not statistically significant at the $P=.05$ level of confidence.³⁹

Table 1

Voting records of United States Court of Appeals judges
in published preemption decisions, 2005–2009

	Republican appointees	Democratic appointees
Proportion of votes in favor of outcome resulting in federal preemption of state law	53.70% N=420.5	48.71% N=246
Proportion of votes against outcome resulting in federal preemption of state law	46.30% N=362.5	51.29% N=259

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, and perhaps substantially so. Of the 420 cases included in the data set, 396 (almost 95 percent) involved no dissent, at least on the question of federal preemption. (This proportion would assuredly be higher if we also considered the preemption cases that were resolved though unpublished dispositions.) Indeed, more than 93 percent of the cases

³⁹ 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.

decided by ideologically mixed panels—panels with at least one Republican appointee and one Democratic appointee—were resolved unanimously. (Again, the proportion would be even larger if we also considered unpublished opinions.)

Table 2

Rates of unanimity in different categories of published preemption decisions handed down by the United States Courts of Appeals, 2005–2009

	Proportion of cases decided unanimously
All published opinions	94.29% N=420
Ideologically mixed panels	93.15% N=292
Ideologically homogenous panels	96.85% N=127

Though dissensus in preemption decisions was relatively rare, it occurred disproportionately in cases resolved by ideologically mixed panels. That is, while most mixed panels were unanimous, they were also the place where disagreement was most likely to arise. (Given the small number of non-unanimous decisions, however, the difference between the proportion of non-unanimous opinions decided by mixed ideological panels and the proportion of all decisions decided by mixed ideological panels was not statistically significant.)

Table 3

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

	Proportion of all decisions N=420	Proportion of non-unanimous decisions N=24
Ideologically mixed panels N=293	69.76%	83.33%
Ideologically homogenous panels N=127	30.24%	16.67%

Indeed, when we focus on this small proportion of published preemption decisions, where at least one judge registered a dissent, the divide between Republicans and Democrats was rather striking. 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. (And it hardly seems coincidental that all twenty cases in which a Republican voted differently than a Democrat involved the validity of a state law, regulation, or common-law rule imposing additional obligations on a private business.) These differences between these proportions are statistically significant at a confidence level of 99 percent.⁴⁰

⁴⁰ 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 published decisions, 2005–2009

	Republican appointees	Democratic appointees
All non-unanimous decisions N=24	68.75% N=40	23.86% N=44
Non-unanimous decisions with ideologically mixed panels N=20	72.06% N=34	22.37% N=38

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 President Clinton were indistinguishable from judges appointed by President George W. Bush, President George H.W. Bush, or President Reagan. Interestingly, though, judges appointed by President Carter differed from all the others, voting in favor of preemption roughly 10 percent less frequently than those appointed by the other presidents. This difference was statistically significant at the $P=.05$ level in comparison to Clinton appointees and George W. Bush appointees, and it was statistically significant at the $P=.10$ level in comparison to George H.W. Bush appointees and Reagan appointees. Also noteworthy is that, although Clinton appointees were no different than Republicans overall, they were quite different in non-unanimous cases, casting only 22 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 87.5 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 cannot infer much from them. However scant, though, these data are consistent with what we see elsewhere: a very significant partisan split at the margin, despite strong similarity on the issue area as a whole.

Table 5

Percentage of votes by United States Court of Appeals judges in favor of preemption in published decisions, organized by appointing president (minimum of 100 votes), 2005–2009

	All decisions	Non-unanimous decisions
Judges appointed by President Carter	44.76% N=124	50.00% N=9
Judges appointed by President Reagan	53.65% N=274	64.29% N=14
Judges appointed by President G.H.W. Bush	53.87% N=168	66.67% N=12
Judges appointed by President Clinton	57.73% N=343	21.21% N=33
Judges appointed by President G.W. Bush	55.71% N=280	87.5% N=12

Comparing the voting records of Republicans and Democrats across various panel compositions also illustrates a large degree of partisan consensus in the full universe of preemption decisions, but with an important caveat. As reflected in the figures on unanimity *infra*, Republicans and Democrats voted quite similarly when they served on ideologically heterogeneous panels—panels with at least one Republican and one Democrat. But a comparison of the voting records on ideologically homogenous panels—three-judge panels comprised exclusively of Republicans or Democrats—reveals some partisan cleavage. Here,

the difference in voting records between Republicans (50 percent in favor of preemption) and Democrats (36 percent in favor of preemption) is considerably larger—indeed, statistically significant at the $P=.05$ level.⁴¹ What is more, this difference is almost entirely attributable to a shift in behavior by Democrats. While Democrats voted in favor of preemption at a rate of roughly 54 cases when serving on panels with at least one Republican, that rate dropped to 35 percent when the panel consisted entirely of Democratic appointees.

⁴¹ The Z value for the difference of these proportions is 2.24. Thus, the likelihood of obtaining this large of a difference if the null hypothesis is true is less than 5 percent.

Table 6

Percentage of votes by United States Court of Appeals judges in favor of preemption in published decisions, organized by panel composition, 2005–2009

Partisan composition of panel	Republican appointees	Democratic appointees
3 Republicans N=101	49.50% N=303	———
2 Republicans and 1 Democrat N=174	58.05% N=348	55.17% N=174
1 Republican and 2 Democrats N=116	56.96% N=116	53.26 N=234
3 Democrats N=26	———	35.26 N=78
En banc N=3	18.75% N=16	0.00% N=23

Finally, sorting the data by the court of decision reveals some interesting disparities, though the small sample sizes should make us cautious in drawing any conclusions. In a majority of the circuits (7 of 13), Democrats actually voted in favor of preemption more frequently than Republicans, and in at least one court (the First Circuit) by a wide margin.

Perhaps unsurprisingly, the discrete group of judges most likely to vote against preemption was the Democratic appointees on the Ninth Circuit. Interestingly, though, 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 Ninth Circuit) were more likely to vote against preemption than Democrats on most other courts.

Table 7

Proportion of votes in favor of preemption by court of decision

	Total	Republicans	Democrats
First Circuit N=27	46.30% N=81	39.83% N=59	63.64% N=22
Second Circuit N=36	57.87% N=108	65.25% N=59	48.98% N=49
Third Circuit N=24	48.59% N=71	57.69% N=39	37.50% N=32
Fourth Circuit N=19	52.63% N=57	57.14% N=42	40.00% N=15
Fifth Circuit N=45	39.63% N=135	36.11% (N=90)	45.00% N=45
Sixth Circuit N=38	44.71% N=123	42.31% N=65	47.41% N=58
Seventh Circuit N=38	61.84% N=134	65.85% N=82	51.56% N=32
Eighth Circuit N=48	69.79% N=144	69.37% N=111	71.21% N=33
Ninth Circuit N=69	35.46% N=227	40.43% N=94	31.95% N=133
Tenth Circuit N=22	51.52% N=66	44.79% N=48	69.44% N=18
Eleventh Circuit N=17	54.90% N=51	54.69% N=32	55.26% N=19
D.C. Circuit N=7	80.95% N=21	83.33% N=18	66.67% N=3
Federal Circuit N=8	75.00% N=24	66.67% N=12	83.33% N=12

III. Discussion

Overall, these data reveal some interesting patterns, but two core themes stand above the others. The first is one of bipartisan consensus. In the vast majority of published preemption decisions, United States Court of Appeals judges were unanimous. Indeed, the rate of unanimity in preemption cases (over 94 percent) exceeds our best estimates for the rate at which the circuit courts decide published decisions unanimously in general (90 to 93 percent), and perhaps by a significant margin. While Republicans voted in favor of preemption at a rate exceeding that for Democrats, the margin was relatively small (around 5 percent). Thus, preemption is unlike a number of other legal issues handled by the Courts of Appeals, carrying greater political salience, for which recent studies have found significant partisan voting differences.⁴²

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 reveal 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 apparent ideological “panel effect” in voting patterns, at least among Democrats; and (3)

⁴² 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*, at 21–40, 54–57.

the differences in voting patterns across the federal circuit courts. The following section briefly 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).⁴³ 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 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 ideological division among the justices.

⁴³ If we count all decisions in which the Court was unanimous as to the result from October Term 1991 through October Term 2008, then the Court's reate of unanimity in all cases decided with signed opinions after oral argument was 41.93% (639 out of 1,524). If instead we only count those decisions in which the Court was unanimous both as to the result and the opinion, then the justices were unanimous in 32.68% of its cases decided with signed opinions after oral argument over this time frame. *See The Statistics*, 123 HARV. L. REV. 382, 387 (2009); *The Statistics*, 122 HARV. L. REV. 516, 521 (2008); *The Statistics*, 121 HARV. L. REV. 436, 441 (2007); *The Statistics*, 120 HARV. L. REV. 372, 377 (2006); *The Statistics*, 119 HARV. L. REV. 415, 423 (2005); *The Statistics*, 118 HARV. L. REV. 497, 502 (2004); *The Statistics*, 117 HARV. L. REV. 480, 484 (2003); *The Statistics*, 116 HARV. L. REV. 453, 457 (2002); *The Statistics*, 115 HARV. L. REV. 539, 543 (2001); *The Statistics*, 114 HARV. L. REV. 390, 394 (2000); *The Statistics*, 113 HARV. L. REV. 400, 404 (1999); *The Statistics*, 112 HARV. L. REV. 366, 370 (1998); *The Statistics*, 111 HARV. L. REV. 431, 433 (1997); *The Statistics*, 110 HARV. L. REV. 367, 369 (1996); *The Statistics*, 109 HARV. L. REV. 340, 342 (1995); *The Statistics*, 108 HARV. L. REV. 372, 374 (1994); *The Statistics*, 107 HARV. L. REV. 372, 374 (1993); *The Statistics*, 106 HARV. L. REV. 378, 380 (1992).

At the same time, in those preemption cases in which 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 becomes 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.⁴⁴

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 ideological friction than the average issue on the Court's docket. But when the justices have disagreed, Republicans (and conservatives) have favored preemption much more frequently than Democrats (and liberals).

B. *Ideological panel effects*

Another pattern worth noting concerns the behavior of Democratic appointees in cases decided by ideologically homogenous panels. As Table 6 illustrates, Democratic judges voted in favor of preemption much less frequently when serving on panels comprised

⁴⁴ 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.

exclusively of fellow Democrats. Specifically, Democratic judges voted in favor of preemption at a rate of 54 percent when serving on panels with at least one Republican appointee. But that rate fell to only 35 percent when Democrats served on panels comprised only of Democrats. By contrast, Republican voting patterns were fairly consistent across varying panel compositions. (Indeed, Republican judges were *least* likely to vote in favor preemption when serving on all-Republican panels, though the difference between this rate and those for Republicans serving on ideologically mixed panels is not statistically significant.)

Given that the number of decisions falling into each category is relatively small, and that the results concerning Republican judges serving on all-Republican panels is rather odd, we should be cautious in drawing any definite conclusions. Still, the data suggest the existence of an ideological “panel effect” in preemption cases, albeit only for Democrats: The absence of a potential dissenting voice in the conversation appears to have led Democratic judges (but not Republicans) to indulge their ideological preferences more freely and frequently.

Such behavior would be consistent with the findings of other studies of judicial voting patterns on the Courts of Appeals. The study by Sunstein and his co-authors discussed above, for instance, found statistically significant panel effects in the voting records of circuit court judges in sixteen of the twenty-four issue areas they examined.⁴⁵ And separate studies of D.C. Circuit opinions in administrative law cases by Richard Revesz and by Frank Cross and Emerson Tiller found similar patterns. Furthermore, the idea that judges would behave differently when surrounded by like-minded colleagues is well grounded in research from social psychology concerning group deliberations. Groups of like-minded persons tend to push one another towards the extremes of their common beliefs, while the existence of diverse thinkers (or potential whistle-blowers) in a group tends to moderate the results of the group’s deliberations.

⁴⁵ See SUNSTEIN ET AL., *supra* note ____, at 24–57.

Again, more research is necessary to determine whether this apparent pattern is genuine—whether Democratic appointees actually vote differently in preemption cases when the panel is comprised exclusively of Democrats. But if the effect is real, it would be interesting, for it would show that the ideological composition of a panel can influence judicial decision making even in an area of the law that is not particularly ideological. Stated differently, it would show that group dynamics can significantly amplify (or moderate) even small ideological differences between Republican and Democratic judges.

3. *Differences across the Courts of Appeals*

Finally, as Table 7 illustrates, the data reveal some large 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 80 percent and 70 percent, respectively. In contrast, judges on the Ninth Circuit (35 percent) and the Fifth Circuit (40 percent) were quite hostile to preemption, at least in relative terms. 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 Eighth 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 Eighth Circuit. Meanwhile, Republicans on the Ninth Circuit were less likely to vote in favor of preemption than Democrats on any court other than their colleagues on the Ninth Circuit and those on the Third Circuit.

Because the number of cases decided by any one circuit was rather small (between 8 and 69), some of these disparities might well be no more than noise in the data. Nonetheless, the results at least 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 she is likely to decide a preemption case 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 the circuit courts’ decisions more generally.

Conclusion

Even if the core findings of this study only confirm what many already suspected, they still tell us something useful about American politics and their influences on judicial decision making. First, although many issues seem to have become ideological battlegrounds in the circuit courts, federal preemption has not been one of them. One could certainly imagine a different state of affairs. Given the significance of preemption, both in terms of structural principles and practical consequences, it could have been source of substantial friction between Republicans and Democrats. But it was not. The accepted sources of legal authority, or perhaps the norms of consensus and collegiality on the Courts of Appeals, have largely controlled judicial behavior in this area. This says something important about the issue of preemption, as well as the degree to which decision making by federal circuit courts can accurately be called “political.”

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 state tort liability, have been successful in shaping *their* party's judicial nominations. Or it might be a combination of the two.

In all events, 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. Knowing this provides some insight into the policy priorities of the two major parties as they relate to judicial nominations—and the extent to which those policy goals have actually influenced judicial decision making.