
NEW EVIDENCE ON THE PRESUMPTION AGAINST PREEMPTION: AN EMPIRICAL STUDY OF CONGRESSIONAL RESPONSES TO SUPREME COURT PREEMPTION DECISIONS

Cases regarding federal preemption of state law are among the most important decided by the Supreme Court, not only because they determine the fate of state laws that significantly impact people's lives,¹ but also because they substantially affect the balance of power between states and the federal government.² Unfortunately, although preemption decisions are very important, they are also remarkably inconsistent.³ For decades, the Court has claimed to apply a presumption against finding federal preemption of state law.⁴ However, the Court has not reliably applied this presumption,⁵ and Justices frequently disagree about when the presumption applies⁶ and what result it requires in any given case.⁷ This inconsistency has led to accusations that the Court is simply imposing its substantive preferences in preemption cases.⁸

¹ See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (striking down local regulation intended to improve air quality); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (upholding state law intended to reduce prescription drug prices).

² See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000). Preemption jurisprudence is also important because preemption “is almost certainly the most frequently used doctrine of constitutional law in practice.” Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

³ See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 (“The Supreme Court’s preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And the decisional outcomes are difficult to cohere.”); Nelson, *supra* note 2, at 232 (“Most commentators who write about preemption agree on at least one thing: [m]odern preemption jurisprudence is a muddle.”).

⁴ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–16 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁵ See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318–24 (2004) (arguing that in many recent cases the Court has actually applied a presumption in favor of preemption); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002) (same).

⁶ Compare *Bates v. Dow Agrosiences LLC*, 125 S. Ct. 1788, 1801 (2005) (applying the presumption against preemption), with *id.* at 1806 (Thomas, J., concurring in the judgment in part and dissenting in part) (arguing against applying the presumption in this case because the presumption “does not apply . . . when Congress has included within a statute an express preemption provision”).

⁷ See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 263–64 (2004) (Souter, J., dissenting) (arguing that the majority’s ruling was inconsistent with the presumption against preemption).

⁸ See, e.g., Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 471–72 (2002) (arguing that conservative Justices have

The importance and inconsistency of preemption doctrine have prompted many academics to suggest ways for the Court to improve its preemption jurisprudence. Some argue that the Court should apply a more robust presumption against preemption to better protect federalism values.⁹ Others argue that the Court should do away with the presumption and simply do its best to interpret statutory preemption provisions using conventional tools of statutory interpretation.¹⁰

One thing both sides agree on is that the Supreme Court's preemption jurisprudence should be informed, at least to some extent, by how Congress responds to the Court's preemption decisions. That is, both sides make arguments that rely on assumptions about whether pro-preemption or anti-preemption forces can better protect themselves in Congress if the Supreme Court misinterprets how broadly preemptive Congress intended a statute to be.¹¹ In light of this agreement that congressional responses matter, there is a remarkable gap in scholarly writing about preemption issues: no study has looked at what Congress actually does after the Supreme Court decides preemption cases.

This Note begins the process of filling in this gap. It looks at Congress's responses to every Supreme Court preemption decision between the 1983 and 2003 Terms to see whether the facts support either side's argument. Ultimately, this Note concludes that neither side should make arguments based on likely congressional responses to the Court's preemption decisions. The data show that Congress almost never responds to the Court's preemption decisions, so mistaken interpretations for or against preemption are unlikely to be corrected.

Part I of this Note summarizes the ongoing debate over the presumption against preemption and explains the weight that academics on both sides place on Congress's likely response to preemption decisions. Part II provides the empirics: it describes congressional responses to Supreme Court preemption decisions between the 1983 and 2003 Terms. Part III offers some possible explanations for trends in congressional behavior uncovered in Part II. Part IV discusses the implications for courts of the findings in Parts II and III; it argues that in light of Congress's failure to respond to preemption decisions, the Court should adopt a pragmatic approach in preemption cases when

been quick to find state law preempted to achieve their substantive goals); Michael S. Greve, *Federal Preemption: James Madison, Call Your Office*, 33 PEPP. L. REV. 77, 80-81 (2005) (accusing liberal Justices of applying the presumption against preemption to achieve their substantive goals).

⁹ See, e.g., Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1850 (2005).

¹⁰ See, e.g., Goldsmith, *supra* note 3, at 200-02.

¹¹ See *infra* section I.C, pp. 6-8.

traditional sources of statutory interpretation are ambiguous. Part V concludes.

I. THE PRESUMPTION AGAINST PREEMPTION

A. *Current Doctrine*

Federal law can preempt state law either expressly or impliedly, and implied preemption can occur either because Congress has occupied the entire regulatory field a state seeks to enter or because state law conflicts with federal law.¹² While these varying types of preemption pose slightly different issues for courts, the Supreme Court has consistently said that “[t]he purpose of Congress is the ultimate touchstone” in every pre-emption case.¹³ The Court discerns Congress’s purpose primarily by looking to the text and structure of the federal statute at issue.¹⁴ Unfortunately, the statutory text is often indeterminate in preemption cases. In implied preemption cases, there are no statutory provisions explaining which state laws Congress intended to preempt, and even when Congress includes an express preemption clause in a statute, such clauses are often absurdly vague or appear to be contradicted by broad “savings clauses” that purport to protect areas of state regulation.¹⁵ For example, the Employee Retirement Income Security Act of 1974¹⁶ (ERISA) preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”¹⁷ But what does “relate to” mean in this context? For example, does it prohibit states from imposing prevailing wage laws¹⁸ or taxing hospitals?¹⁹ As Justice Scalia, normally an avowed textualist, has pointed out, “applying the ‘relate to’ provision according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.”²⁰

This example helps illustrate that multiple interpretations of the preemptive scope of a federal statute are almost always plausible, and

¹² See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality opinion).

¹³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (alteration in original) (quoting *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

¹⁴ See *id.* at 486.

¹⁵ See Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 26–27 (2005) (providing examples).

¹⁶ 29 U.S.C. §§ 1001–1461 (2000).

¹⁷ *Id.* § 1144(a).

¹⁸ See *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 323–34 (1997).

¹⁹ See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654–68 (1995).

²⁰ *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring).

the Court must choose one.²¹ The hard question for the Court is: how should it do so?

For several decades now, the Court's answer has been to apply the presumption against preemption:

In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."²²

The Court applies the presumption both to determine "'whether Congress intended any pre-emption at all' and to 'questions concerning the *scope* of [the federal statute's] intended invalidation of state law.'"²³ And while scholars may debate the extent to which the Court actually applies a presumption against preemption,²⁴ there is no question that the Court invokes the doctrine religiously.²⁵

B. Rationales for the Presumption and Their Weaknesses

The Court has offered many rationales for the presumption against preemption over the years, all involving the promotion of federalism. Of course, general paeans to the constitutional importance of federalism are not enough to justify the presumption because the Constitution also places a high value on national unity.²⁶ In particular, the Supremacy Clause makes clear that validly enacted federal laws trump conflicting state laws, and there is no straightforward textual basis in the Constitution for favoring states when interpreting the preemptive scope of statutes.²⁷ Therefore, the Court has tried to offer more nuanced federalism-based rationales for the presumption. Opponents of

²¹ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947) ("It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide."); Nelson, *supra* note 2, at 296.

²² *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (omission in original) (citation omitted) (quoting *Rice*, 331 U.S. at 230).

²³ *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260–61 (2004) (Souter, J., dissenting) (quoting *Medtronic*, 518 U.S. at 485).

²⁴ See sources cited *supra* note 5.

²⁵ See, e.g., *Medtronic*, 518 U.S. at 485; *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–16 (1985); *Rice*, 331 U.S. at 230.

²⁶ See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. (forthcoming Apr. 2007) (manuscript at 12–14, on file with the Harvard Law School Library).

²⁷ See Goldsmith, *supra* note 3, at 184. One might cite "the role of States as separate sovereigns" that inheres in the Tenth Amendment," *id.* (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting)), but "[s]tate sovereignty ends precisely at the point to which federal power, properly exercised, extends," *id.*, so the Tenth Amendment does not provide a clear textual basis for favoring states over the federal government in preemption analysis.

the presumption, however, have offered strong counterarguments against each of these rationales.

For example, the Court often says it applies the presumption to ensure “that ‘the federal-state balance’ will not be disturbed unintentionally by Congress or unnecessarily by the courts.”²⁸ The problem with this argument is that it only looks at one type of potential error: it assumes that through vagueness Congress can only preempt state law it did not intend to, and that courts can only misread statutes to preempt more state law than Congress intended.²⁹ There is no reason to think, however, that the opposite mistakes would not be just as common; that is, it seems equally likely that Congress could pass unintentionally vague language that it intended to be preemptive, and that courts could interpret that language to preempt less state law than Congress intended.³⁰

Justice Stevens made a more refined federalism-based argument for the presumption against preemption in his dissent in *Geier v. American Honda Motor Co.*,³¹ arguing that the presumption’s “requirement that Congress speak clearly” when preempting state law allows “the structural safeguards inherent in the normal operation of the legislative process [to] operate to defend state interests from undue infringement.”³² Put another way, by requiring Congress to speak clearly when preempting state law, the Court forces Congress to notify states that their interests are threatened, thereby allowing states to protect themselves.³³ As Professor Jack Goldsmith argues, however, any clear rule would put states on notice of what they had to watch out for in Congress; for example, a presumption in favor of preemption would notify states to be wary of and lobby against any bill that did not expressly disavow preempting state law.³⁴ Thus, “the notice argument depends at bottom on a constitutional reason to bias outcomes in favor of states — a reason that is thus far lacking” in the Court’s jurisprudence.³⁵

²⁸ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993) (“In the interest of avoiding unintended encroachment on the authority of the States . . . , a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.”).

²⁹ See Goldsmith, *supra* note 3, at 185–86.

³⁰ See *id.*

³¹ 529 U.S. 861.

³² *Id.* at 907 (Stevens, J., dissenting).

³³ See Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1385 (2001) (stating that the presumption against preemption “makes sure that all the states’ potential defenders have notice of what is at stake”).

³⁴ See Goldsmith, *supra* note 3, at 186–87.

³⁵ *Id.* at 187.

The best constitutional argument for the presumption against preemption may be one the Court has not yet made explicitly. The Framers of the Constitution intended for the federal government to have only certain limited powers, with remaining lawmaking authority left to the states.³⁶ However, when the New Deal Court effectively gave Congress plenary lawmaking power under the Commerce Clause, this original intent was deeply threatened.³⁷ The Court developed the presumption against preemption at the same time that it gave Congress broader Commerce Clause authority, and the initial purpose of the presumption appears to have been to protect some measure of state authority in light of Congress's newly recognized power to legislate in virtually any field.³⁸ Thus, a strong presumption against preemption may be a way to "translate" the Framers' original intent into the modern-day world.³⁹

Ultimately, however, this argument relies on a leap of faith. One must accept both that the Framers' original intent for the balance between state and federal power is still appropriate in modern America despite our dramatically changed circumstances, and that the presumption against preemption is a reasonable second-best way to translate that intent into today's world.⁴⁰ Some will accept this line of reasoning and some will not, and it is a fragile basis for a principle so frequently invoked in important cases.

C. *A More Persuasive Justification?*

In light of the highly contested nature of the normative arguments for and against the presumption against preemption, some scholars have tried to develop more objective, empirical arguments to support

³⁶ See THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); Young, *supra* note 9, at 1765–71.

³⁷ See, e.g., Gardbaum, *supra* note 2, at 806; Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 649 (1996) (arguing that the modern interpretation of the Commerce Clause and the idea that the federal government has only certain enumerated powers are fundamentally contradictory).

³⁸ See Gardbaum, *supra* note 2, at 806–07; Lawrence Lessig, *Translating Federalism*: United States v. Lopez, 1995 SUP. CT. REV. 125, 167–68.

³⁹ See Goldsmith, *supra* note 3, at 187. This need for translation also supplies a counterargument to Professor Caleb Nelson's contention that the original understanding of the Supremacy Clause does not support a presumption against preemption. See Nelson, *supra* note 2, at 290–303. Given how much the federal government's power has diverged from the original understanding of what it would be, the presumption could be seen as a necessary "compensating adjustment" to achieve something more like the balance of power the Framers originally intended. See Young, *supra* note 9, at 1849.

⁴⁰ Cf. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383–87, 395–412 (1997) (arguing that we should not be bound by the original understanding of the Constitution and discussing the problems with "translation").

or discredit the presumption. These arguments rely on empirical claims about the relative political power of pro-preemption and anti-preemption interest groups and which side is better able to correct erroneous judicial interpretations of the intended preemptive scope of federal statutes.

Professor Roderick Hills makes the most persuasive argument of this type in favor of the presumption against preemption. He argues that the presumption is justified because pro-preemption groups (generally business interests) have far more ability and incentive than anti-preemption groups (usually states, environmentalists, or consumer advocates) to lobby Congress on preemption issues.⁴¹ Therefore, pro-preemption groups are better able to persuade Congress to correct mistaken judicial interpretations of the intended preemptive scope of statutes than are anti-preemption groups.⁴² For this reason, “where a statute is ambiguous, the court ought to interpret the preemptive force of federal statutes to burden interest groups favoring preemption,” that is, apply a presumption against preemption.⁴³ Thus, Professor Hills sees the presumption as analogous to what Professor Einer Elhauge has called “preference-eliciting statutory default rules.”⁴⁴ That is, when a statute’s preemptive effect is unclear, the presumption helps determine true legislative preferences by generating rulings that “burden[] some politically powerful group with ready access to the legislative agenda.”⁴⁵

Other scholars attack the presumption against preemption by making precisely the opposite assumption about which side in preemption debates is more powerful. For example, Professor Goldsmith argues:

States are among the most influential of interest groups in the federal legislative process, and thus are relatively well suited to convince Congress to revise unwanted judicial interpretations. Erroneous judicial preemptions (which adversely affect states) are thus more likely, on balance, to be cor-

⁴¹ See Hills, *supra* note 26 (manuscript at 62–69). Professor Hills argues that pro-preemption forces have greater ability and incentive to lobby Congress on preemption issues because they often “have an interest in regulatory uniformity for its own sake,” *id.* (manuscript at 64), while “anti-preemption groups have less of a consistent interest in eliminating preemption for the sake of state diversity,” *id.* (manuscript at 68). For example, while business interests might favor preemptive legislation for the sake of uniformity even if it slightly increased the stringency of regulations to which business was subject, *see id.* (manuscript at 67–68), environmentalists would never lobby to eliminate preemption if they thought the result would be less stringent environmental standards overall, *id.* (manuscript at 68–69).

⁴² See *id.* (manuscript at 62–63).

⁴³ *Id.* (manuscript at 63).

⁴⁴ Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002), *cited in* Hills, *supra* note 26 (manuscript at 63).

⁴⁵ *Id.* at 2165. Professor Elhauge, however, argues that the presumption against preemption cannot appropriately be considered a “preference-eliciting default rule” because it “favor[s] a set of parties — the states — that has unusually strong, not weak, access to the congressional agenda to get statutes overridden.” *Id.* at 2250.

rected than erroneous judicial nonpreemptions (which adversely affect groups that are in general less influential in Congress than states).⁴⁶

Professor Alan Schwartz makes a similar argument, attempting to prove by a mathematical model that, at least in the product liability context, “[i]t is harder for Congress to correct an erroneous judicial interpretation [finding nonpreemption] than it is for Congress to correct an erroneous judicial interpretation [finding preemption].”⁴⁷

While one may find these arguments more or less intuitively appealing, they are all essentially empirical claims that should be testable. If either side is empirically correct, it could provide strong support for, or a strong argument against, the presumption against preemption. Remarkably, however, no one has ever checked whether any of these empirical claims is true, that is, whether pro-preemption or anti-preemption rulings are more likely to be reversed by Congress. The next Part takes up this project.

II. EMPIRICS

While many scholars, most notably Professor William Eskridge, have tried to determine how often Congress overrides the Supreme Court’s statutory interpretation decisions in general,⁴⁸ no one has ever looked specifically at how often Congress reverses the Court’s preemption decisions, or whether these reversals systematically tend to broaden or narrow preemption. This Part answers these questions. It first describes the Note’s methodology and findings, then briefly details the cases in which Congress responded to the Court’s preemption decisions, and concludes by outlining some areas of law in which the Court has decided numerous preemption cases yet Congress has never responded. Before turning to the Note’s findings, one background fact is important: the broad trend in Congress since 1960 has been toward massive federal preemption of state law.⁴⁹ Any congressional response to the Supreme Court’s preemption decisions must be evaluated against this backdrop of enormous power transfers to the federal government.

⁴⁶ Goldsmith, *supra* note 3, at 186 (footnote omitted).

⁴⁷ Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 29 (2000); *see also id.* at 31–37 (presenting the mathematical model).

⁴⁸ *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); *see also, e.g.*, Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983); Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL. L. REV. 729 (1991); Note, *Congressional Reversals of Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324 (1958).

⁴⁹ *See* U.S. ADVISORY COMM’N ON INTERGOV’T RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY 1 (1992).

A. Methodology and Findings

To determine how often Congress overrides the Supreme Court's statutory preemption decisions, this study first identified every Supreme Court case between the 1983 and 2003 Terms⁵⁰ in which the Court explicitly decided whether a federal statute preempted state law.⁵¹ Then, an exhaustive search of subsequent congressional action was conducted to determine whether Congress had overridden any of these decisions.⁵²

The study's central finding is that Congress almost never overrides the Supreme Court's preemption decisions. Between the 1983 and 2003 Terms the Supreme Court decided 127 cases involving federal

⁵⁰ This time period was chosen for several reasons. First, during this period membership on the Court changed significantly, which assuages concerns that any findings are the result of idiosyncratic behavior by a few Justices. Second, partisan control of Congress shifted, allowing analysis of whether Republican- or Democrat-controlled Congresses respond differently to the Court's preemption decisions. Finally, Supreme Court decisions after the 2003 Term were not analyzed because it seemed more likely that Congress might still respond to them.

⁵¹ An initial list of 316 potential preemption cases was generated by searching the Westlaw database for Supreme Court decisions between the 1983 and 2003 Terms containing any variation of the word "preempt" or "pre-empt" (the Court uses both spellings). These 316 cases were then examined to determine whether they in fact dealt with federal preemption of state law. Most of the results were excluded because they did not relate to federal preemption of state law (for example, the word preempt was used in a different sense, or in describing an earlier case), mentioned preemption only in dissent, or were not full opinions (for example, dissents from denials of certiorari). Decisions that primarily turned on federal Indian law were also excluded, for reasons explained below. Finally, the resulting list of cases was compared to the lists generated by Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006), and Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006), to ensure that no cases were missed.

Cases involving federal Indian law were excluded primarily because these cases involved disputes between Indian tribes and states, and whether they were reversed thus speaks only to the relative power of those groups, not to the relative power of more typical opponents in preemption cases. Moreover, the presumption in Indian law is that states cannot tax or regulate Indians on their reservations unless expressly authorized by Congress, *see, e.g.,* *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973), while the normal rule in other contexts is that states can regulate their citizens unless prohibited from doing so by Congress. Thus, the background principles against which preemption issues are debated in Indian law are very different from those governing other areas of law. In any event, even if these cases had been included in the sample, it would have made virtually no difference in the study's empirical findings. *See infra* note 59.

⁵² This study began by using essentially the same approach that Professor Eskridge used to identify statutory overrides in his seminal article, *Overriding Supreme Court Statutory Interpretation Decisions*, *supra* note 48: searching the Legislative History (LH) database in Westlaw, which contains all congressional committee reports since 1990 and the legislative history of public laws as reprinted in the *U.S. Code Congressional and Administrative News* from 1948 through 1989, for any mention of the preemption cases previously identified. This method was supplemented with two others: reading all subsequent amendments to the statute the Court had interpreted to see if any of them changed the statute's preemptive scope, and reading recent appellate court decisions citing the Supreme Court's decision to see if they mentioned any changes in the preemptive scope of the relevant law since the Court's decision.

preemption of state law,⁵³ finding state law preempted approximately half of the time.⁵⁴ Congress explicitly overrode only two of these 127 decisions⁵⁵ (and part of a third decision⁵⁶). After an additional three of these 127 cases, Congress passed broad new legislation that significantly changed the balance of state and federal power regarding the issue but did not clearly reverse the Supreme Court's decision.⁵⁷ And after two of these 127 decisions, Congress codified the Supreme Court's interpretation of the preemptive force of the statute.⁵⁸ In short, Congress has virtually always accepted the Court's preemption decisions.⁵⁹

Furthermore, in the few cases in which Congress has explicitly reversed the Supreme Court, no discernible pattern in favor of pro-preemption or anti-preemption interest groups emerges. In reversing one decision, Congress reduced the preemptive effect of a federal law;⁶⁰ in partly reversing another, Congress preempted more state law;⁶¹ and in reversing a third, Congress reduced the preemptive effect of a federal law but in a way that primarily benefited business interests,⁶² which are usually pro-preemption. Meanwhile, the three occasions on which Congress substantially changed statutes after the Court interpreted them (without explicitly reversing the Court) all increased federal preemption of state law, but did so in the context of broad new

⁵³ A complete list of the decisions is available at http://www.harvardlawreview.org/issues/120/april07/note/presumption_against_preemption.pdf and is also on file with the Harvard Law School Library. In addition to the 127 cases considered in this study, the list separately provides the thirteen preemption cases decided during the study period that turned on federal Indian law, which were excluded from the sample for the reasons explained above, *see supra* note 51.

⁵⁴ In fifty-nine cases the Court found the state law not preempted, in fifty-nine cases the Court found the state law preempted, and in nine cases the Court found the state law partly preempted.

⁵⁵ *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

⁵⁶ *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

⁵⁷ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Hayfield N.R.R. Co. v. Chi. & N.W. Transp. Co.*, 467 U.S. 622 (1984); *Silkwood v. Kerr-McGee Corp.*, 465 U.S. 238 (1984).

⁵⁸ *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473 (2002); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990).

⁵⁹ The same is true of the Court's preemption decisions applying federal Indian law: only one of the Court's thirteen such decisions between the 1983 and 2003 Terms was later modified by Congress. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court held that California could not enforce its bingo regulations on tribal bingo games occurring on reservations. Soon thereafter, Congress passed the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168 (2000) and 25 U.S.C. §§ 2701-2721 (2000)), which allows tribes to run bingo games and other limited types of gambling without state regulation, but also prohibits certain types of gambling (such as slot machines) on reservations unless the tribe reaches a compact with the state. *See* Linda King Kading, *State Authority To Regulate Gaming Within Indian Lands: The Indian Gaming Regulatory Act*, 41 *DRAKE L. REV.* 317, 327-32 (1992).

⁶⁰ *See infra* section II.B.1.a, p. 11.

⁶¹ *See infra* section II.B.1.c, p. 12.

⁶² *See infra* section II.B.1.b, p. 12.

regulatory regimes.⁶³ While these three cases certainly evince the broad trend toward federal preemption of state law, they do not demonstrate that pro-preemption forces are able to correct erroneous statutory interpretations because there is no evidence that Congress's passage of these broad amendments had anything to do with the Court's decisions in these cases.

B. Congressional Responses to Supreme Court Preemption Decisions

Because Congress has responded to so few of the Supreme Court's statutory preemption decisions, it is impossible to draw valid statistical conclusions from the data. However, it is possible to examine the instances when Congress altered the preemptive scope of a federal statute the Court had interpreted to see if any trends appear. That is the focus of this section.

1. *Decisions Congress Overrode.* — After each of the following cases, Congress intentionally and explicitly overrode all or part of the Court's decision.⁶⁴

(a) *Exxon Corp. v. Hunt*.⁶⁵ — The Supreme Court held that section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980⁶⁶ (CERCLA) preempted a New Jersey tax on hazardous waste producers that was intended to fund the cleanup of hazardous waste sites in New Jersey and compensate those injured by the sites. Before the Supreme Court decided the case, Congress had begun working on a bill to repeal section 114(c), which passed soon after the Court issued its decision.⁶⁷ Congress's purpose could not have been clearer: "The [bill] clarifies that States are not preempted from imposing taxes for purposes already covered by CERCLA."⁶⁸

⁶³ See *infra* section II.B.3, pp. 13–15.

⁶⁴ Another case deserves mention here even though Congress did not override it. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), the Supreme Court struck down a Florida statute that made it illegal for a person to use the direct molding process to duplicate vessel hulls made by another. The Court found the Florida statute preempted by federal patent law, saying: "States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law." *Id.* at 156. Nine years later Congress enacted the Vessel Hull Design Protection Act, Pub. L. No. 105-304, tit. V, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1301–1332 (2000)), which provided federal protection against the type of imitation that Florida had earlier tried to prohibit. See *id.*; see also H.R. REP. NO. 105-436, at 12–13 (1998) (describing the need for greater protection of boat hull designs in light of *Bonito Boats*). Thus, rather than overriding *Bonito Boats* and allowing states to provide this protection by narrowing the scope of patent law preemption, Congress provided the protection itself.

⁶⁵ 475 U.S. 355 (1986).

⁶⁶ 42 U.S.C. §§ 9601–9675 (2000).

⁶⁷ See *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125–26 (3d Cir. 1991) (summarizing Congress's actions in response to *Hunt*).

⁶⁸ H.R. REP. NO. 99-962, at 225 (1986).

(b) *Adams Fruit Co. v. Barrett*.⁶⁹ — The Court held that despite a Florida statute providing that worker's compensation was the sole source of liability for employers whose employees were injured on the job, a group of migrant farm workers who were injured in a car accident while being driven to work in a company van could sue their employer under the federal Migrant and Seasonal Agricultural Worker Protection Act.⁷⁰ Two years later, Congress attached a rider to a bill appropriating funds for the Executive Branch that temporarily reversed *Adams Fruit*. The rider provided that "where a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker, the workers' compensation benefits shall be the exclusive remedy for loss of such worker."⁷¹ In 1995, Congress made this change permanent by enacting a bill specifically to overturn *Adams Fruit*.⁷²

(c) *Barnett Bank v. Nelson*.⁷³ — The Supreme Court held that a federal statute that allowed banks in small towns to sell insurance preempted a Florida statute that prohibited most banks from selling insurance. The Court also summarized the rule it had developed for when a federal banking statute preempted state law: "[Our] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted [to national banks]."⁷⁴ Three years later, Congress passed the Gramm-Leach-Bliley Act.⁷⁵ Section 104(d)(2) of the Act⁷⁶ codified and clarified the *Barnett* standard for preemption of state laws regulating banks' sale of insurance as to any state law passed before September 3, 1998 (the date on which the provisions of section 104(d)(2) were first introduced in Congress).⁷⁷ Section 104(e) of the Act,⁷⁸ however, partly overrode *Barnett Bank* by preempting any state law passed after September 3, 1998, that treated banks differently from any other entity selling insurance.⁷⁹

⁶⁹ 494 U.S. 638 (1990).

⁷⁰ 29 U.S.C. §§ 1801–1872 (2000).

⁷¹ Pub. L. No. 102-392, § 325, 106 Stat. 1703, 1728 (1992) (codified at 29 U.S.C. § 1854(d) (2000)).

⁷² Act of Nov. 15, 1995, Pub. L. No. 104-49, 109 Stat. 432 (1995) (codified at 29 U.S.C. §§ 1821, 1831, 1842, 1854 (2000)); see also H.R. REP. NO. 104-875, at 38–39 (1997) (describing Congress's efforts to reverse *Adams Fruit*).

⁷³ 517 U.S. 25 (1996).

⁷⁴ *Id.* at 33.

⁷⁵ Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.).

⁷⁶ 15 U.S.C. § 6701(d)(2) (2000).

⁷⁷ See S. REP. NO. 106-44, at 12–14 (1999).

⁷⁸ 15 U.S.C. § 6701(e).

⁷⁹ See S. REP. NO. 106-44, at 13–14; see also *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 404–06 (6th Cir. 2001) (explaining the history and application of section 104).

2. *Decisions Congress Codified.* — After each of the following cases, Congress passed bills codifying the Court's central holding.

(a) *English v. General Electric Co.*⁸⁰ — The Supreme Court held that although Congress had heavily regulated the field of nuclear safety and preempted most state law in the area, a worker who was fired for pointing out safety violations at a nuclear facility could sue under state law for intentional infliction of emotional distress. Apparently endorsing this decision, Congress soon amended the statutes regulating nuclear safety to state expressly that they “may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.”⁸¹

(b) *Wisconsin Department of Health & Family Services v. Blumer.*⁸² — The Supreme Court held that Wisconsin's “income-first” rule for calculating how much money a couple could keep and still qualify for Medicaid was not preempted by the Medicare Catastrophic Coverage Act of 1988⁸³ (MCCA). The income-first approach generally requires couples to spend more of their savings before qualifying for Medicaid than does the alternative “resources-first” rule.⁸⁴ In 2006, Congress decided to write the income-first rule into the MCCA,⁸⁵ not only making it clear that states could use it, but also requiring states that were using the resources-first rule to switch to the income-first approach.

3. *Decisions Congress May Have Inadvertently Modified.* — After each of the following cases, Congress passed a comprehensive regulatory statute that gave the federal government substantially more power to regulate the issue area that was the subject of the case. However, in passing these statutes, Congress never indicated that it intended to reverse these decisions, and the revised statutes would not have clearly altered the results in any of these cases.

(a) *Silkwood v. Kerr-McGee Corp.*⁸⁶ — The Supreme Court held that the Atomic Energy Act of 1954⁸⁷ did not preempt a state court's award of punitive damages against Kerr-McGee, a nuclear facility operator, for failing to protect its employees from radioactive material.

⁸⁰ 496 U.S. 72 (1990).

⁸¹ Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(e), 106 Stat. 2776, 3124 (codified at 42 U.S.C. § 5851(h) (2000)).

⁸² 534 U.S. 473 (2002).

⁸³ 42 U.S.C.A. §§ 1320b-10, 1395b-2, 1396r-5 (West 2003 & Supp. 2006).

⁸⁴ See *Blumer*, 534 U.S. at 484.

⁸⁵ See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6013(a), 120 Stat. 4, 64 (2006) (to be codified at 42 U.S.C. § 1396r-5(d)(6)).

⁸⁶ 464 U.S. 238 (1984).

⁸⁷ 42 U.S.C. §§ 2011 to 2297h-13 (2000).

Four years later, Congress passed the Price-Anderson Amendments Act of 1988,⁸⁸ which prohibited courts from awarding punitive damages in lawsuits against nuclear facilities if the federal government had an indemnity agreement with the facility.⁸⁹ This would not have reversed the outcome in *Silkwood* because Kerr-McGee did not have such an indemnity agreement,⁹⁰ and in the legislative history of the Amendments Act, *Silkwood* is never mentioned. However, several courts that have interpreted the Act have seen it as a response to *Silkwood*.⁹¹

(b) *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*⁹² — The Supreme Court held that a Minnesota company's attempt to use a state statute to obtain a segment of abandoned railroad by eminent domain was not preempted by the Staggers Rail Act of 1980,⁹³ which "regulate[d] the process by which rail carriers [could] abandon unprofitable lines and provide[d] a mechanism for shippers to obtain continued service by purchasing lines or subsidizing their operation."⁹⁴ Eleven years later, Congress passed the ICC Termination Act of 1995⁹⁵ (ICCTA). The ICCTA enacted broad preemptive language,⁹⁶ which numerous courts have held blocks states from using their eminent domain powers against railroads in many circumstances.⁹⁷ Again, however, *Hayfield* was never mentioned during con-

⁸⁸ Pub. L. No. 100-408, 102 Stat. 1066 (codified as amended in scattered sections of 42 U.S.C.).

⁸⁹ *Id.* § 14, 102 Stat. at 1078 (codified at 42 U.S.C.A. § 2210(s) (West 2003 & Supp. 2006)).

⁹⁰ See *Silkwood*, 464 U.S. at 251-52 & n.12; *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997).

⁹¹ See, e.g., *Farley*, 115 F.3d at 1503 ("[T]he 1988 Amendments can be read in part as a congressional response to the result in *Silkwood* . . ."); *In re TMI*, 67 F.3d 1119, 1125 (3d Cir. 1995) (describing the Amendments Act as a response to *Silkwood* and stating that "it is clear from the unambiguous language of those Amendments that Congress did not intend to change the result the Supreme Court had reached in *Silkwood*").

⁹² 467 U.S. 622 (1984).

⁹³ Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 11, 45, and 49 U.S.C.).

⁹⁴ *Hayfield*, 467 U.S. at 625.

⁹⁵ Pub. L. No. 104-88, 109 Stat. 803 (codified as amended primarily in scattered sections of 49 U.S.C.).

⁹⁶ See *id.* sec. 102(a), § 10,501(b), 109 Stat. at 807 ("The jurisdiction of the Board over . . . the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.").

⁹⁷ See, e.g., *Buffalo S.R.R., Inc. v. Vill. of Croton-on-Hudson*, 434 F. Supp. 2d 241, 248 (S.D.N.Y. 2006) ("[T]he ICCTA has been held to preempt eminent domain proceedings where the state action would 'prevent or unreasonably interfere with railroad operations.'" (quoting *Maumee & W.R.R. Corp., STB Fin. Docket No. 34354*, 2004 WL 395835, at *1 (Surface Transp. Bd. Mar. 3, 2004)); *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (holding that the ICCTA preempted a city's attempt to use eminent domain to obtain a segment of railroad).

gressional deliberations on the ICCTA, so it is unclear whether Congress intended to overturn the decision.

(c) *Louisiana Public Service Commission v. FCC*.⁹⁸ — The Supreme Court held that FCC rules for the depreciation of equipment used by phone companies did not preempt state laws on the same subject because federal law did not authorize the FCC to preempt this type of state law. Ten years later, however, Congress passed the Telecommunications Act of 1996,⁹⁹ which transferred a great deal of authority over intrastate phone service from states to the FCC.¹⁰⁰ The Act did not specify whether it covered depreciation of equipment, and *Louisiana Public* was never mentioned in the recorded deliberations over the bill.

*C. Important Areas of Preemption Doctrine
to Which Congress Has Never Responded*

Reading descriptions of the Supreme Court's preemption decisions to which Congress has responded can give the misleading impression that congressional responses have been the norm, rather than the exception. In fact, however, it has been far more common for Congress to ignore the Court's preemption decisions, even in vitally important areas of law.

For example, between the 1983 and 2003 Terms, the Supreme Court decided nineteen cases interpreting the preemptive scope of ERISA.¹⁰¹ Congress did not pass legislation responding to a single one of these decisions. This is an enormous problem for several reasons. First, the health care system has changed dramatically since Congress passed ERISA, and ERISA's unchanging preemption clause is stymieing state attempts to address current challenges.¹⁰² Second, because

⁹⁸ 476 U.S. 355 (1986).

⁹⁹ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

¹⁰⁰ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

¹⁰¹ See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Boggs v. Boggs*, 520 U.S. 833 (1997); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

¹⁰² See JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 281-85 (2004).

ERISA's preemption clause is so broad, and the Supreme Court has interpreted its remedial provisions so narrowly, plaintiffs injured by new health care delivery systems, such as HMOs, are often unable to recover make-whole remedies, or anything at all.¹⁰³ For these reasons, several Supreme Court Justices have implored Congress to revisit ERISA preemption,¹⁰⁴ but Congress has ignored the call.

The same basic pattern has been repeated in the labor law and arbitration fields. Between the 1983 and 2003 Terms, the Supreme Court decided fourteen cases that asked whether federal labor law preempted state laws or actions,¹⁰⁵ and seven cases interpreting whether the Federal Arbitration Act¹⁰⁶ (FAA) preempted state laws regulating arbitration.¹⁰⁷ Some of these cases have been enormously important and controversial,¹⁰⁸ yet Congress has not responded to any of them.

D. Summary

In the vast majority of cases, the Supreme Court's interpretation of the preemptive effect of a federal statute is the last word on the subject. This Part described the few anomalous cases in which Congress intentionally overrode the Court's interpretation, the related phenomenon of Congress passing broad new preemptive legislation bordering on an earlier Court decision, and the usual outcome of Congress doing nothing at all. Of course, Congress could respond to any of the Court's preemption decisions. The next Part asks why it almost never does.

¹⁰³ See *id.* at 282.

¹⁰⁴ See, e.g., *Davila*, 542 U.S. at 222 (Ginsburg, J., concurring).

¹⁰⁵ See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); *Livadas v. Bradshaw*, 512 U.S. 107 (1994); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993); *United Steelworkers v. Rawson*, 495 U.S. 362 (1990); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851 (1987); *Baker v. Gen. Motors Corp.*, 478 U.S. 621 (1986); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984).

¹⁰⁶ 9 U.S.C. §§ 1–16 (2000).

¹⁰⁷ See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹⁰⁸ See, e.g., *Circuit City*, 532 U.S. at 114–15 (holding that the FAA applied to almost all employment contracts).

III. EXPLANATION

Congress's failure to respond to any particular Supreme Court preemption decision can be explained in one of three ways: a majority in Congress agrees with the decision, a majority in Congress does not care about the decision, or a majority in Congress disagrees with the decision but not strongly enough to motivate Congress to reverse the Court. Each explanation is plausible and undoubtedly true some of the time.¹⁰⁹

The first and most obvious explanation for Congress's failure to respond to a particular preemption decision is that the Court correctly determined the preemptive scope Congress intended the statute to have. In such a case, Congress would agree with the Court's decision and have no desire to change it. This surely occurs, but it cannot possibly be true all of the time. Congress often reverses the Supreme Court's statutory interpretation decisions on issues other than preemption,¹¹⁰ and there is no reason to think the Supreme Court more accurately discerns congressional intent on preemption issues than on other statutory interpretation questions. Furthermore, the Supreme Court sometimes substantially changes its approach to interpreting the preemptive scope of a given statute;¹¹¹ when it does so, the earlier and revised interpretations cannot both accurately reflect what a majority in Congress intended the statute to mean. Thus, at least some of the time, Congress's failure to respond must be for a reason other than that it agrees with the decision.

The second reason Congress often fails to respond is that it has no majority opinion on the preemptive scope of the statute. For many statutes, Congress never seriously considered what it intended the preemptive scope of the legislation to be;¹¹² for others, Congress debated the preemptive scope of the statute but decided to include only vague

¹⁰⁹ One overarching explanation also deserves brief mention. In his study of congressional overrides of Supreme Court decisions, Professor Eskridge found that business groups and state governments were among the most successful interest groups at convincing Congress to reverse the Court. See Eskridge, *supra* note 48, at 348–49 & tbl.7. Because these groups are often pitted against each other in preemption debates, it may be that they usually cancel each other out in each process described above, that is, in shaping how Congress feels about a preemption decision, in getting members of Congress to take a position on preemption, and in blocking congressional majorities from acting.

¹¹⁰ See *id.* at 335–36 (finding that from 1975 to 1990, Congress reversed an average of six Supreme Court statutory interpretation decisions each year).

¹¹¹ Compare, e.g., *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (revising the Court's previous approach to ERISA preemption), with *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (applying the earlier approach).

¹¹² See Gasaway, *supra* note 15, at 26–27. This failure to consider preemption seems especially likely to have occurred on issues for which federal regulation largely predated state regulation, such as nuclear energy, because Congress may not have anticipated that states would try to regulate the issue at all.

or contradictory language about preemption because it could not reach agreement on the issue.¹¹³ When a majority in Congress never agreed on the preemptive scope of a statute, the Supreme Court's determination of that issue is likely to be the last word.

Finally, and most troublingly, Congress sometimes fails to respond to a statutory preemption decision even though a majority in Congress disagrees with it. In many cases, public choice theory provides a compelling explanation of how this could happen.¹¹⁴ A significant number of the Supreme Court's preemption decisions over the last twenty-five years have favored narrow groups with a lot at stake over diffuse groups whose members each stand to lose only a small amount. For example, many of the Supreme Court's decisions regarding ERISA preemption have favored HMOs, insurance companies, or large employers over individuals who have been or might someday be harmed by a medical provider, who lack health insurance, or who have lost a pension benefit.¹¹⁵ Other decisions have favored tobacco companies,¹¹⁶ auto manufacturers,¹¹⁷ and other powerful, concentrated interests over diffuse interests of the general public.¹¹⁸ When the Supreme Court decides a case in a way that favors a powerful interest group, it is unsurprising that members of Congress — even many who disagree with the decision — are unwilling to cross the powerful interest by changing the law in favor of the diffuse public interest.

This explanation is incomplete, however, because in many other cases the Supreme Court has issued preemption decisions that favored diffuse interests over concentrated ones.¹¹⁹ Congress surely disagreed with at least some of these decisions as well, so what explains its failure to act in these cases? Part of the answer is the universally acknowledged principle that it is far harder to change a law than to keep it the way it is,¹²⁰ so even though powerful interests may want Con-

¹¹³ See *id.*

¹¹⁴ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (arguing that small groups with focused interests will often prevail over larger, more diffuse groups).

¹¹⁵ See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

¹¹⁶ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

¹¹⁷ See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

¹¹⁸ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (striking down state regulation of mandatory arbitration clauses used by employers); *United States v. Locke*, 529 U.S. 89 (2000) (striking down state regulation of oil tankers).

¹¹⁹ See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (allowing Maine to continue bulk buying of prescription drugs over the objections of a drug company trade group); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (holding that states can require HMOs to fund coverage deemed medically necessary by independent boards); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (holding that plaintiffs can bring some state law tort claims for harm caused by defective medical devices).

¹²⁰ See, e.g., *Hills*, *supra* note 26 (manuscript at 29–30).

gress to change the law, they may be unable to overcome legislative inertia. Another crucial part of the answer is the agenda-setting process. Given “the scarcity of legislative time” and the intensive effort required to pass statutes, it is not surprising that interest groups are rarely able to convince Congress to correct mistaken Supreme Court interpretations on preemption issues.¹²¹ Thus, even when a majority in Congress disagrees with the Supreme Court’s interpretation of the preemptive scope of a federal statute, and when powerful interest groups support overriding the Court’s decision, Congress sometimes will not override the Supreme Court because it is unwilling to devote the necessary time and energy to the issue.

IV. IMPLICATIONS

The data collected in this Note demonstrate that empirical arguments regarding the presumption against preemption do not clearly favor its supporters or its opponents. As explained in Part II, some supporters of the presumption against preemption argue that the Court should apply the presumption because pro-preemption forces are better able to correct erroneous interpretations in Congress than are anti-preemption forces; meanwhile, opponents of the presumption make exactly the opposite empirical assertion. This Note suggests that both of these empirical claims are incorrect.

Neither pro-preemption nor anti-preemption forces are able to reverse any significant number of Supreme Court interpretations that they believe to be mistaken. Both sides appear to be equally (in)effective at lobbying Congress on preemption issues, and if there is a difference in effectiveness, it is vanishingly small. Thus, these empirical arguments about who is best able to get Congress to respond to mistaken Supreme Court decisions should likely drop out of debates over the presumption against preemption. This leaves the debate back where it started — largely in a stalemate over the relative importance of federalism and nationalism — but with a better sense of which arguments hold water.

While the data collected here thus help resolve this empirical debate, they also lead to a normative argument about how the Court should decide preemption cases. Because Congress virtually never responds to the Court’s preemption decisions, the Court usually has the last word on the preemptive scope of federal statutes. This cries out for at least a modest version of what Judge Posner calls a pragmatic

¹²¹ See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 392.

approach to statutory interpretation.¹²² In many preemption cases, finding state law preempted leaves plaintiffs with no make-whole remedy, creates inequitable results, or produces a dangerous regulatory gap.¹²³ The Court sometimes brushes these consequences aside, hoping that Congress will address them if they are really problematic.¹²⁴ The data presented here suggest that Congress is unlikely to do so. Instead of setting such consequences to the side, when statutory text, congressional intent, and legislative history are indeterminate,¹²⁵ the Court should explicitly consider and give weight to the effects of finding preemption.¹²⁶ This approach may sound unorthodox, impractical, or undemocratic, but the remainder of this Part demonstrates that these critiques are unpersuasive.

A. Pragmatism on Preemption Is Consistent with Current Practice

Looking at consequences to decide preemption cases when traditional sources of statutory interpretation run out would not be a dramatic break from current practice. The Court already considers consequences explicitly in some areas of preemption law.¹²⁷ Furthermore,

¹²² See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57–96 (2003) (describing the pragmatic approach to law); see also WILLIAM D. POPKIN, STATUTES IN COURT 207–48 (1999) (describing “ordinary judging,” a version of pragmatism).

¹²³ See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (“A series of the Court’s decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.”).

¹²⁴ See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282–84 (1995) (O’Connor, J., concurring) (disagreeing with the Court’s interpretation of the FAA but acquiescing in it largely for reasons of stare decisis, and concluding, “[i]t remains now for Congress to correct this interpretation”).

¹²⁵ Such indeterminacy is disappointingly common in the statutes considered in preemption cases that reach the Supreme Court. See Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1594–95 (2003) (book review).

¹²⁶ See POSNER, *supra* note 122, at 59 (explaining that “the core of pragmatic adjudication . . . [is] a heightened concern with consequences”).

¹²⁷ For example, the Court applies the following rule in many cases in which it is asked to evaluate whether a state law or action is preempted by the National Labor Relations Act:

[S]tate regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, *the State’s interest in controlling or remedying the effects of the conduct is balanced against both the interference with the [National Labor Relations] Board’s ability to adjudicate controversies committed to it by the Act, and the risk that the State will sanction conduct that the Act protects.*

Belknap, Inc. v. Hale, 463 U.S. 491, 498–99 (1983) (emphasis added) (citations omitted). More recently, the Court has attempted to justify this consequentialist rule by saying that it is not weighing consequences for their own sake, but rather to determine what Congress likely intended. See *Livadas v. Bradshaw*, 512 U.S. 107, 120–21 (1994). However, this justification assumes either that some consequences are so bad that Congress could not have intended them or that the Court

even when the Court does not explicitly consider consequences in preemption cases, concerns about consequences often seem to influence its opinions.¹²⁸ For example, Professors Samuel Issacharoff and Catherine Sharkey convincingly argue that the underlying motivation for many of the Rehnquist Court's preemption decisions was to prevent states from imposing externalities on their neighbors and to facilitate the creation of a uniform national market.¹²⁹ Numerous other scholars have demonstrated that the Court's preemption decisions appear to have more to do with the substantive preferences of the Justices than with a presumption against preemption or straightforward statutory interpretation.¹³⁰ Thus, without admitting it, the Court already seems to be focused on consequences, so a more explicit focus on consequences would change the outcome in very few cases.

This is especially true because a pragmatic approach to statutory uncertainty about preemption could be consistent with the presumption against preemption. As Judge Posner argues, pragmatism often calls for default rules for reasons of judicial economy, institutional competence, or rule-of-law values.¹³¹ Because the Court is not designed to conduct or evaluate detailed cost-benefit analyses, preemption cases in which statutory text and legislative intent are unclear present a perfect opportunity for this type of default rule. Why choose the presumption against preemption as the pragmatic default rule instead of the opposite presumption? Because the presumption against preemption allows each state to satisfy the preferences of its own citizens, while a presumption in favor of preemption would impose a uniform national policy even when national preferences are unclear.¹³² Of course, if a state appeared to be satisfying its own citizens by imposing externalities on other states, this rationale would be undermined and the Court would be forced to delve deeply into the costs and benefits

can tell which consequences Congress preferred; the former explanation is still a consequentialist inquiry, and if the latter explanation is true then the Court should rely on legislative history, not on a weighing of current costs and benefits, to demonstrate what Congress preferred. For a similarly consequentialist approach, see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487–88 (1996).

¹²⁸ See Meltzer, *supra* note 121, at 376–77 & n.140, 396–97, 409 (arguing that in preemption cases, the Court assumes a “common-law like role” in order to avoid “counterproductive results”).

¹²⁹ See Issacharoff & Sharkey, *supra* note 51, at 1368–69.

¹³⁰ See, e.g., Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1343–45 (2002); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 756, 767–68 (2000); see also David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1193–94 (1999) (reaching the same conclusion based on an analysis of preemption decisions by lower federal courts).

¹³¹ See POSNER, *supra* note 122, at 68–70. For an example of the Court adopting a default rule for these types of reasons, see *Michigan v. Long*, 463 U.S. 1032 (1983).

¹³² See Elhauge, *supra* note 44, at 2249–51.

in such a case. This too, however, would be consistent with current practice because the Court already seems to ignore the presumption against preemption when states impose externalities on their neighbors to reap benefits for themselves.¹³³

B. Pragmatism on Preemption Is Practicable

That the Supreme Court is not designed to conduct or evaluate detailed cost-benefit analyses militates against attempting to measure consequences. However, the Court would rarely have to engage in careful weighing of costs and benefits. Many preemption cases are relatively easy¹³⁴: they can be decided based on text and intent alone, without resort to consequences.¹³⁵ Furthermore, as explained above, even when text and intent are indeterminate, pragmatism would usually call for applying the presumption against preemption as a default rule, so it would be quite rare for the Court to have to delve into specific consequences. In addition, in difficult cases the Court already seems to be considering consequences — it is just doing so without the benefit of empirical evidence supplied by the parties. Weighing consequences based on evidence is certainly more practicable than weighing consequences in a vacuum. Finally, there are many areas of law in which the Court conducts this type of difficult weighing of consequences,¹³⁶ so this approach would not be unprecedented.

C. Pragmatism on Preemption Is Democratic

Some will object that this approach is undemocratic because it gives judges too much discretion. There are at least three responses to this objection. First, as mentioned above, judges would rarely need to consider consequences because traditional methods of statutory interpretation often answer preemption questions. Second, without saying so, the Justices already seem to be considering consequences in difficult cases. Thus, the pragmatic approach would simply make what is currently happening more transparent, and make judges more accountable, by focusing the inquiry on what the Court actually seems to care about when ordinary sources of guidance about statutory meaning are indeterminate: the practical consequences of possible rulings. This would encourage parties to present evidence about consequences, help-

¹³³ See Issacharoff & Sharkey, *supra* note 51, at 1390.

¹³⁴ See Greve & Klick, *supra* note 51, at 55–56 (showing that over half of the Rehnquist Court's preemption decisions were unanimous, a higher percentage than for its cases on the whole).

¹³⁵ See POSNER, *supra* note 122, at 62.

¹³⁶ See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142–46 (1970) (evaluating whether a state statute violated the dormant commerce clause by asking whether “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits”).

ing the Court make decisions less biased by unconscious preferences and more informed by empirical evidence.¹³⁷ Finally, as Professor Daniel Meltzer argues, preemption doctrine is an area in which Congress seems to want — and should want — the Court to play a robust, common law-like role.¹³⁸ Given the vast number of state and local governments, and uncertainty about what they will do in the future, it would be impossible for Congress to resolve or even consider every possible preemption issue up front.¹³⁹ Congress thus inevitably leaves some preemption issues for the Court to decide, and it is hard to believe that Congress would want the Court to ignore consequences when doing so. Even Justice Scalia has recognized that sometimes Congress would want the Court to consider consequences rather than unthinkingly apply the text of a vague preemption clause.¹⁴⁰

In sum, looking to consequences when traditional sources of statutory interpretation run out is not unorthodox, and it is no less practicable or democratic than the Court's current approach.

V. CONCLUSION

The debate over the presumption against preemption has been raging for years and shows no signs of abating. Some have attempted to resolve the debate by presenting contestable empirical claims about how Congress responds to the Supreme Court's preemption decisions. If these claims were supported by the data, they would provide great insight into the value of the presumption against preemption. But instead, the data do not support either side's argument, returning the initial debate to the status quo.

In light of the dispute over the value of the presumption against preemption and the overwhelming evidence of congressional inaction presented here, a pragmatic approach is the best way forward. This approach is certainly not perfect, but its tremendous benefit is that it focuses judges' attention on what they — and the people — really care about: results.

¹³⁷ See POSNER, *supra* note 122, at 75–76 (arguing that it is important for judges to receive and evaluate more empirical evidence so as to avoid “fall[ing] back on hunch, intuition, and personal experiences that may be misleading”).

¹³⁸ See Meltzer, *supra* note 121, at 376–77 & n.140, 396–97, 409.

¹³⁹ See *id.* at 376–77; see also Gasaway, *supra* note 15, at 27–30.

¹⁴⁰ See *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring) (recognizing that the text of ERISA's preemption clause “provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended — which it is not”).