

Partisan Preemption: the Strategic use of Federal Preemption Legislation

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[Accepted Manuscript for open access Duke University Repository]

Abstract:

Federal preemption by both parties has risen dramatically since the 1960s. Scholars note that Democrats and Republicans routinely employ preemption to advance partisan political goals, but we know very little about how each party uses this tool of federal power. Are policymakers from both parties employing preemption in similar ways, or do strategic partisan differences exist? Using an original dataset, we show that Democrats and Republicans systematically vary in their use of preemption. Democrats put forward preemption legislation that maximizes regulation by mandating a floor of protection across the states, particularly for policies that promote consumer protection and expand civil rights. In contrast, Republicans enact preemptions that cap regulation by utilizing ceilings that curtail the states' ability to regulate, particularly for business and commerce policy. Ultimately, both parties have enhanced federal power and limited state authority, but they do so in dramatically different ways and for vastly different political goals.

After several decades of expanded federal government power, Presidents Richard Nixon and Ronald Reagan called for the decentralization and devolution of power from the national government back to the states, ushering in the era of New Federalism. Despite these public calls to return regulatory and administrative authority to the states, federal preemption—one of the most significant tools for consolidating regulatory power in the federal government—began steadily increasing, and both Democrats and Republicans contributed to that growth. Since the 1960s both parties appear to have contributed in relatively equal measure to the dramatic increase in federal preemption across an array of policy issues (see Zimmerman 2008). For example, President Bill Clinton, a Democrat, and President George W. Bush, a Republican, each signed sixty-four preemption statutes into law during their respective eight years in office; indeed, President Bush failed to veto a single preemption bill (Zimmerman 2007).

To explain this trend, scholars have noted that, despite the rhetoric of New Federalism within the Republican Party, both parties routinely abrogate state authority in order to advance other valuable policy ends (Robertson 2012; Zimmerman 1991). As Timothy J. Conlan (1986; 1991) has emphasized, when the devolution of governing authority clashes with other important policy goals, respecting states' rights takes a back seat for Republicans in Congress and the White House.

Although scholars recognize that both Republicans and Democrats use preemption strategically to advance their partisan goals, we know very little about when or how each party is likely to employ preemption. Both Republicans and Democrats have increased their use of federal preemption in the last few decades. But are policymakers employing preemption at similar rates and in similar ways, or do strategic and systematic partisan differences exist in the use of federal preemption? To answer these questions, we delve more deeply into the partisan

dynamics of federalism and policymaking, focusing specifically on the use of Congressional preemption and drawing on an original dataset of the entire population of preemption policies enacted between 1990 and 2012.

To preview our main conclusions, during this period policymakers from both sides of the aisle strategically designed and implemented federal preemption as a tool to advance political goals. Specifically, we find that Democratic and Republican majorities in Congress passed preemption statutes at similar rates but enacted systematically different types of preemption. In general, Republicans employed preemption strategies that seek to minimize regulation, either by providing a regulatory ceiling that states cannot exceed or by entirely removing policymaking or judicial authority from the states. This pattern is especially strong for issues that directly affect the regulation of business and commerce across an array of industries. In contrast, Democrats were more likely to pass floor preemptions that set a baseline of regulation that states must meet while allowing progressive states to enact more stringent regulations. This tendency is strongest for issues that relate to consumer protection broadly construed. Social issues provide the one policy arena where the parties diverged from their respective preferences for floor or ceiling preemption. Instead, the parties relied on preemption to restrict or enable state policymaking power in order to advance liberal or conservative social policy goals in accordance with their partisan preferences.

The Partisan Dynamics of Federalism and Preemption

Federalism scholars have noted that the dynamic and continual struggle for power between state and national actors in the U.S. federal system has presented a fertile site for partisan conflict. David Brian Robertson argues that lawmakers employ “federalism as a political

weapon,” using it as “an advantageous political institution that helps them win political battles or to defeat opponents” (2013, 20). In other words, policymakers can advance partisan goals not only by what they do, but also by where they do it: at the federal or state level. Policies can enhance or diminish federal power with consequences for policy outcomes. Robertson explains that “[f]ederalism is an attractive weapon in politics because when important choices are left to the states, the states produce results different from the national government’s” (24). Work on federalism emphasizes that partisan battles are also being waged over the size and scope of the federal government. Martha Derthick notes that the increasing centralization of federal power that began in the 1960s was distinctive because “for the first time in a century, changing federalism became an end in itself, consciously pursued by numerous holders of national power who were trying to reconstruct American society and politics” (2001, 152). Policymakers’ conscious effort to reshape the contours of federalism has not abated since the 1960s. Thus, federalism scholars emphasize that federal/state governing arrangements provide the opportunity for contestation over the relative size and power of each level of government, as well as providing a site for expanding the scope of conflict.

The battle over Congressional preemption of state law stands out as an obvious area where we would expect such partisan conflict to be present. Preemption, the constitutionally granted power of the federal government to limit state and local governing authority in a particular policy area, was employed with relative scarcity for much of the nation’s history. For example, under the system of “dual federalism”—a period extending roughly from the nation’s inception to the revolutionary changes of the New Deal in the 1930s—during which the federal and state governments exercised governing authority primarily in separate spheres (Grodzins 1966), the use of federal preemption was rare. From 1789 until 1900, the federal government

enacted a mere twenty-nine preemption statutes (Zimmerman 2008). However, as the federal government began to extend the reach of its political authority throughout the twentieth century (see Kettl 1983; Dye 1990), Congress increased its use of preemption, enacting 453 preemption statutes between 1900 and 1999 (Zimmerman 2005).

With their growing use, preemption policies can directly limit or empower the states relative to the federal government. At the same time, preemption policies can also affect a second dimension of political contestation—constraining or expanding government intervention in the regulation of private enterprise—making them a particularly rich tool for waging partisan conflict (McGarity 2008). According to Thomas McGarity, the first, or horizontal, dimension of preemption addresses the “extent of government power over the private sector” (2008, 54)—a fundamental point of conflict between Democrats and Republicans. The second dimension, which he terms vertical, concerns “the locus of governmental power” on a spectrum between the federal and state government (55). Thus, “[t]he crosscutting politics of preemption play out against these two intersecting dimensions” (55).

These two dimensions of preemption politics mean that the strategic design of preemption policy may occur with either political goal in mind. Democrats may increase federal power, not as a goal in and of itself, but rather as a byproduct of using preemption legislation to force states to comply with minimum standards and regulations. Republicans may eschew preemption legislation to avoid usurping state power, but they could also use preemption to harness the federal government to prevent states from regulating business. In this way, McGarity offers a key insight: preemption is not just about federal versus state power, but it is also about the degree of market intervention.

Previous research on the use of preemption by different federal actors has found that, when these two dimensions come into conflict, both Republicans and Democrats willingly preempt state's rights to advance their other partisan goals. Within the public law literature, several scholars have noted that competing values often outweigh principled positions of federalism (Banks and Blakeman 2011; Joondeph 2001). For example, Baybeck and Lowry find that, for members of the Supreme Court, "concepts of states' rights and national supremacy are used opportunistically, when convenient, to defend specific rulings, but not as guiding principles for decision-making" (2000, 96). Beyond the courts, scholars have consistently found that presidents routinely sacrifice federalism principles to advance larger goals (Conlan 1986; 1988; 1991; 1998, 206-207; Robertson 2012; Zimmerman 1991). Timothy J. Conlan notes of President Reagan that, "when truly difficult decisions were on the line, the overall thrust of policy by this administration seemed to bear little resemblance to the president's rhetoric on intergovernmental reform" (1986, 45). The literature is in agreement that Republicans' actions on preemption are not in line with their rhetoric on federalism. Instead, scholars have suggested that Republican preemption decisions are driven primarily by concerns about regulation and not the devolution of power to states (Conlan 1986; Epstein and Greve 2007; Young 2007).

While scholars have made a compelling case that both Democrats and Republicans are behaving opportunistically with respect to preemption and thus may be equally likely to rely on preemption as a policy tool, we lack a systematic test of this claim. Furthermore, we know very little about the conditions under which federal policymakers enact preemption to secure partisan goals or whether parties employ systematically different approaches to preemption. Finally, the existing literature has paid less attention to the role of Congress in enacting federal preemptions, despite its significant role as a policymaker. We address these issues by exploring how

Republicans and Democrats in Congress opportunistically use preemption to advance policy goals, particularly surrounding the degree of government regulation across policy domains. Drawing on an original dataset, this article systematically tests whether Congressional Democrats and Republicans engage in preemption at different rates and in different ways. Ultimately, we conclude that the parties do not enact preemption laws at different rates but exhibit differences in the form their preemption laws take, especially for issues that are most politically salient to each party.

Partisan Preemption Strategies

In line with New Federalism scholarship, we contend that legislative preemption can be a vehicle for accomplishing partisan goals. This only matters, of course, if Republicans and Democrats have sufficiently different goals and priorities that they will manifest in distinct preemption policymaking. Existing scholarship suggests that Republican and Democratic lawmakers do, in fact, differ in their preferences for both the balance of federal and state power as well as the balance between state and private sector relations for a variety of issues. Since the Civil Rights era and the partisan realignment in the mid-20th Century, the Democratic Party has coalesced around a platform supporting civil rights and a stronger role for the federal government in protecting equal opportunity and the public welfare, whereas the Republic Party coalition of pro-business and social conservatives seeks to limit the government's power to interfere in the business environment and with the governing capacity of the states, while supporting government intervention in the regulation of certain spheres of social behavior (Phillips 1969; Carmines and Stimson 1989; Miller and Schofield 2008).

For Democrats, the tradeoff between the two axes of preemption may be relatively easy to reconcile. Democrats are typically willing to support greater centralized policymaking authority to provide uniform treatment and protection for citizens. Similarly, they will support relatively more stringent regulation of private enterprise in a variety of areas, particularly as a tradeoff for protecting the public welfare broadly construed. We anticipate, then, that Democratic-backed preemption laws will secure the greatest level of regulatory oversight for the issue at hand—an outcome that may best be achieved by providing federal minimum standards that bring laggard states up to a basic level of protection while allowing pro-regulatory states to introduce more stringent protections.

Republicans, on the other hand, may have a more difficult time reconciling their positions along the two axes of contestation. The Republican Party supports a philosophy of limited federal government and is also more inclined toward allowing private enterprise to function in the relative absence of state intervention. When these two priorities come into conflict—for example, when states introduce stringent environmental regulations burdensome to auto manufacturers—Republican legislators must choose one priority over the other. We expect that when Republican policymakers are confronted with a conflict between these two priorities, they will give primary weight to minimizing government regulation of private interest, even if it means overriding state regulatory authority for an industry. As Robertson notes, conservative presidents “have decentralized power when they believed it was likely to produce conservative results, whereas they expanded national rules and limited state authority where state control could undermine more important substantive priorities, such as freeing business from government regulation” (2013, 33).

The result, we argue, is that both Democratic and Republican administrations are likely to preempt state power, and we expect to observe very little difference between the aggregate rates of preemption for each party in recent decades.

Hypothesis 1: Democratic and Republican administrations will enact federal preemption of state laws at relatively similar rates.

There is, of course, observational evidence that suggests this is the case. As we noted earlier, scholars such as Zimmerman have reported that since the 1960s presidential administrations of both parties have signed off on a relatively equal number of policies that preempt state power. But these trends have not been systematically tested. Nor have scholars examined similar trends with respect to partisan control of Congress. Perhaps the number of preemption policies enacted under different presidents is masking systematic differences across Congressional party control. We examine whether the rate of preemption differs under partisan political control—both presidential and Congressional—of the federal government.

If Hypothesis 1 is correct and Republicans and Democrats engage in federal preemption at similar rates but possess different partisan goals for government regulation of the market, what does that mean for the form of preemption employed by the respective parties? Preemption can be used both to empower states to regulate beyond federal standards or to prevent them from doing so. Therefore, the parties might adopt different methods to accomplish differing goals. Conlan explains that “[P]rivate interests have often asked the federal government to restrict state regulatory activities beyond minimum national standards or to preempt state regulatory authority in a field entirely” (1986, 37)—a call that is likely to resonate with Republican policymakers dedicated to unfettered private enterprise. On the other hand, Democrats began looking to federal

preemption to empower state regulators “as an increasingly vital line of defense” against Republican efforts to deregulate many industries in the 1980s (Epstein and Greve 2007, 20-21).

We expect that the type of preemption policies enacted by Republicans, in an attempt to limit government regulation, will differ significantly from those enacted by Democrats, who are more supportive of federal regulation under certain circumstances. Specifically, we expect Democrats to enact preemptions that raise the overall level of regulation for a given policy area while Republicans enact preemptions that curtail state efforts to promulgate more stringent regulation.

Hypothesis 2a: Democrats will be more likely to employ preemption that maximizes the degree of regulatory control on salient issues, primarily through implementing floor preemptions.

Hypothesis 2b: Republicans will be more likely to employ preemption that reduces the degree of regulatory control on salient issues, primarily through implementing ceiling preemptions.

Finally, we consider the range of issues for which we expect to find systematic variation in preemption strategy between the parties. While Democrats and Republicans have a number of significant partisan disagreements, these differences may not be manifested in the same way across all issues. As Joondelph explains, for example, “Reagan...consistently favored national over subnational authority only in those areas in which federal policies were more deferential to private markets or could be used to advance the conservative social policy agenda” (2011, 4). Businesses have long looked to federal preemption to provide regulatory relief from state policies (Young 2007). Indeed, Robertson notes that “[T]he Reagan administration sought to preempt states from regulating the transportation, communications, and banking industries to

protect these sectors from state restrictions” (2012, 151-152). In general, therefore, we expect that Republicans will be especially likely to enact ceiling preemptions that restrict state regulation of business and commerce than will Democrats.

Hypothesis 3a: Republicans will be more likely to employ ceiling preemptions of business and commerce in order to minimize state regulation.

While Republican policymakers and their constituents favor a more minimal regulatory environment to promote commerce, regulating businesses with the explicit goal of protecting the health and safety of citizens has long been a policy priority of Democrats. For example, Democratic lawmakers since the 1970s have championed the expansion of consumer protections across an array of issues, preempting less restrictive state laws in the process (see Pertschuk 1982). We anticipate, therefore, that Democrats will be far more likely to pursue floor preemptions that enable states to increase regulatory oversight in the realm of consumer protection.

Hypothesis 3b: Democrats will be more likely to employ floor preemptions on issues of consumer protection in order to maximize state regulation.

Civil rights and social policy represent a final arena in which we expect to see Democrats and Republicans exhibit different patterns of preemption based on their partisan policy preferences. While we still expect the general pattern of preemption to hold for these policies—Democrats will be more likely to enact floor preemptions and Republicans will be more likely to enact ceiling preemptions—when the parties do stray from their preferred preemption type, they will do so in order to promote more liberal or conservative social policies respectively. For example, Republicans, who generally espouse a more conservative stance on social issues, may be likely to enact ceiling preemptions that restrict the ability of states to expand rights for gay

and lesbian citizens while employing floor preemptions that allow for expanded state power to restrict abortion. Democrats would likely embrace the reverse set of preemption tools. As a result, we expect Democrats to enact preemptions that restrict or enable state policymaking on social issues in whichever way produces a more socially liberal outcome, while we expect Republicans to do so in a way that produces a more socially conservative policy outcome, even if doing so introduces a greater degree of regulation into the private lives of citizens.

Hypothesis 3c: For civil rights and social policy issues, Democrats will be more likely to employ preemptions that result in the expansion of liberal policy outcomes regardless of whether state power is enabled through a floor or restricted through a ceiling preemption, while Republicans will preempt using floors and ceilings in ways that expand conservative social policy outcomes.

Data and Methods

We test these hypotheses using an original dataset that contains the entire population of 283 express federal preemption statutes signed into law between 1990 and 2012.¹ By express preemption, we mean “instances in which Congress has demarked the breadth of a federal statute’s preemptive reach through an explicit statutory provision,” rather than laws that were later interpreted as preempting state authority by the courts (Joondeph 2011, 226). By limiting our analysis to express preemptions, we are able to focus on those policies in which legislators employed preemption as an intentional policy solution, which we expect to best reflect their partisan strategic thinking. Each statute was analyzed to determine the issue it addressed and the manner of preemption it prescribed.² The time period was selected because it offered variation along a number of desirable attributes. First, the years from 1990 to 2012 contained four

presidential administrations including two Democrats—Bill Clinton and Barack Obama—and two Republicans—George H.W. Bush and George W. Bush. The House of Representatives also experienced several years of majority control by each party during this time period, as well as instances of both divided and unified government. This twenty-two year span also encompassed economic highs and lows and periods of relative peace and war—ensuring that a variety of salient policy issues came before Congress.³ The potential for preemption with respect to a variety of issue areas is necessary to ensure that the type of policy under consideration does not bias our results.

In order to test our first hypothesis—that Democratic and Republican administrations enact preemption at similar rates—we compare the rate of preemption, our primary dependent variable, for a given administration or partisan majority in Congress. The simple frequency of preemption statutes enacted under differing partisan control is insufficient to confirm the degree to which Republican and Democratic administrations adopt preemption. It could be the case that one party simply passes a greater number of policies than the other, and so the sheer number of preemption statutes might be similar while the actual rate of preemption is lower. In order to capture the potential for both the party of the president and of the Congressional majority to shape preemption, we calculate a rate of preemption for each presidential administration and each Congressional majority. The rate is calculated for each period by dividing the number of preemption statutes enacted by the number of all laws and resolutions enacted.⁴

We employ three primary independent variables to test our first hypothesis: partisan control of the presidency, the House majority party, and the Senate majority party at time of passage (Democratic control equals zero for each). Trends in preemption are often discussed in terms of presidential administration (e.g., Zimmerman 2007; 2008). Presidents, of course, play a

significant role at the bookends of the policymaking process. Scholars have long argued that much of the president's power stems from his ability to help set the policymaking agenda either through personal relationships within Washington or through appealing to the general public (Neustadt 1960; Kernell 1986). Presidents also hold the ultimate decision—barring an override—on whether or not to sign a bill into law. While these powers may make it attractive to assume that partisan trends in preemption will correlate with the party of the presidential administration, the ultimate arbiter of partisan preemption statutes may well be the majority party in the House of Representatives.

First, it is still the case that the majority of the legislative process—including the debate over the details of a particular piece of legislation—occurs within Congress. And of the two branches within Congress, it is usually the majority party in the House that represents the strongest partisan faction.⁵ During periods of high homogeneity within each party—which has been the norm over the last several decades due to increasing partisan polarization—the majority party exercises significant agenda setting control in the House (Cox and McCubbins 2005). Members of the majority party chair most House committees. As such, they serve as partisan gatekeepers controlling the agenda and promoting the party's interests in the committee rooms where the policy design of bills is being hammered out. Furthermore, the majority party has the power to set the rules of procedure within the House, typically resulting in an ability to decide what legislation comes to the floor for a vote. As we have seen recently, this institutional feature, when combined with growing partisan polarization, can make it very difficult for a bill to pass without the support of the House majority. We anticipate, therefore, that the House majority party will have a significant effect on the scope and content of laws containing federal preemption.

Tests of the second hypotheses—that the parties differ significantly in their preemption strategies, with Democrats enacting more preemption floors and Republicans enacting more preemption ceilings—were conducted using logistic regression. The primary dependent variable for the second hypotheses is the degree to which preemption policies either restrict or promote regulation across a variety of issue areas. We have operationalized this variable as a dummy by determining whether the statute implements a preemption floor or ceiling (floor equals zero). A preemption floor—or partial preemption—typically sets a minimum federal standard that a state must adopt; however, states are not prohibited from passing more stringent protections as long as they do not come into conflict with the federal legislation (United States Advisory Commission on Intergovernmental Relations 1992). For example, a preemption floor might mandate that all states adopt a minimum wage of seven dollars per hour. Such a floor would require any state with a lower minimum wage to comply with the federal minimum, but a state that already required a minimum wage of nine dollars per hour would be allowed to keep that threshold. Similarly, a state that chose to raise their minimum wage to nine dollars per hour even after the passage of the federal law would not be precluded from doing so. Thus, floor preemptions set a regulatory benchmark that every state must meet, while allowing states that are inclined and able to implement even more stringent regulations to do so.

By contrast, we define a ceiling preemption—or complete preemption—as a federal policy that either partially or entirely restricts state-level regulatory innovation on an issue by preventing states from passing regulations in a particular area or by implementing a threshold of regulation that states cannot exceed (United States Advisory Commission on Intergovernmental Relations 1992). Ceilings are notable because, rather than mandating state participation in

specific standards, they remove state power and flexibility on a given issue—often minimizing the overall level of regulation that can occur.

As traditionally construed, a ceiling preemption is the true mirror image of a floor preemption. It imposes a regulatory limit that states may choose to meet, though they are not required to, but that states may not *exceed*. In practice, however, this type of ceiling preemption is relatively rare. William Buzbee (2007) argues that a more accurate construction of the concept is one of “unitary federal choice ceiling”—referring to scenarios in which “the federal government asserts its regulatory power with a regulation or legislation, and additional regulatory action is prohibited. ... It constitutes a federal choice that is final, displacing any other state or local actors’ additional regulation in the area” (12). In other words, ceiling preemptions may set explicit ceilings, but more often than not they simply bar state governments from creating new regulations on the issue.

Adopting a strategy similar to Buzbee’s, we use a more inclusive definition of ceiling for this research. Ceiling preemption is defined as any preemption that 1) sets a regulatory cap that states cannot exceed, 2) removes policymaking authority from the state for a particular issue, or 3) removes jurisdiction from state courts for a particular issue. The first aspect of our definition is relatively intuitive, but it is reasonable to ask if the second and third parts would not potentially lead to more stringent regulation of an issue area. By completely removing policy authority from the states, as stipulated by part two of the definition, it is possible that the subsequent federal government standards may be more stringent than those that previously existed in a number of states. In this way, removing state policymaking authority is similar to implementing a federal floor preemption. Where they differ, and ultimately where the complete removal allows for *less* expansive regulation, is that states cannot exceed the federal standard as

they can when a simple floor is implemented. The main logic behind issuing this type of preemption in lieu of a floor, therefore, is to prevent states from further regulating. Similarly, when jurisdiction is removed from state courts for a particular issue, it might be that cases will be held to a more stringent federal standard. In practice, however, the removal of state jurisdiction typically occurs so that plaintiffs cannot bring suit in the state with the most favorable remedies. As such, it constitutes a ceiling on the liability that the subject of regulation can face.⁶

As with the first hypothesis, we include several measures to capture party control at time of passage. We include dummy variables for party control of the House and the party of the president respectively (Republican equals one).⁷ We also include a control variable for divided government, where divided government equals one, to capture whether the party of the president and that of the House majority are the same.

In order to test our final hypothesis—that patterns of partisan preemption differ by issue—we compare the passage of floor and ceiling preemptions by each party for different policy issues. Each of the policies was assigned one of seven issue categories to reflect the content of the preemption area: 1) Banking and Finance; 2) Commerce, Energy, Labor, and Transportation; 3) Health, Safety, and Environmental Protection; 4) Natural Resources, Animal Welfare, and Fish and Wildlife Conservation; 5) Civil Rights; 6) Taxation; and 7) Other.⁸ Categories one, two, and three represent issues related to the regulation of business and commerce for which we would expect Republicans to enact a higher rate of ceiling preemptions than Democrats. Category three also represents consumer protection issues, for which we predict Democrats will enact a higher rate of floor preemptions than Republicans will. Finally, category five contains civil rights and social policy issues. For this set of policies we expect to see Republicans and Democrats employ a mixture of floor and ceiling preemption strategies that

allow them to advance conservative or liberal social goals for each individual policy issue. As such, we discuss specific cases of preemption beyond the aggregate trends for civil rights policies.

Results and Analysis

Do the parties exhibit significantly different rates of preemption? Figure 1 displays the results addressing this question.⁹

[Figure 1 About Here]

As we predict in our first hypothesis, the rate at which federal policymakers preempt state law is relatively similar for each of the parties irrespective of how one chooses to measure partisan control of the policymaking apparatus. In fact, both Republican presidential administrations and Congressional majorities actually enact preemption at slightly higher rates than do their Democratic counterparts. On average, policies that preempt state regulation represent around two percent of all laws and resolutions enacted for each administration—presidential or Congressional. These results lend credence to previous research that argues that, when the partisan goals of limited federal intervention and limited government regulation come into conflict for Republican lawmakers in Congress and in the White House, preserving limited regulatory burdens trumps preserving state autonomy.

Given the similar rates of preemption illustrated in Figure 1, do we then observe different partisan strategies for preempting state policy? Figure 2 displays the results of a test of our second hypotheses. As expected, significant partisan differences exist in preemption strategy, with Democrats enacting more floor preemptions (H2a) and Republicans enacting more ceiling preemptions (H2b).

[Figure 2 About Here]

Figure 2 demonstrates that significant differences exist with respect to the form of preemption passed under Democratic versus Republican party control, driven primarily by the majority party in the House. When the Republican Party holds a the majority in the House, the odds that a preemption statute signed into law contains a ceiling instead of a floor increases by a factor of 2.68—nearly 170 percent—compared to preemption statutes passed under Democratic control of the House. The party of the president and the presence of divided government do not appear to predict systematic differences with respect to preemption type.

[Figure 3 About Here]

As Figure 3 shows, when comparing the type of preemptions passed from 1990-2012, 67 percent of preemptions passed under Republican House control were ceilings versus just 43 percent of those resulting from Democratic House control. Thus, during this time period, the majority of Democratic preemption (57 percent) came in the form of floors, whereas the majority of Republican preemptions were ceilings—a statistically significant difference. The results support our hypothesis that Democrats and Republicans are more likely to implement systematically different types of preemption, floors and ceilings respectively—preemption types reflecting each party’s respective partisan goals for government regulation of private enterprise.

Do the partisan differences that emerge for enacting floor versus ceiling preemptions occur across all issues, or do certain issues drive these patterns? We utilize our dataset to break down the type of preemption employed by each party across six of the seven issue categories (excluding the relatively small “other” category). Figure 4 displays the number of ceiling and floor preemptions enacted by each House majority party for each issue area.¹⁰

[Figure 4 About Here]

We first hypothesize that Republicans will be especially likely to enact ceilings to curtail the regulation of business and commerce, issues represented by the “banking and finance;” “commerce, energy, labor, and transportation;” and “health, safety, and environment” categories. As Figure 4 shows, Republicans do pass ceiling preemptions at a greater rate than Democrats for each of these three areas. Under Republican House control, 62 percent of preemptions enacted addressing banking and finance issues were regulatory ceilings, compared with only 40 percent of the banking and finance preemptions passed under Democratic House control—a 22 percentage-point difference. Three out of every four Republican-led preemption statutes (75 percent) addressing commerce, energy, labor, and transportation enacted regulatory ceilings, compared to only 58 percent of those enacted under Democratic House control—a difference of 17 percentage points. An even greater gap emerges in the rate of health, safety, and environmental ceiling preemptions passed by the two parties. Republican majorities enacted ceilings on 64 percent of these preemption policies, while Democratic majorities did so for only 25 percent—a 39 percentage-point difference.

While Republicans are more dedicated to enacting preemption ceilings to curtail government regulation of business and commerce, we hypothesize that Democratic lawmakers will be especially likely to enact floors in order to expand consumer protection regulation—policies captured by the “health, safety, and environment” category. Once again, the results presented in Figure 4 align with this contention. Of the preemption laws passed under House Democratic control, 75 percent of the health, safety, and environment preemptions were floors, compared to only 36 percent of those passed under Republican majorities. Not only do Democratic House majorities pass floor preemptions at a greater rate than Republicans do for consumer protection issues, but Democrats also enact floors for this type of policy at a rate

higher than they enact floors for any other issue area except for civil rights (80 percent). Democrats enact regulatory floors for only 60 percent of banking and finance preemptions; 50 percent for natural resources, animal welfare, and fish and wildlife conservation preemptions; and only 42 percent—fewer than half—of all commerce, energy, labor, and transportation preemptions. These rates suggest that Democratic legislators are most compelled to expand regulatory power through the use of federal preemption for consumer protection and civil rights issues.

We expect the parties to exhibit different patterns of preemption on civil rights issues in order to promote liberal or conservative social policies in this domain in accordance with partisan goals. As Figure 4 demonstrates, the pattern of Democratic preemption floors and Republican preemption ceilings carries over to the arena of civil rights policy. Of the preemption statutes enacted under Democratic House majorities, 80 percent implemented floors. By contrast, a majority (58 percent) of preemption statutes enacted under Republican majorities provided ceilings on state regulatory activity. While these differences conform to our hypotheses about the general partisan approaches to preemption, a closer look at the content of these policies provides a more interesting illustration of how each party employs preemption to achieve partisan goals.

The twelve civil rights floor preemptions enacted under Democratic control generally mandate greater governmental protection for potentially underserved communities—a fundamental policy goal of the modern Democratic Party. Six implement baseline non-discrimination statutes to protect certain groups. For example, the Americans with Disabilities Act of 1990 (P.L. 101-336) created a federal baseline for disability protections without curtailing the efforts of states to provide even greater accommodation. Four statutes expand access to and

assistance with voting (P.L.s 102-344, 103-31, 111-84, 111-97). The remaining two address violence against women (P.L. 103-322).

Republican majorities have enacted a relatively high rate of floor preemptions (42 percent) for civil rights issues when compared to their record in other policy areas, but they have done so in ways that are generally consistent with their party's platform. While some Republican floor preemptions address similar topics to those enacted by Democratic majorities—for example, the Republican-led House has twice reauthorized provisions of the Violence Against Women Act—others reflect attempts to force states to comply with more conservative social policy positions. Republican majorities have enacted floors to increase protections of religious freedom (P.L. 106-274) and they have set minimum standards for driver's licenses (P.L. 109-13) as a national security measure.

A similar trend is evident in the issues for which Republican majorities have preempted state power by imposing regulatory ceilings. Three of these seven statutes enact ceilings for public safety purposes, including reinstating limits to the Age Discrimination in Employment Act for public safety hiring (P.L. 104-208), restricting the use of certain forms of state ID as proof of citizenship (P.L. 104-132), and increasing penalties for human trafficking (P.L. 109-164). Another two attempt to override more expansive state provisions about abortion and end-of-life decisions, including the well-known Partial Birth Abortion Ban Act of 2003 (P.L. 108-105) and the eleventh hour attempt to intervene in the 2005 Terri Schiavo case, whereby Congressional Republicans attempted to override both state and federal court judgments allowing for the removal of life-sustaining treatment in an end-of-life situation (P.L. 109-3).

These results suggest that, while systematic differences between Republican and Democratic preemption appear to extend across multiple issues, they are consistent with each

party's issue-specific priorities. One interesting thing to note is that, despite the different partisan strategies pursued within each issue area, the overall distribution of preemption activity across each of the seven issue categories was relatively equal, the lone exception being that Democrats engaged in more preemption on behalf of civil rights issues. This trend, presented in Figure A2 in the Appendix, suggests that the parties do not target the issue area of their preemptive activities in systematically different ways; they simply enact different forms of preemption within each particular policy arena.

Discussion and Conclusion

Federal preemptions of state regulatory authority have risen dramatically since the 1960s, with both Republicans and Democrats utilizing this tool of federal power. Scholars have explained the disconnect between Republicans' New Federalism rhetoric and their rising use of preemption by noting that the GOP has prioritized competing goals, particularly reducing government regulation, over limiting the power of the federal government. However, to date, this claim had yet to be systematically tested or explored further to see if the two parties engaged in preemption in different ways or within different issue areas. Drawing on a new dataset, our research has enabled us to do so. We find that Democrats and Republicans use preemption at similar rates. Moreover, we find that the types of preemption policymaking the parties engage in are distinctly different and fit within their competing partisan agendas. Like Democrats, Republicans have drawn on this tool of federal authority to exert influence over the states to achieve specific, albeit drastically different, partisan political ends.

We find that Democrats are more likely to put forward preemption legislation that has the potential to maximize regulation by mandating a floor of protection across the states, while

allowing states to offer higher levels of regulation if they so desire. In short, Democrats have pushed laggard states to provide equal levels of protection while allowing progressive states to promulgate more stringent regulatory standards. Republicans, despite the Party's public rhetoric of limited government and states' rights, are just as likely to engage in preemption. In contrast to their Democratic counterparts, however, Republicans are more likely to enact preemptions to ultimately cap regulation by utilizing ceilings that curtail state authority and limit the states' ability to regulate the market. Republicans have thus restrained the states' ability to provide greater protections than those set at the federal level.

Finally, we find that these general trends vary by issue. Our research suggests that the magnitude of the difference between Democrats' use of floor preemptions and Republicans' use of ceiling preemptions varies by specific policy areas and in ways that advance the respective parties' political goals. Republicans utilize higher rates of ceiling preemptions for policies that directly relate to the regulation of business and commerce, thus minimizing state regulation of the party's important constituent groups. By contrast, Democrats' reliance on floor preemptions is particularly strong in the area of health, safety, and environment, supporting our hypothesis that they will use preemption to try to maximize consumer protection. Likewise, Democrats' enactment of civil rights floor preemptions to expand protections against discrimination and to enhance access to voting fits with the party's stated goals for social liberalization. Republicans occasionally enact policies that provide similar protections, but they also attempt to curtail state regulation in order to promote national security and to limit access to abortion—consistent with the party's more conservative approach to these policy issues.

Overall, our findings offer insight into an understudied arena of partisan conflict in the United States. Robertson notes that “Republicans and Democrats, conservatives and liberals,

have all found federalism a very useful strategic battleground for waging political warfare, as the United States has become more politically polarized (2013, 33).” We confirm the contention that policymakers utilize preemption not solely for practicality or expediency but also as a strategic tool employed in Robertson’s political warfare: polarized lawmakers have capitalized on the flexibility of preemption, wielding it as a tool to expand the scope of their partisan agendas from the national to the state level, regulating the states to pursue their national partisan priorities in new governmental venues.

In so doing, the battlefield of partisan conflict can be waged on multiple fronts with important consequences for the U.S. regulatory framework and, more fundamentally, the dynamic and continual struggle between the states and the federal government. Preemption has been utilized over the last two decades to strategically shift the balance of power dramatically in favor of the federal government and the national partisan agenda of whichever party retains control of it. Despite the rhetoric of New Federalism, Republicans and Democrats both helped to tilt the balance in favor of the federal government. However, as this research has made clear, while both parties engage in preemption, they do so in dramatically different ways and for vastly different goals. Ultimately, both parties have increased the influence of the federal government over the states: the Democrats in order to expand a floor of protection for citizens, the Republicans in order to place a ceiling on government regulation.

Supplementary Data

Supplementary data can be found at www.publius.oxfordjournals.org.

Notes

The authors would like to thank Peter Enns; participants in the 2015 APSA panel "Policy Tools and Current Problems in U.S. Federalism"; the Cornell Government department graduate research colloquium; our anonymous reviewers; and the editor for their constructive feedback.

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Figure 1: Percent of Total Laws and Resolutions Enacted Containing Express Preemptions by Partisan Control, 1990-2012

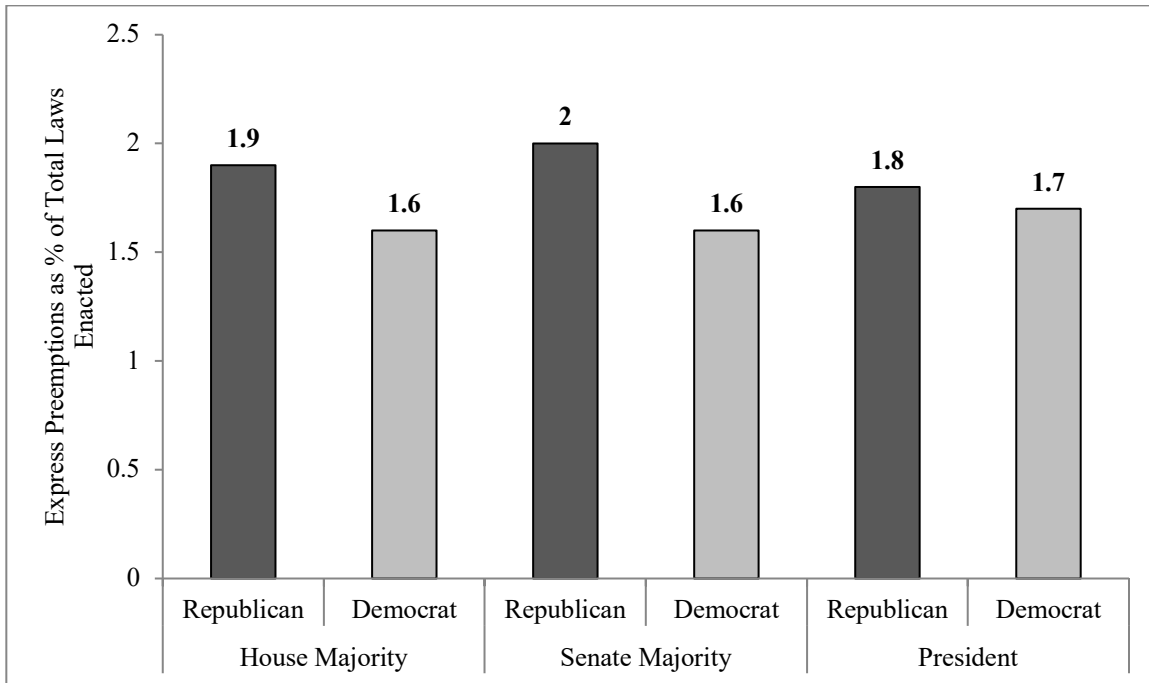
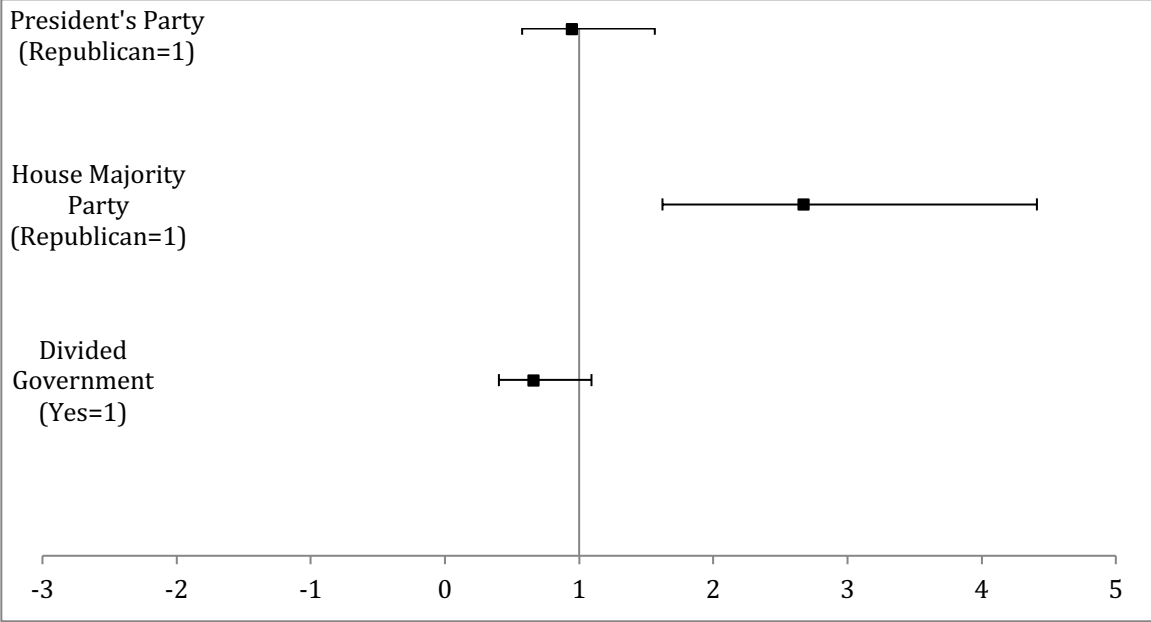


Figure 2: Odds of Enacting Ceiling Preemption by Partisan Control of Presidency and House of Representatives, 1990-2012



Note: Figure reports odds ratios from logistic regression. Full results are available in the appendix. Confidence intervals represent 95% significance level; n=274

Figure 3: Preemption Strategy by Partisan House Control, 1990-2012

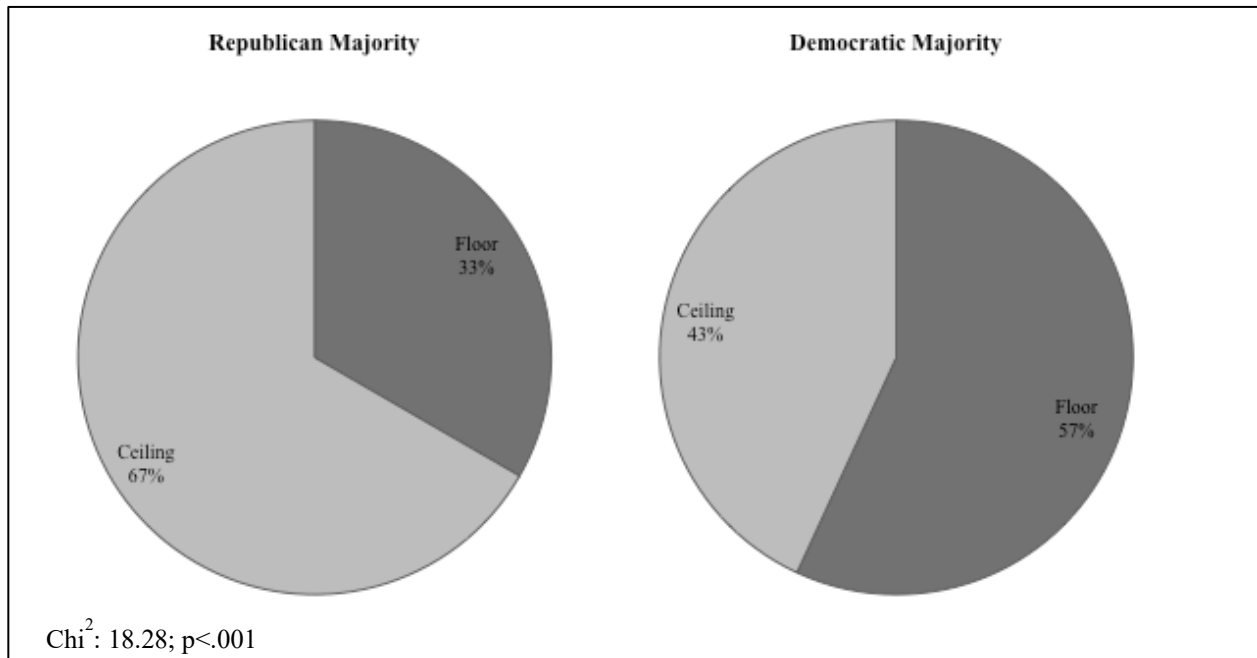
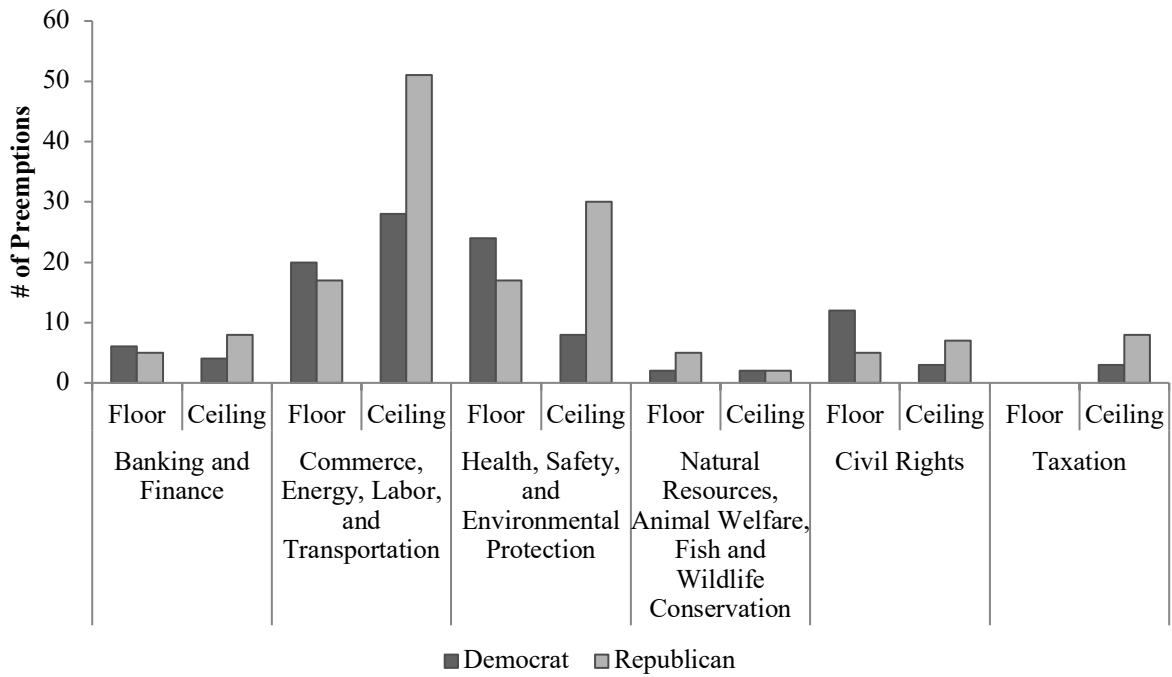
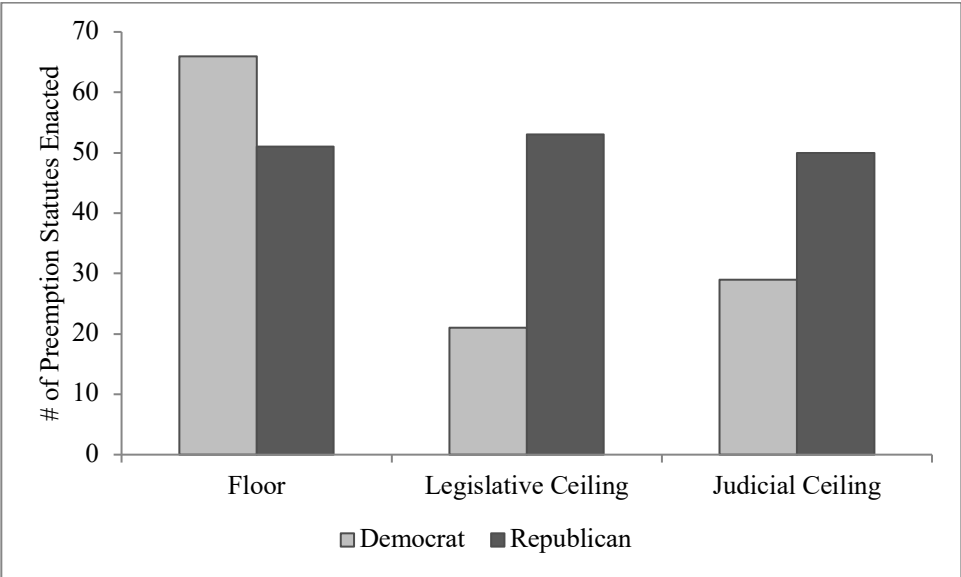


Figure 4: Issue-Specific Preemptions Enacted by House Party Control, 1990-2012

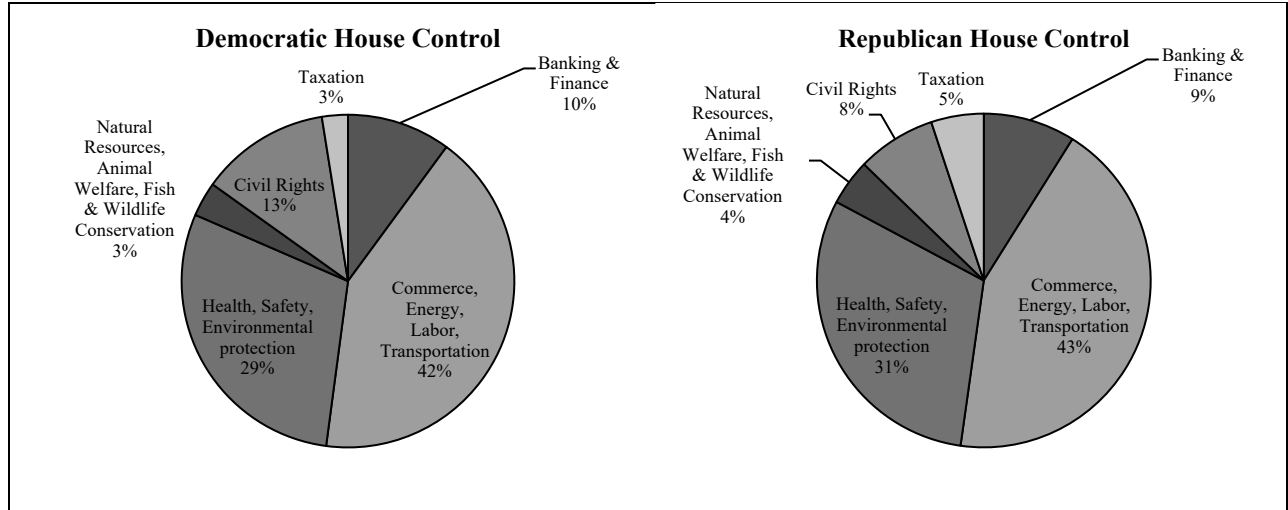


Appendix Figure A1: Preemption Type by Partisan House Control, 1990-2012



This figure depicts the breakdown of preemption statutes by type under majority control of the house by each party. It disaggregates preemption ceilings that limit state legislative versus judicial power. We combine these two categories in our statistical analysis both because we treat them as theoretically similar and to enhance statistical power. The above figure largely confirms this intuition, demonstrating that partisan patterns in the enactment of both legislative and judicial ceilings are very similar. Thus, we do not consider it a problem to combine the measures for our analysis.

Appendix Figure A2: Preemption Issue by Partisan House Control, 1990-2012



This figure depicts the breakdown of preemption statutes by issue under majority control of the house by each party. These results show that, with the exception of the Democrats more frequent civil rights preemptions, the parties are relatively equal in the degree to which they engage in statutory preemption across issues.

Appendix Figure A3: Effect of Partisan Control on Preemption Type, 1990-2012

	Preemption Type (Ceiling=1)
House Majority Party (R=1)	2.675 * (0.684)
President's Party (R=1)	0.948 (0.242)
Divided Government (Yes=1)	0.662 (0.169)
Observations	274
Chi ²	19.25
Pseudo R ²	.05

Note: Figures in columns are odds ratios.
Coefficient standard errors are in parentheses.
* p<0.05

Data Appendix

The dataset is provided in a supplemental Microsoft Excel file. Our analysis was conducted using Stata statistical software. Below are descriptive statistics for the dataset.

	#	%
Total Observations	283	100
Floor	117	43
Ceiling	157	57
Preemption by R House Majority	158	58
Floor	51	32
Ceiling	107	68
Preemption by D House Majority	116	42
Floor	66	57
Ceiling	50	43
Preemption by R Senate Majority	124	45
Floor	45	36
Ceiling	79	36
Preemption by D Senate Majority	150	64
Floor	72	48
Ceiling	78	52
Preemption by R President	154	56
Floor	65	42
Ceiling	89	58
Preemption by D President	120	44
Floor	52	43
Ceiling	68	57
Banking and Finance	23	8
Floor	11	48
Ceiling	12	52
Commerce, Energy, Labor, and Transportation	37	42
Floor	79	32
Ceiling	116	68
Health, Safety, and Environmental protection	79	29
Floor	41	52
Ceiling	38	48
Natural Resources, Animal Welfare, etc.	11	4
Floor	7	64
Ceiling	4	36
Civil Rights	27	10
Floor	17	63
Ceiling	10	37
Taxation	11	4
Floor	0	0
Ceiling	11	100
Other	7	3
Floor	4	57
Ceiling	3	43

¹ We would like to thank Joseph Zimmerman for providing us with a complete list of federal laws enacted between 1990 and 2012 that contain express preemption language. Our dataset is built using this list. Descriptive statistics for the dataset, as well as technical notes on analysis of the data, are included in the appendix. The dataset is provided in a supplementary file.

² Each of the authors took responsibility for coding half of the dataset. Every law was read to identify the preemption language it contained. Where possible, authors cross-referenced their coding of the law's preemption language with external evaluations—primarily individual legislative analyses or summary reports produced by the Congressional Research Service. Finally, a ten percent sample of the statutes was randomly selected and reviewed by both authors to test for inter-coder reliability, which was 97%.

³ We further chose to restrict our analysis to this time period because it takes place after the rise of partisan preemption had firmly been established in the 1980s. Our goal in this research is not to explain the rise in preemption over time, which has already been thoroughly discussed by others (e.g., Zimmerman 1991; 2008). Our research starts with the premise that preemption is already a common tool used by both parties, and we seek to examine the systematic differences between the two parties' equally high rates of preemption. Restricting ourselves to the 1990s onward thus enables us to focus on the variation within high rates of preemption, while avoiding the separate discussion of why preemption rose in the first place.

⁴ We draw the number of preemption statutes enacted by each Congress and presidential administration from our dataset, which represents the entire universe of express preemption policies enacted during our period of interest. The total number for enacted laws and passed resolutions for each period was derived from data available at govtrack.us, available from <https://www.govtrack.us/congress/bills/statistics>.

⁵ It is not coincidental that theories of party government focus on the House of Representatives (Cox and McCubbins 1993; 2005).

⁶ Because we treat all three categories of ceiling preemptions as theoretically similar, they are combined for the purpose of our statistical analysis. We have provided descriptive statistics for types one and two (preemption of state legislative power) vs. type three (preemption of state judicial power) in the appendix, Figure A1. The patterns of preemption are consistent across types.

⁷ Party control in the Senate is not included in our model for two reasons, one theoretical and one practical. First, centralized party control, and thus the degree to which partisanship is likely to influence policy outcomes, is much

stronger and more influential in the House (as discussed above). It is unlikely; therefore, that the majority party in the Senate will be driving partisan policy results. Second, our data does not contain any observations for which Republicans have majority control in the Senate without also having majority control in the House. This does not allow for the full range of variation to adequately capture the effect of Senate majority party control without accounting for issues of intra-Congressional divided government.

⁸ These categories were chosen to be consistent with the issue areas used in a 1992 report on preemption produced by the U.S. Advisory Commission on Intergovernmental Affairs. The report is the major existing work that systematically catalogues and categorizes the universe of preemption cases by issue area.

⁹ The results reported in Figure 1 are descriptive statistics.

¹⁰ Figure 4 displays descriptive statistics.