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THE IDEOLOGICAL COMPONENT OF JUDGING IN THE TAXATION CONTEXT

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I. INTRODUCTION

Despite the vast number of systematic empirical studies of judicial behavior, we know surprisingly little about how and why judges reach decisions in the business and finance context.¹ This void is due, in part, to scholars' abiding focus on controversies involving civil rights and liberties;² indeed, based on the extant literature, it would be easy to conclude that judges, particularly U.S. Supreme Court Justices, spend their days interpreting civil rights-type legislation to the exclusion of all other types of laws. Yet this conclusion is wide of the mark—even a simple count of the Supreme Court's plenary docket reveals that the Court is

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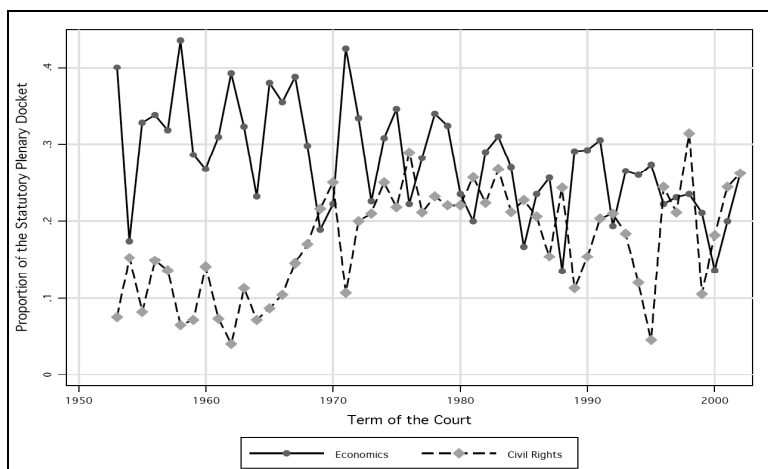
1. We refer to the void in the quantitative empirical literature. A rich qualitative empirical literature exists on judicial decision making in the economic context. See, e.g., Adam Chodorow, *Economic Analysis in Judicial Decision Making—An Assessment Based on Judge Posner's Tax Decisions*, 25 VA. TAX REV. 67 (2005) (describing Judge Posner's sixty tax decisions and commenting on the strengths and weaknesses of the underlying principles of law and economics); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 124–25 (1997) (exploring facts that impact certiorari in bankruptcy cases); Charles L.B. Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222, 225 (investigating Supreme Court tax cases and arguing the opinions are characterized by “triviality and futility”); Beverly I. Moran & Daniel M. Schneider, *The Elephant and the Four Blind Men: The Burger Court and Its Federal Tax Decisions*, 39 HOW. L.J. 841, 856–74 (1996) (examining hundreds of Supreme Court tax cases); Nancy C. Staudt, *Agenda Setting In Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889 (2004) (examining Supreme Court tax cases from 1986–1994 and identifying factors that impact certiorari decisions); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004) (examining Supreme Court securities and antitrust decisions); Bernard Wolfman, Jonathan Silver & Marjorie Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235 (1973) (analyzing Supreme Court decisions addressing corporate insider trading, labor law, and tax law in an effort to understand Justice Douglas's voting behavior).

2. For further discussion and cites highlighting findings in the civil rights literature that are not likely to explain decision making in economic controversies, see Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305 (2003).

more likely to address congressional statutes regulating business and the economy than civil rights legislation.³

The scholarly focus on civil rights cases, of course, is not itself problematic. The literature on judging in this area is both deep and rich; the studies are numerous and the findings robust. The problem, in our view, is that it is far from clear whether the findings in the civil rights literature can be generalized to all other areas of the law and, in particular, to cases involving statutes regulating business or the economy (“economic controversies”). To be sure, researchers find similarities in the decision making processes across issue areas,⁴ but just as often they find differences.⁵

3. The Supreme Court has decided 2,905 cases since 1954. As depicted in the figure below, with the exception of a few Terms, the number of economic cases is always higher than the number of civil rights cases on the Supreme Court docket. In the figure, the horizontal axis depicts the Term of the Court and the vertical axis shows the proportion of civil rights and economic cases decided. The figure displays each Term between 1953 and 2002, the Terms for which we have comparative data.



4. See, e.g., Scott D. Gerber & Keeok Park, *The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices*, 91 AM. POL. SCI. REV. 390–408 (1997) (finding Supreme Court Justices are less likely to be consensus driven on the Supreme Court than they were as lower court judges regardless of issue area); Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137 (1990) (finding Supreme Court is responsive to Solicitor General in analysis of all cases decided between 1953 and 1982 in which the Solicitor General filed a brief); see also HAROLD J. SPAETH, *THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953–2006 TERMS* (2006), http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf (finding that Justices are more likely to produce outcomes that favor the federal government than any other party regardless of issue area).

5. See, e.g., Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (1996) (finding measures of political preferences have more explanatory value in the civil

One of the most enduring divides that scholars have uncovered between decision making in different areas of the law is the role of politics, whether in the form of partisanship or ideology. Study after study confirms a strong correlation between judges' political preferences and their behavior in civil rights and liberties cases, but researchers have only rarely identified an association between politics and decisions in economic cases.⁶ Some argue that the apolitical nature of decision making in the business and finance contexts is due to the fact that judges simply do not have political preferences in these areas,⁷ or if they do, other factors work to neutralize them.⁸ Recently scholars have used empirical data and statistical methods to investigate these claims, but no study has rejected the null hypothesis that ideological orientation and votes are completely independent of each other in economic cases.

In our view, the existing literature highlights a curious puzzle: why do judges appear to stand above politics in the areas of the law that are rife with conflict and controversy in the other two branches of government? Lawmaking in the context of taxation, bankruptcy, securities, antitrust, and corporate law, to name just a few examples, is highly political in both the legislative and executive branches, as many empirical scholars have documented.⁹ For this reason, we seriously question the claim that judges are unique in that they have no political or ideological preferences when it comes to business and finance. Our hypothesis is that the null findings in the literature are due to the technical difficulties associated with uncovering politics in large-*n* quantitative studies addressing economic decision making, rather than to a lack of judicial interest in these issues. This is the question we investigate here.

We first briefly discuss three measures of individual preferences that scholars have used to assess the role of politics in the judicial decision making environment. Irrespective of the measure adopted, scholars reach the same conclusion: ideology (or partisanship) explains quite a bit about

rights context than in the economic context); *see also infra* notes 17–56 and accompanying text.

6. *See infra* notes 18–56 and accompanying text.

7. *See, e.g.*, Neil M. Richards, *The Supreme Court Justice & “Boring” Cases*, 4 GREEN BAG 2d 401 (2001) (Justices find economic controversies cases “boring”); *see also* Stuart Taylor, *Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14 (“If one’s in the doghouse with the Chief, he gets the crud. He gets the tax cases and some of the Indian cases, which I like, but I’ve had a lot of them.” (quoting Justice Blackmun)).

8. Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 351 (2001) (finding no correlation between individual political preferences and judicial decision making, and noting politics may be “neutralized by the legal process”).

9. *See infra* notes 51–56 and accompanying text.

decision making in civil rights and liberties cases, but very little about business and finance. We then use our own data set to investigate this question further. Specifically, we examine every U.S. Supreme Court case decided between 1940 and 2005 that involves an interpretation of the Internal Revenue Code.¹⁰ We first approach the problem using the same measure of politics that researchers have adopted heretofore in the study of judicial decision making. We then modify this approach by using slightly more refined coding protocols to identify “liberal” and “conservative” decisions. Our study produces interesting findings, in part, because they are so mixed. When we aggregate the cases, we find that neither liberal nor conservative Justices systematically vote in favor of either the taxpayer or the government. When we slice the data to investigate this finding further, we again find a lack of association between politics and outcomes in individual income tax cases. When we examine only the corporate income tax cases, however, we obtain very different results. Our study suggests that liberal Justices are far more likely to vote with the government while conservative Justices systematically vote with corporate taxpayers in the Supreme Court. This finding is robust across many different models and suggests, at least in these circumstances, that the Justices do have political preferences regarding the outcomes in economic controversies. We think our findings have implications for empirical studies of judicial decision making in many areas, and we discuss these possibilities in the last section of the paper.

II. THE EXTANT LITERATURE: POLITICAL PREFERENCES EXPLAIN OUTCOMES IN CIVIL RIGHTS BUT NOT ECONOMIC CASES

Operationalizing the role of political preferences for purposes of identifying its role, if any, in judicial decision making is not a straightforward task. After all, scholars interested in the correlation between case outcomes and a judge’s partisanship or ideology cannot simply ask the decisionmaker to define the nature of her political preferences as well as the extent to which they influence her voting behavior. Most judges would (sincerely) respond that they are “completely neutral” when considering controversies in the courtroom; individual political preferences, it is often argued, should not—and allegedly do not—impact case outcomes.¹¹

10. For a description of the details of our data collection procedures, see *infra* notes 63–64 and accompanying text.

11. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV.

To avoid the obvious problems associated with relying on survey data and questionnaires, scholars have devised a wide array of approaches to investigate how closely correlated political preferences are to judicial voting behavior and, ultimately, to case outcomes. In this section, we focus on three of the more prominent mechanisms for quantifying the role of politics in the judicial context that scholars have developed over the last decades. The first group of scholars measures the role of politics by counting the number of votes a judge (or a court) casts in the liberal and conservative direction; as the percentage of votes reaches some threshold in one direction or another they are labeled either conservative or liberal. The second group measures the role of politics in judicial decision making by examining the different outcomes reached by Republican and Democratic presidential appointees; the former is expected to have right-leaning proclivities while the latter is expected to be left-leaning. The third group relies on scores devised by expert analysts, known in the literature as the “Segal-Cover” ideology scores, to determine whether judges characterized as more liberal decide cases differently from the judges deemed more conservative.

Regardless of the measure of politics used, all researchers recognize that identifying possible political predilections in the judging context requires a prior definition of both “liberal” and “conservative” decisions. To give meaning to the two terms, scholars look to the identity of the winning party as well as the claim alleged. The prevailing wisdom suggests that decisions supportive of “underdogs,” such as civil rights claimants, the criminally accused, unions, and so forth, are liberal, while conservative decisions include pro-business, pro-government, pro-employer, pro-creditor, and other outcomes favoring the “haves” over the “have-nots.”¹² Although many scholars have set forth their own standards for making this determination, quite a few now rely on the coding protocols developed by Harold Spaeth for his data collection project on U.S. Supreme Court decision making.¹³ Spaeth’s coding decisions (and all others that we have identified) follow the “upperdog/underdog” approach for characterizing a vote or an outcome as, respectively, conservative/liberal.

1335, 1337 (1998) (“I maintain, and always have maintained, that appellate judging is fundamentally a principled practice.”). Judge Edwards also argues that empirical studies showing politics impact judicial decision making are seriously “mislead[ing]”. *See id.*

12. *See* SPAETH, *supra* note 4, at 52–55 (discussing coding protocols for partisan direction of Supreme Court cases).

13. *Id.*

With regard to differences in coding decisions between civil rights and liberties cases and the cases we have labeled “economic controversies,” there is an important distinction. If the case involves the federal or state government and the issue is in the business context, pro-government outcomes are coded liberal, and decisions in favor of the private party are labeled conservative. This approach diverges from that found in areas such as search and seizure or civil rights, where scholars almost uniformly view pro-government decisions as conservative. We explore this coding discrepancy further below, but for now we note that the distinction at least initially appears sound: we agree that an important and relevant political difference exists in cases involving governmental support for strict sanctions for accused criminals and those involving the imposition of a tax on corporate income or the regulation of securities markets. The former fit well with our understanding of conservative behavior as a victory of the “haves,” while the latter appear to involve the government, as representative of the general public, prevailing over the “haves.” In short, the coding protocols adhere to the conventional wisdom described above regarding “underdogs” and “upperdogs.”

Following these distinctions, Spaeth and many others code tax decisions that are in favor of the taxpayer as conservative and decisions in favor of the government as liberal.¹⁴ In the securities law context, Sullivan and Thompson follow this approach by coding pro-government decisions as liberal and anti-government decisions as conservative.¹⁵ Various other researchers interested in business and finance cases have also followed suit.¹⁶ As we discuss further below, we think these coding rules work well in the civil rights context but produce unexpected errors in business and finance litigation. If methodological barriers exist to collecting and coding data in a reliable and accurate manner in the economic context, as we suspect they do, the role of politics may not surface—even if it is present. Before exploring this problem in further detail, we briefly describe empirical findings published in the existing literature.

14. *Id.*; Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473, 513 (2002) [hereinafter *Predicting Who Wins*] (expecting federal judges appointed by Democratic Presidents to be systematically biased in favor of the government); Daniel M. Schneider, *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?*, 25 VA. TAX REV. 201, 237 (2005) [hereinafter *Social Background Model*] (same); see also Nancy Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (2004) (expecting federal judges appointed by Democratic Presidents to rule in favor of taxpayer standing in spending controversies).

15. See, e.g., Sullivan & Thompson, *supra* note 1, at 1578–81.

16. See, e.g., *id.* at 1578–88.

A. Vote Counting

The first, and for decades the dominant measure that scholars have used to investigate possible partisan behavior in the judging context is a simple tabulation of the number of votes a judge or Justice renders in the liberal or conservative direction, using the definitions outlined above.¹⁷ One reason scholars have so widely adopted this approach is that it is relatively easy to employ. As Martin, Quinn, and Epstein note,

All the researcher needs to do is select an area of the law—say, criminal procedure or an even finer one, such as Fourth Amendment search and seizure cases—and inspect the behavior of individual Justices in a given Term(s), Term t , with an eye toward characterizing [the votes] in that term or in a subsequent one, Term $t + 1$.¹⁸

After categorizing votes and outcomes as liberal or conservative, scholars then array the judges and courts in a table from most liberal to most conservative or along a continuum (judges with the highest percentage of liberal votes, for example, are placed furthest to the left and those with the lowest percentage on the far right) to highlight the level of partisanship and ideology at play in the voting process.

One of the first scholars to adopt this approach, C. Herman Pritchett, examined civil rights and liberties cases decided between the 1941 and 1946 Terms. Pritchett found (as expected) that Justices Murphy, Rutledge, Black, and Douglas were liberals while Justices Reed, Burton, and Vinson

17. Andrew Martin and Kevin Quinn developed a more sophisticated measure of politics that also relies upon vote counting. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). Their findings confirm our general claim here: politics do not seem to explain outcomes in economic cases. We ran a logit model using the median Martin-Quinn score for each Term's tax cases as the independent variable and Spaeth's direction variable as the dependent variable. See SPAETH, *supra* note 4, at 52–55 (indicating that if $dir=1$ court outcome is liberal, and if $dir=0$ outcome is conservative). This model produced an insignificant coefficient ($p=0.775$) on the Martin-Quinn score in the federal taxation context. In other words, knowing the Martin-Quinn score of the median Justice does not help us to predict outcomes in tax cases (at least using Spaeth's database). In substantive terms, the predicted probability of the most liberal court ruling in favor of the government (liberal according to Spaeth's coding protocols) is 76% with a 95% confidence interval of 61%–87%; for the most conservative court the number is 73% with a 95% confidence interval of 61%–82%. The average Justice—in terms of ideology—votes for the government in 74% of the cases with a 95% confidence interval of 68%–80%. These are entirely trivial differences, as we would expect given that the coefficient is not significant.

18. Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1292 (2004).

were conservatives.¹⁹ Following Pritchett, many other researchers have used this same technique in the civil rights context and have found results that place judges and Justices on a continuum that appears consistent with our general understanding of judicial ideology. Ulmer, for example, found that the Warren Court was quite a bit more liberal than many of the earlier Courts when it came to voting on civil liberties cases.²⁰ LeVar counted votes and found that Justices Douglas, Brennan, and Marshall consistently voted together for liberal outcomes in civil rights and liberties cases and Justices Burger and Rehnquist systematically voted for conservative outcomes.²¹ Lim similarly found that Justices Brennan and Marshall voted in the liberal direction on crime and civil liberties while Justices Rehnquist, Scalia, and White voted in the conservative direction on crime.²²

When it comes to judging in economic cases, however, the data are far less consistent and the findings less robust. Sullivan and Thompson calculated the votes in nearly one hundred securities cases decided over several Supreme Court terms and found that politics is not a strong predictor of outcomes.²³ The authors' coding rules characterize a liberal vote as one in favor of expanding the securities statutes (a pro-government outcome), while conservative votes are those in favor of restricting the coverage of the laws to narrow circumstances (an anti-government outcome) and thus are consistent with the coding protocols described above. Sullivan and Thompson find that in some eras the Justices are arrayed in a manner that places the well-known liberals (such as Justices Douglas, Brennan, and Marshall) at one end of the spectrum and the conservatives predictably at the other end.²⁴ In other eras, however, the Justices appear to change their views completely and the role of politics begins to look a bit less predictable; this randomness, the authors note, makes it difficult to accept the premise that the Justices' political preferences offer the best explanation for their voting behavior in the securities law context.²⁵ They argue that something more must be going

19. C. Herman Pritchett, *The Roosevelt Court: Votes and Values*, 42 AM. POL. SCI. REV. 53, 62 (1948).

20. S. Sidney Ulmer, *Government Litigants, Underdogs, and Civil Liberties in the Supreme Court: 1903–1968 Terms*, 47 J. POL. 899, 905 (1985).

21. C. Jeddy LeVar, *The Nixon Court: A Study of Leadership*, 30 W. POL. Q. 484, 487 (1977).

22. Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 748 (2000).

23. See Sullivan & Thompson, *supra* note 1, at 1578–88.

24. *Id.*

25. *Id.*

on, and for this reason the authors look to “entrepreneurial” activities undertaken by a specific Justice to explain Supreme Court activity in this context. They find that Justice Lewis Powell, a Justice who had extensive experience in securities law prior to coming to the bench, seemed to have the greatest impact on outcomes in this area of the law, and that after his retirement the outcomes become more difficult to predict and explain.²⁶

Various other studies appear to confirm Sullivan and Thompson’s finding that politics and ideology are not good predictors of decision making in economic contexts, notwithstanding their usefulness for explaining outcomes in other areas of the law. Youngsik Lim, for example, found a systematic correlation between politics and outcomes in economic controversies, but the results were not in the expected direction. Using the Spaeth database coding rules for identifying “liberal” and “conservative” decisions, he found that between the 1988 and 2000 Terms, Justice Rehnquist was the true liberal while Justices Brennan, Marshall, Blackmun, and O’Connor were the real conservatives.²⁷ Rather than confirming the role of political preferences in judicial decision making, these peculiar results suggest something is amiss either in our current theory of judging or in the existing coding processes. We hypothesize it is the latter.

B. The Party of the Appointing President

In an attempt to move beyond vote patterns as indicators of political preferences, scholars have sought independent measures to quantify ideological or partisan viewpoints. A popular proxy for a judge’s or Justice’s political preference, and one that is now widely used in the legal literature, is the political party of the appointing President.²⁸ A vast array of data suggests that U.S. Presidents hope to ensure that judicial appointees have preferences that mirror their own partisanship, and this goal leads to a nomination process rife with politics—and ultimately one that produces judges and Justices that reflect the views of the President. As Sunstein, Schkade, and Ellman note,

26. *Id.* at 1592–97.

27. Lim, *supra* note 22, at 748.

28. Most scholars use the party of the appointing President, but others use the party of the Justice or a score that combines the parties of the appointing President and the Senate at the time of the nomination. See Martin, Quinn & Epstein, *supra* note 18, at 1285–86 (discussing alternative scoring methods).

A Democratic president is unlikely to want to appoint judges who will seek to overrule *Roe v. Wade* and strike down affirmative action programs. A Republican president is unlikely to want to appoint judges who will interpret the Constitution to require states to recognize same-sex marriages. It is reasonable to hypothesize that as a statistical regularity, judges appointed by Republican presidents . . . will be more conservative than judges appointed by Democratic presidents²⁹

Numerous researchers have investigated the hypothesis that Republican-appointed judges reach systematically more conservative outcomes than those produced by Democratic appointees. Defining “liberal” and “conservative” outcomes in the manner described above, the researchers have obtained results that are consistent and robust in the civil rights and liberties context.³⁰ Sunstein, Schkade, and Ellman find that politics as measured by the party of the appointing President explains voting behavior in abortion cases as well as those involving capital punishment;³¹ Staudt finds a relationship in cases involving constitutional challenges to government spending on religious activities;³² Rowland and Carp uncover a strong relationship in race discrimination and religion cases;³³ Cross and Tiller find a relationship in environmental law controversies;³⁴ Gates and Cohen find Republican-appointed Justices are far more likely to vote against the plaintiff in racial equality cases;³⁵ Aliotta finds a correlation in the context of equal protection claims,³⁶ and the list goes on and on.

The correlation story, however, again changes when economic cases are the subject of study. Although it is true that most scholars using this

29. Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 303 (2004) (footnotes omitted).

30. A few exceptions to the general findings exist. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257–65 (1995) (noting these claims but arguing presidential politics do not explain outcomes).

31. Sunstein, Schkade & Ellman, *supra* note 29, at 327–28.

32. Staudt, *supra* note 14, at 663–66.

33. C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 24–26 (1996).

34. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175–76 (1998).

35. John B. Gates & Jeffrey E. Cohen, *Presidents, Supreme Court Justices, and Racial Equality Cases: 1954–1984*, 10 POL. BEHAV. 22 (1988).

36. Jilda M. Aliotta, *Combining Judges’ Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280 (1988) (“Being a Democrat is associated with casting votes in favor of equal protection claims.”).

measure of political preferences have ignored economic controversies altogether, those who have relied on the approach find no relationship between political preferences and voting behavior. Schneider, for example, has systematically examined taxation cases in district and appellate courts and finds that this measure of partisanship has no explanatory value for either the method of interpretation or the outcome itself.³⁷ Even the Sunstein team, which finds a statistically significant correlation in nearly all of the civil rights and liberties contexts it examines, does not find such a relationship in cases outside this area, such as takings and federalism.³⁸ Lim's study of Supreme Court cases decided between 1988 and 2000 also fails to uncover a statistically significant correlation between the party of the appointing President and the Justices' decisions in economic controversies.³⁹ In all these studies, judges appear apolitical when it comes to issues involving business and finance.

C. *The Segal-Cover Ideology Scores*

The most important advancement in terms of an exogenous methodology for measuring judicial ideology came in 1989 from the work of political scientists Jeffrey A. Segal and Albert D. Cover.⁴⁰ Segal and Cover created independent measures of ideological values for Supreme Court Justices using a content-analytic technique. The Segal-Cover team derived judicial "ideology scores" by examining statements in four of the nation's leading newspapers—the *New York Times*, *Los Angeles Times* (now they use the *Wall Street Journal*), *Chicago Tribune*, and the *Washington Post*—from the time the President nominated a Justice to the Supreme Court until the confirmation vote by the U.S. Senate.⁴¹ More specifically, Segal and Cover coded each paragraph of the editorials contained in the newspapers as "*liberal, moderate, conservative, or not applicable*."⁴² Liberal scores were based on several factors, including

37. *Predicting Who Wins*, *supra* note 14, at 513; *Social Background Model*, *supra* note 14, at 237.

38. Sunstein, Schkade & Ellman, *supra* note 29, at 326–27. This team of researchers, however, also found an area in the civil rights context—criminal appeals—that did not have outcomes correlated with the party of the appointing president. *Id.* at 325–26.

39. Lim, *supra* note 22, at 748. Lim, however, also failed to find a statistically significant association in the context of criminal law cases. *Id.*

40. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

41. *See id.* at 559; Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 814 (1995).

42. *See Segal & Cover*, *supra* note 40, at 559 (italics in original).

support for the rights of defendants in criminal cases, women and racial minorities, individuals against the government in privacy and First Amendment cases, and the government against individuals in tax and takings cases. Conservative scores, by contrast, were linked to judicial views that went in the opposite direction. Segal and Cover then used their expert scoring to calculate U.S. Supreme Court Justices' ideology ranging from +1 (unanimously liberal) through 0 (moderate) to -1 (unanimously conservative). The scores, in short, can theoretically be any real number between -1 and +1.⁴³

The Segal-Cover scores, like those discussed above, are remarkably reliable for predicting votes in civil rights and liberties cases. As Martin, Quinn, and Epstein note, the scores "are well in line with commonly held intuitions about particular Justices and Court eras, they appear facially valid,"⁴⁴ and for this reason they have been used widely in studies investigating judicial decision making. Segal and Cover themselves use the scores to examine civil rights and liberties votes and find that Justices Marshall and Harlan are very liberal while Justices Rehnquist, Scalia, and O'Connor are far to the right when it comes to casting votes.⁴⁵ Similarly, Epstein and Mershon find the Segal-Cover scores predict civil rights, criminal, and civil liberties cases quite well;⁴⁶ Segal, Epstein, Cameron, and Spaeth reach a similar conclusion.⁴⁷ Many more examples support the point that judicial preferences as measured by the Segal-Cover scores are systematically correlated with votes and outcomes in civil rights and liberties litigation.⁴⁸

Scholars, however, have found the scores have far less explanatory value in economic cases generally, and virtually no explanatory value in specific areas of the law, such as taxation. Epstein and Mershon conducted a methodological audit of the usefulness of the Segal-Cover scores across issue areas, and their work highlights the problem.⁴⁹ The scores appear to explain forty-three percent of votes in civil rights cases, eighteen percent of the votes in economic cases generally, and zero percent of the Justices'

43. *Id.* at 559.

44. Martin, Quinn & Epstein, *supra* note 18, at 1290.

45. Segal & Cover, *supra* note 40.

46. Epstein & Mershon, *supra* note 5, at 264-71.

47. Segal, Epstein, Cameron & Spaeth, *supra* note 41, at 815-20.

48. *E.g.*, Francine Sanders Romero, *The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases*, 34 L. & SOC'Y REV. 291, 306-07 (2000).

49. Epstein & Mershon, *supra* note 5, at 277-78 & tbl.4.

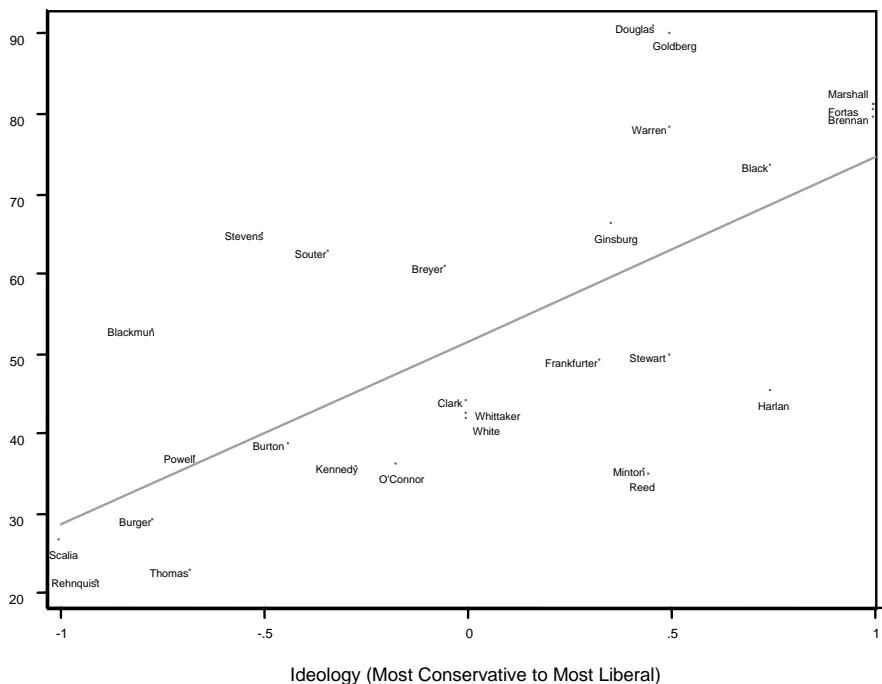
decisions in taxation cases.⁵⁰ To make the point even more transparent, we created a figure to depict the linear relationship between politics and judging in two different issue areas. Figure 1 below compares the relationship between the Justices' ideology and their voting in civil liberties (Panel A) and tax cases (Panel B). The horizontal axis in both panels of Figure 1 displays the Justices' ideology, as derived from the Segal-Cover scores. The vertical axis shows the percentage of support for the party alleging a rights violation or the government in tax cases. Note that the relationship between ideology and voting is rather strong in the rights cases ($r = +.677$) but not in tax litigation ($r = +.145$).⁵¹

50. *Id.*

51. The Segal-Cover scores are available in LEE EPSTEIN & JEFFERY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 110 (2005). Data on voting is derived from Harold J. Spaeth's U.S. Supreme Court Judicial Database, with `dec_type=1` or `7` and `analu=0` and value set to 1-6 for civil liberties and 12 for tax cases. SPAETH, *supra* note 4. The authors include only justices participating in ten or more cases; Justice Jackson was excluded for that reason.

FIGURE 1: RELATIONSHIP BETWEEN JUDICIAL IDEOLOGY AND VOTES IN CIVIL LIBERTIES CASES (PANEL A) AND TAX CASES (PANEL B).

PANEL A: PROPORTION OF LIBERAL VOTES (I.E., THOSE FOR “UNDERDOGS”) IN CIVIL RIGHTS CASES



PANEL B: PROPORTION OF LIBERAL VOTES
(I.E., THOSE FOR GOVERNMENT) IN TAX CASES

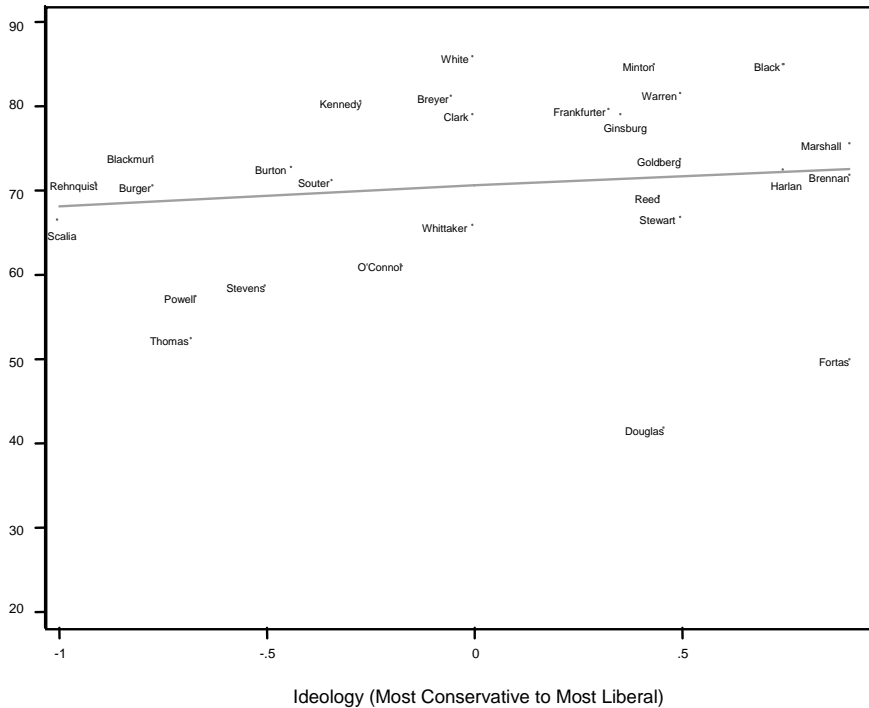


Figure 1 and the studies described above highlight the question that interests us: why do politics, defined either in terms of ideology or partisanship, help account for decisions in the areas of civil rights and civil liberties but not in the economic context? We find it extremely unlikely that judges and Justices simply set aside their political preferences in cases involving business and finance questions, or that the preferences are so weak they cannot show up in empirical studies. Many congressional scholars, such as Poole and Rosenthal; Cox and McCubbins; Smith and Deering; Suarez; and Fenno, to name just a few, find that the most powerful—and political—legislators are those involved in economic lawmaking.⁵² Scholars find, for example, that the legislators serving on the

52. See, e.g., GARY COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993); KEITH KREHBEIL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 49–52 (1991); KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL ECONOMIC HISTORY OF ROLL CALL VOTING* (1997); RICHARD SPOHN & CHARLES MCCOLLUM, *THE REVENUE COMMITTEES* (1975); SANDRA L. SUAREZ, *DOES BUSINESS LEARN? TAX BREAKS,*

Appropriations, Ways and Means, Finance, Commerce, and Banking Committees wield the most political power in Congress.⁵³ These studies demonstrate that the committees and their members routinely craft highly partisan legislation and consistently vote along party lines during roll call votes.⁵⁴ In fact, these studies show that legislators with control over economic issues are just as partisan as those with control over civil rights and liberties issues, if not more so.⁵⁵ Empirical studies of the presidency produce similar findings: political maneuvering and partisan politics pervade executive activities on a day-to-day basis in the business and finance context.⁵⁶

III. DEFINING IDEOLOGY IN THE ECONOMIC CONTEXT: ARE THE 0'S ALL 0'S AND THE 1'S ALL 1'S?

Given the importance of budget issues, tax policy, securities regulation, and so forth for the political careers of legislators and Presidents, it seems implausible that judges simply do not care—or know little about—the economic issues that find their way into the courtroom. For this reason, we hypothesize that the null findings in the extant literature may be a by-product of the way in which scholars have operationalized the term “ideology” in business and finance cases. In particular, we believe the existing coding protocols that researchers use (and that we too have relied on in our work) to categorize liberal and conservative decisions may be problematic when transposed into the economic context. As noted above, scholars routinely characterize liberal decisions as those that go in favor of the “underdog,” such as civil rights complainants, the criminally accused, unions, and so forth; conservative decisions are understood as those that

UNCERTAINTY, AND POLITICAL STRATEGIES (2000); *see also* E. SCOTT ADLER, WHY CONGRESSIONAL REFORMS FAIL: REELECTION AND THE HOUSE COMMITTEE SYSTEM, 149 *tbl.*10 (2002) (tax-writing committees subject to capture); RICHARD FENNO, CONGRESSMEN IN COMMITTEES 1–45 (1973) (same); JOHN F. MANLEY, THE POLITICS OF FINANCE: THE HOUSE COMMITTEE ON WAYS AND MEANS (1970) (same); STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 140–54 (1973) (same); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. PA. L. REV.* 1, 86–87 (1990) (stating that tax law has been dominated “by interested groups that seek favors for themselves and that through a norm of logrolling, almost never oppose favors for each other”); *accord* JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX (1985) (exploring history of politics in tax context).

53. *See generally* STEVEN S. SMITH & CHRISTOPHER DEERING, COMMITTEES IN CONGRESS (3d ed. 1997).

54. *See generally* COX & MCCUBBINS, *supra* note 52.

55. *Id.*

56. *See generally* THOMAS J. REESE, THE POLITICS OF TAXATION (1980).

favor businesses, employers, creditors, and the government. With respect to cases involving economic issues, the coding protocols are precisely the same *unless* the government is involved in the litigation. In cases that involve the government as a participant and concern issues such as securities regulation, taxation, antitrust, and corporate law, an outcome in favor of the government is coded as liberal, and an outcome in favor of the private party is coded as conservative. When quantified, the former is coded as 0 and the latter as 1. This approach to identifying liberal and conservative decisions is certainly a plausible first approximation, but there are many cases in which it would produce questionable characterizations of the data, and in some cases the rule would lead researchers to make demonstrably false categorizations. To make our point more clear, we focus on taxation litigation.

The coding rules mandate that all private parties, be they poor individuals, partnerships, public corporations, or nonprofits, be viewed identically; this means that a decision in favor of any of these parties is a conservative decision. Although a court decision that enhances the government's ability to tax corporations and "big businesses" seems consistent with a liberal point of view, when the taxpayer is a poor individual the decision might more accurately be labeled a conservative decision. For example, when the government prevails in a lawsuit contesting a poor taxpayer's right to the Earned Income Tax Credit, we think it is an error to categorize the outcome as liberal. Consider the case of *United States v. Dalm*,⁵⁷ which involved an individual taxpayer, Francis Dalm, who mistakenly paid too much tax on money she received from her employer for serving as a "loyal secretary" for decades.⁵⁸ Although the statute of limitations had run out by the time Dalm went to court to obtain a refund, the Sixth Circuit determined she was nevertheless entitled to recompense under the doctrine of equitable recoupment.⁵⁹ The Supreme Court reversed this decision, holding Dalm was not entitled to recovery of the taxes she paid but did not actually owe.⁶⁰ In their dissent, Justices Stevens, Brennan, and Marshall argued that the Court's outcome was not required by the law and that the majority had effectively sanctioned government conduct that was both "'immoral' and tantamount to a 'fraud on the taxpayer's rights.'"⁶¹ The existing coding rules would require a

57. 494 U.S. 596 (1990).

58. *Id.* at 598.

59. *Id.* at 600.

60. *Id.*

61. *Id.* at 612 (Stevens, J., dissenting).

scholar to code *Dalm* as a liberal outcome, and yet the three dissenting Justices seemed to think that forcing a working-class woman to pay taxes twice on the same income was anything but liberal. There are many other cases in our database of Supreme Court tax decisions that also raise this problem.

Put differently, the conventional approach to coding could lead to systematic errors in the identification of liberal and conservative decisions in the economic context. We think this problem is especially likely to occur in the economic context because the federal government litigates against such diverse parties when the issues involve business and finance. Taxpayer litigants are extremely diverse along socioeconomic lines, and the same may be said of the parties involved in securities litigation, bankruptcy, and business law generally. In the civil rights and liberties cases, we also expect some diversity among claimants (for example, white individuals alleging “reverse discrimination”), and not all will receive the same level of sympathy from liberal Justices. But we expect to find—on a routine basis—a mixture of different types of parties in the business context and relatively homogenous claimants in civil rights and liberties litigation. If our hypothesis is an accurate description of the data, then this would explain why politics is highly correlated with decision making in so many legal areas, but not in the context of business and finance. To be clear, we do not object to the methodology that characterizes decisions in favor of the “upperdog” as conservative and those in favor of the “underdog” as liberal; rather our reservation lies with the coarse coding rules researchers use to identify these two parties. We are confident that the government should not always be viewed as the “underdog” in taxation cases and, similarly, that the taxpayer should not uniformly be considered the “upperdog,” but conventional rules require coders to conclude as much.

Of course, we recognize that the all-purpose rules are useful precisely because they do not require researchers to examine each individual case to identify the liberal or conservative nature of the outcome. This more refined approach would obviously lead to a database that, while perhaps more accurate, would have very little scientific use. It would be next to impossible to replicate, reproduce, update, or build on the individual researcher’s work, essential components of valid empirical research.⁶² Although we hope eventually to develop coding rules that avoid both the

62. See generally Lee Epstein & Andrew Martin, *Coding Variables*, in 1 ENCYCLOPEDIA OF SOCIAL MEASUREMENT (2005), first proof available at <http://Epstein.law.northwestern.edu/research/codingvariables.pdf>.

drawbacks of the existing approach as well as the problems associated with individual analysis of each case, for purposes of this essay we test our theory in a different manner. We use Supreme Court tax cases in a way that steers clear of coding errors: we look to the data in the aggregate, then examine individual taxpayer cases and corporate taxpayer cases separately. Disaggregation allows us to identify the role of politics without veering from existing coding rules. We hypothesize that, although the Justices may have diverse views on taxpayers generally, their views on corporate taxpayers are likely to be more uniform: liberal Justices will favor the government in controversies involving corporations, but conservative Justices will be more apt to favor the corporation. We do not expect the Justices to have similarly consistent views in cases involving the other groups of taxpayers, for the reasons we just noted. We explore this hypothesis and discuss our empirical findings below.

IV. THE ROLE OF POLITICS IN ECONOMIC CASES: A CASE STUDY IN TAXATION

To test our theory that politics informs and impacts judges' decision making in economic controversies and that the existing literature has missed this correlation due to definitional problems, we investigate U.S. Supreme Court tax cases. In this section, we first outline our data collection procedures, our coding protocols, and our findings. We then comment on the implications of our study for future research.

A. Data Collection and Coding Decisions

For purposes of this essay, we collected every Supreme Court tax case decided between 1941 and 2004 (i.e., the 1940–2003 Terms). We began our data collection by first identifying every case in the Supreme Court that mentioned the word “tax” or a variant thereof.⁶³ We then reviewed each case produced by the search, retaining only those cases that involved an interpretation of a federal tax statute. This procedure led us to exclude state taxation cases, as well as cases involving tax fraud, jurisdictional

63. We identified these cases via a LEXIS search. The LEXIS search that we conducted reads as follows: (federal w/s tax!) or (excise w/s tax!) or (estate w/s tax!) or (user w/5 fee) or (user w/s tax!) or (tax! w/s fraud) or (irc) or (i.r.c.) or (stamp w/s tax!) or (income w/s tax!) or (internal w/s revenue) or (tax! w/s lien) or (tax! w/s code) or (tax! w/s evad!) or (tax! w/s evasion) or (corporate w/s tax!) or (payroll w/s tax!) or (employment w/s tax!) or (social w/s security) or (26 usc) or (26 u.s.c.) or (tax! w/s refund) or (tax! w/s deficiency) or (unemployment w/s tax!) or (gift w/s tax!) or (fica w/s tax!) or (f.i.c.a. w/s tax!).

questions, and evidentiary issues (if they did not involve a statutory interpretation issue). At the end of the culling process, we obtained a data set of 487 distinct cases,⁶⁴ dispersed over sixty-four Supreme Court Terms.

The Court decided thirty-three percent of these tax cases in the 1940s, and the remaining sixty-six percent in the next five decades. The corporate income tax was litigated in thirty-five percent of the cases; the individual income tax in eighteen percent of the cases; procedural issues, such as statute of limitation issues, in seventeen percent of the cases; criminal issues in ten percent; and the remaining cases involved a variety of issues such as estate and gift taxes, pass-through entities, excise taxes, social security taxes, and nonprofits. In each era and in each context, the federal government was far more likely to win. The government won roughly seventy percent of the cases overall; the sovereign win rate was highest in the 1950s, when the government won seventy-five percent of its cases, and is currently at its nadir, with only fifty-five percent of the cases decided in favor of the government. We comment further upon and offer a preliminary explanation of these statistics below.

For purposes of investigating the role of politics in this essay, we adopted the social scientists' and legal scholars' "rule of thumb" with regard to coding outcomes: a liberal outcome (coded 0) is in favor of the government and a conservative outcome (coded 1) goes in favor of the taxpayer. However, we examined only the individual income tax cases and the corporate tax cases. Thus, we excluded criminal cases, estate and gift tax cases, procedural issues, and so forth. We made this decision in order to test our hypothesis that individual taxpayer controversies will involve taxpayers from a variety of socioeconomic backgrounds and will not easily or uniformly conform to the label "upperdog," and thus the outcomes in these cases will not be systematically correlated to judicial ideology. The corporate taxpayers, by contrast, more readily fit within the existing coding rules, and thus this is the most likely place to find judicial politics in economic decision making.

To measure the Justices' political preferences, we adopted the Segal-Cover scores. Although this approach to quantifying the Justices' politics has its drawbacks, we think it the best of the three measures readily available for our purposes.⁶⁵ In future investigations of the ideological

64. The unit of analysis used to compute this figure is the case citation and not the docket number. If we use the docket number, the figure increases to 554. We included only orally argued cases that resulted in a per curiam judgment or an opinion of the Court.

65. For a discussion of the advantages and disadvantages of the Segal-Cover scores, see Martin,

component of judging in the taxation context, we plan to use the other measures outlined above to test the robustness of our findings here.

Our empirical test of the role that politics plays in Supreme Court decision making in the tax context involves three simple logit models. In each model, the dependent variable is the prevailing party (government=0 and taxpayer=1) and the independent variable is the Segal-Cover score for the median Justice sitting on the Court. The first model includes the 260 cases involving *both* individual and corporate income tax controversies; the second model includes *only* the eighty-nine individual cases; and the third model includes *only* the 171 corporate tax cases. As predicted, judicial ideology explains decision making neither in the aggregated model (both individual and corporate) nor in the model restricted to the eighty-nine individual cases. The Justices' political preferences, however, have significant explanatory value in the model that includes solely the corporate cases—the correlation is statistically significant at the .033 level and in the expected direction.⁶⁶

We think these findings are important because they highlight the possible definitional problems with the existing studies on decision making in the business and finance context. Our first model, the aggregated model, takes the approach that most researchers adopt for investigating the role of politics: all the cases are grouped together and pro-government decisions are coded as liberal and anti-government decisions are coded as conservative. Our findings mirror those found in the extant literature: there is no relationship between judicial politics and outcomes. In the second and third models we slice the data in order to examine corporate and individual cases separately, and we find a strong correlation only in the corporate context. Liberal Justices are significantly more likely to produce pro-government outcomes when the case involves

Quinn & Epstein, *supra* note 18, at 1290–92.

66. The results of the three logit models investigating the role of politics in Supreme Court tax cases are depicted in the Table below. The dependent variable is coded 1 if the taxpayer prevails and 0 if the government prevails. Maximum likelihood logit coefficients are presented with robust standard errors in parentheses. Statistical significance at the .05 level is denoted by a double asterisk (**).

	Model 1 (Aggregated Data) N=260	Model 2 (Individual Taxpayers) N=89	Model 3 (Corporate Taxpayers) N=171
Median Justice	.364 (.300)	-.498 (.568)	.783 (.368)**
Constant	.596 (.158)	.979 (.295)	.401 (.193)
Pseudo R ²	.004	.007	.02

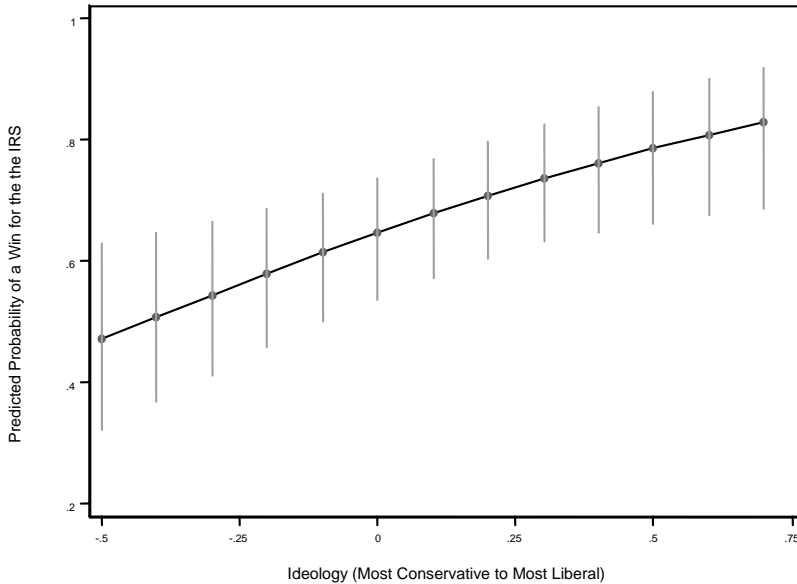
a corporation—an outcome we think fits with most scholars’ intuition of what constitutes “liberal decision making.”

In order to quantify the substantive impact of our findings in the corporate context, we calculated the change in the Court’s predicted probability of producing a pro-government outcome as the median Justice becomes more liberal. To generate the predicted probabilities, we used the software program Clarify,⁶⁷ first estimating a logit model with the winner, the government or the corporation, as the dependent variable and using as the independent variables the Segal-Cover scores and the codification date of the current Tax Code (pre-1954=0; post-1954=1).⁶⁸ Second, we set the Codification of the Tax Code variable at 1 (the results do not change appreciably if codification is set at 0). In Figure 2 below, we depict these probabilities and show that an extremely conservative Court is more likely to rule for the corporation than for the government. The y-axis displays the predicted probability of the government winning in corporate income tax cases; the x-axis plots the ideology of the median Justice on the Supreme Court using the Segal-Cover scores. The solid line in the graph depicts the actual probabilities and the light gray horizontal lines in the graph depict the ninety-five percent confidence intervals.

67. Michael Tomz, Jason Wittenberg & Gary King, *CLARIFY: Software for Interpreting and Presenting Statistical Results*, 8 J. STAT. SOFTWARE 1 (2003). The Clarify software is available at <http://gking.harvard.edu/clarify>.

68. Between 1913 and 1954, Congress revised the Tax Code twenty-three times. The structure of the Code, however, has remained largely intact since 1954. See Nancy Staudt, Rene Lindstaedt & Jason O’Connor, *Judicial Decisions as Legislation* (forthcoming) (manuscript at 17 n.18, on file with author).

FIGURE 2: THE PREDICTED PROBABILITY OF A PRO-GOVERNMENT DECISION IN CORPORATE INCOME TAX CASES BY THE IDEOLOGY OF THE MEDIAN SUPREME COURT JUSTICE.



As the figure shows, the likelihood of a pro-government decision increases significantly as the Court becomes more liberal. When the Court is extremely liberal, the probability that the government prevails is eighty-three percent; whereas when the Court is at its most conservative, the probability that the government will prevail falls to forty-seven percent. A moderate court (i.e. a Court with the median coded as 0) will produce a government win roughly sixty-three percent of the time, which is the mean percentage of government wins in our database of all income tax cases. These statistics offer an explanation for why the government won more often in the 1950s and is currently losing corporate tax cases at a high rate: in the 1950s the Court had a Segal-Cover score of $+0.499$, while the current Court has had a score of -0.349 since the 2000 Term. Although we do not have cases from the 2005 Term in our data set, given the Court's current score of -0.5 , our models predict that a corporation has a fifty-four percent probability of winning a case—quite a bit higher than the mean rate, which

is just thirty-seven percent over the course of the sixty-four Supreme Court Terms we examined.

We tested the robustness of our finding by adding additional independent variables to each of the models and obtained similar findings. We controlled for cases decided pre- and post-1954 (the date when Congress substantially revised and recodified the Internal Revenue Code), the direction of the lower court holding (i.e., pro- or anti-government), and the state of the economy. We specified the models with each of the additional variables separately and in aggregate and found that politics as measured by the Segal-Cover scores continued to be statistically significant in the model that includes only corporate tax cases. Politics was not correlated with outcome in either the aggregated model or the model evaluating the individual taxpayer cases.

Although we can only speculate why the Justices do not appear to be politically motivated in individual taxpayer cases, we expect it relates to the diverse characteristics of this group and thus the categorization problems described earlier. In *Dalm*, the liberal Justices viewed Francis Dalm as a sympathetic taxpayer entitled to a refund, but many individuals that come to the Court are likely to be wealthy taxpayers challenging taxes such as those imposed on business activities, capital gains, and so forth—challenges that would most likely not get a sympathetic ear from the liberal Justices.⁶⁹ We expect that grouping all individual taxpayers together and then labeling pro-taxpayer outcomes as “conservative” has disadvantages for empiricists interested in correlations between politics and outcomes. In some cases, the decisions are accurately categorized as conservative, but others should be coded as liberal. This grouping problem, however, is greatly attenuated in the corporate context because liberals systematically oppose pro-corporate outcomes and conservatives prefer them, just as expected.

B. Implications for Future Research

Our simple models suggest we should reject the null hypothesis that politics plays no role in judicial decision making that involves business and finance. Although our findings are preliminary and we acknowledge

69. In *United States v. Ptasynski*, 462 U.S. 74 (1983), for example, a group of individual royalty owners filed suit challenging the Crude Oil Windfall Profit Tax of 1980. A unanimous Court found in favor of the government, noting that the law did not violate the uniformity clause. *Id.* at 83–85. Unlike *Dalm* discussed in the text, in *Ptasynski* the pro-government decision fits with our understanding of a “liberal” decision.

that we have quite a bit more work to do before fully accepting our results, we think they highlight a problem worthy of further investigation. Scholars interested in uncovering the role that politics plays in the judicial decision making process—whether in the form of partisanship or ideology—may have adopted flawed mechanisms for identifying this relationship. With more nuanced coding protocols—rules that account for the systematic diversity of parties in court—researchers may be able to test their theory of politics with far more precision. Indeed, we expect that a more refined approach to quantifying data may lead to a better understanding of decision making not only in the economic context but also in the civil rights and liberties context. Attention to the problem of using overly generalized rules in the data collection process will avoid the problem of grouping dissimilar observations together as if they are similar, and this could well lead to a stronger association between judges' personal preferences and their voting behavior in the areas in which scholars have already identified a strong relationship.

Our next step, then, involves the design and formulation of coding rules that will allow students of judicial decision making to gain a better understanding of the ways in which politics informs voting, and ultimately outcomes, in different areas of the law. With more refined data, we hope to be able to shed light on the ways in which judicial ideology is at work in the courtroom and identify circumstances where we can say with confidence that it is absent.