Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code

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INTRODUCTION

Why do judges interpret statutes the way they do? Positivist analyses aimed at answering this question abound and, perhaps not so surprisingly, have supplied no shortage of responses. Some suggest that the primary determinant centers on the internal political ideologies of judges. That is, jurists will interpret statutes in line with their sincerely held policy preferences.[1] A second group points to the external context, arguing that judges behave in a strategic fashion vis-à-vis other relevant actors. That is, judges will read statutes in such a fashion as to maximize their policy preferences within the limits set by outside political constraints; for example, to avoid triggering a congressional override.[2] Still others argue that statutory interpretation has less to do with policy maximization than it does with principle maximization, that is, jurists interpret statutes in accord with their

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1. Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 41, 42-43 (1997); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 344-49 (2002).

2. An example of outside constraints is the congressional override. *See* Lee Epstein & Thomas G. Walker, *The Role of the Court in American Society: Playing the Reconstruction Game*, *in* CONTEMPLATING COURTS 322-24 (Lee Epstein ed., 1995); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334, 337-79, 390-91 (1991) [hereinafter Eskridge, *Overriding*]; William Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 642-46, 664-66 (1991) [hereinafter Eskridge, *Reneging*]; Andrew D. Marin, Public Policy, the Supreme Court, and the Separation of Powers, Sept. 1, 1998 (transcript on file with the Journal of Law & Policy).

preference for adhering to precedent, or particular ideas, theories, or philosophies. They may pursue these goals sincerely or strategically, depending upon the specific account.[3]

Other responses exist of course. To us, however, the more interesting features of the non-normative literature on statutory interpretation lie not in the distinctive conclusions it has generated, but rather in its commonalities. We see two as particularly interesting. First, many of the relevant studies focus on civil rights legislation.[4] This holds true regardless of whether the work's producers are legal academics or social scientists, whether the research is primarily qualitative or quantitative, or whether it finds its theoretical grounding in psychology, sociology, or economics. Second, almost all the studies—especially those of the large-*n*, quantitative variety—explore the outcomes reached by jurists, and not the rationale or justifications they invoke.[5] To be sure, the outcomes under investigation differ from study to study—sometimes it is support for the government or not; in others, it is whether the judge reached a "liberal" or "conservative" decision. However, the unmistakable focus is on the result, to the neglect of the rationale.

These are not criticisms of the extant literature. Quite the opposite: we firmly believe that by investigating outcomes reached in civil rights cases, this line of inquiry has revealed a great deal about the "judicial mind." At the same time, we believe just as firmly that if we are to fully understand the determinants of statutory interpretation, then a continued emphasis on civil rights is, for reasons we specify in Part I, a potential problem.[6] And, to the extent that we desire a more comprehensive picture of judicial behavior, an

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3. *See generally* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 574, 579-80, 581-82 (1992).

4. *See*, *e.g.*, Segal, *supra* note 1, at 36; Eskridge, *Reneging*, *supra* note 2, at 617-64. Though there are exceptions, most of the literature also focuses on lower federal court judges. *See, e.g.*, Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 332-33 (2001). *But see* Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions*, 23 RAND J. ECON. 463, 464, 477-78 (1992) (discussing one of the few studies focusing on the Supreme Court level).

5. *See, e.g.*, Martin, *supra* note 2; Segal, *supra* note 1, at 36; SEGAL & SPAETH, *supra* note 1, at 324-27; Spiller & Gely, *supra* note 4, at 477, 490.

6. *See infra* Part I.

exclusive focus on outcomes is, for reasons we elaborate on in Part II, incomplete at best and misleading at worst.[7]

Accordingly, we have devised a project that aspires to address these concerns by (1) exploring Supreme Court tax opinions, a body of case law that, despite its importance, has received virtually no systematic attention, and (2) analyzing or taking into account both outcomes and rationales. At the end of the day, we hope that our attention to these matters will make a useful contribution to the literature on judging statutes.

The time for presenting results has not yet arrived. While our project is well underway, our data set is large, and the task of data collection is formidable and ongoing. Rather than reporting results, in this Article we hope to accomplish three tasks. First, we make a case for moving beyond the arena of civil rights to study interpretation in economic contexts (Part I).[8] Second, we explain the value of moving beyond mere outcomes, and incorporating judicial rationales in the analysis of statutory interpretation (Part II).[9] Third, we provide information about the contours of our study, including a description of our data set and an explanation of some of the questions we plan to explore (Part III).[10]

I. THE CIVIL RIGHTS FOCUS

A mere glance at the literature reveals that most rigorous empirical investigations of statutory interpretation, especially at the level of the U.S. Supreme Court, employ civil rights legislation as their focus. Those that do not are far more heavily weighted toward other types of individual rights-based laws than they are toward more economically oriented statutes.[11]

To us, this bias presents a potential problem when drawing inferences about the general enterprise of statutory interpretation. Because the issues and concerns found in civil rights cases are

7. *See infra* Part II.
8. *See infra* Part I.
9. *See infra* Part II.
10. *See infra* Part III.
11. *But see* Spiller & Gely, *supra* note 4, at 464, 477 (providing an important exception to this general rule).

different from those involved in business law controversies, the accounts offered to explain the resolution of civil rights cases may not hold outside that context.

A. Civil Rights and the Supreme Court Docket

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 controversies.[12] The literature's focus on such laws has been that intense and deep. Yet, this is quite misleading, as even simple counts of the Supreme Court's plenary agenda would reveal.

Consider, for example, Figure 1, which depicts the ten congressional statutes that have received the most attention from the U.S. Supreme Court since its 1953 Term. What emerges is a picture not unlike the one Calvin Coolidge painted of America in 1925: the business of the Court is business.[13] Of the ten statutes most frequently appearing before the Court, six pertain primarily to congressional attempts to regulate business and the economy; just three center on matters of civil rights and liberties, and only two of those are the focus of most scholarly work (the Civil Rights Acts). Even if we were to combine the amount of litigation incident to those two civil rights statutes, the resulting figure would be overwhelmed by cases involving the Internal Revenue Code, which has been the subject of more litigation than any other statute over the last five decades. To think about it another way, of the 2,929 cases in which the Supreme Court interpreted a statute, slightly over eight percent (n=242) involved the Internal Revenue Code[14]—a staggering figure in light of

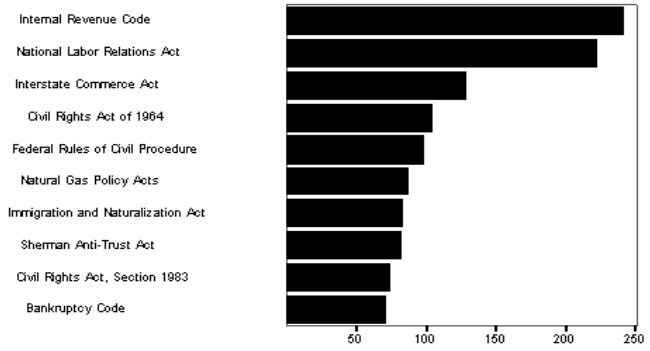
12. Indeed, scholars and commentators claim that the Court's docket has shriveled at the expense of cases "disputing vital, if less visible, issues like taxes, pensions, federal benefits and maritime law." Ted Gest, *The Court; Deciding Less, Writing More*, U.S. NEWS & WORLD REP., June 28, 1993, at 24. *See also* Glenn W. Reimann, *Sour Grapes or Sound Criticism: Is the Supreme Court Really Not Taking Enough Non-Tax Business Cases*, 8 U. MIAMI BUS. L. REV. 161, 175-79, 191 (1999) (citing claims that the Court no longer takes business cases and arguing that empirical evidence supports the claims). However, the Court has also reduced its caseload to such an extent that virtually *all* areas of the law have suffered. *Id.* at 167.

13. In 1925, Calvin Coolidge remarked, "The business of America is Business." President Calvin Coolidge, Address to the Society of American Newspaper Editors (Jan. 17, 1925), *reprinted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 859 (13th ed. 1995).

14. Computed from the Spaeth's U.S. Supreme Court Judicial Database (2002 release), *at*

the scores and scores of laws that have come to the Court's attention since 1953.

Figure 1
Most Frequently Litigated Congressional Statutes in the U.S. Supreme Court, 1953-2001 Terms



Note: Bars represent counts of cases. Data are from the U.S. Supreme Court Judicial Database (2002 release), with analu=0 or 1, and dec_type=1, 6, or 7. The variable depicted is LAW.

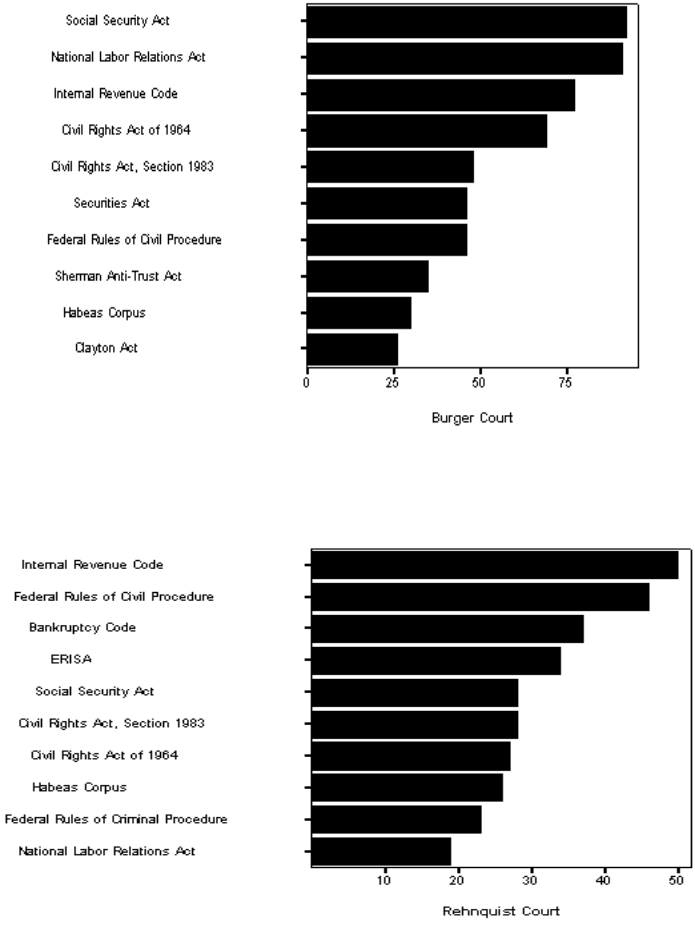
The picture does not change appreciably if we consider patterns since the 1960s, when Congress enacted the great bulk of civil rights legislation investigated in the literature. Figure 2, which compares laws litigated during the Burger Court (1969–1985) and Rehnquist Court (1986–2001) eras, makes this crystal clear.[15] While the "top ten lists" vary—for example, the Bankruptcy Code was among the more frequently litigated provisions during the Rehnquist years, but not during Burger years—the basic finding unearthed in Figure 1

http://www.polisci.msu.edu/pljp/supremecourt.html, with dec_type=1, 6, or 7, and analu=0 or 1. The variable under analysis is AUTHDEC_1.

15. The *Harvard Law Review*'s annual survey of Supreme Court activity for the preceding term contains statistics on the types of cases decided, including a category for tax cases. Using these data, Moran and Schneider conclude that the Burger court did not slight tax cases, and call into question the common belief that the Court loathes tax cases and attempts to avoid them whenever possible. 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, 866-67 & n.69 (1996).

remains: it is largely business and economics that have dominated and continue to dominate the Court's statutory agenda.

Figure 2
Most Frequently Litigated Congressional Statutes During the Burger and Rehnquist Court Eras



Note: Bars represent counts of cases. Data are from the U.S. Supreme Court Judicial Database (2002 release), with analu=0 or 1, and dec_type=1, 6, or 7. The variable depicted is LAW.

If the results depicted in Figures 1 and 2 indicate anything, it is that scholarly emphasis on civil rights laws touches only the tip of the iceberg. To get to the great mass, we ought turn our attention to where the Court itself has focused its attention: on the Internal Revenue Code, the National Labor Relations Act, the Social Security Act, and so on.

Yet, from the sheer numbers alone we cannot say that a focus on civil rights limits our ability to draw inferences about why the Court reaches the decisions it does in litigation that calls for interpretation of other statutes. Even though civil rights laws are not typical of those the Court interprets, it is at least *possible* that the litigation itself is otherwise similar to, say, suits involving the Internal Revenue Code.

But possible is a far cry from likely. We suspect that it is most *un*likely that what we have learned about statutory interpretation from a focus on civil rights transports precisely to other areas of the law. Our suspicions are founded on the fact that civil rights cases generate a great deal more public and media attention than, say, tax suits. According to the extant literature, this suggests that the Court may handle the two in distinct ways.

Figure 3 nicely illustrates this point: If we take a decision's coverage on the front page of the *New York Times* on the day after the Court hands it down as a valid measure of public attention,[16] then it is quite clear that cases involving the Civil Rights Act of 1964—as compared with those asking the Court to interpret the Internal Revenue Code—garner significantly more. Of the 184 tax cases, a trivial 3.8% (n=7) generated *New York Times* coverage; in contrast, of the 67 Civil Rights Act suits, 37.3% (n=25) generated coverage.

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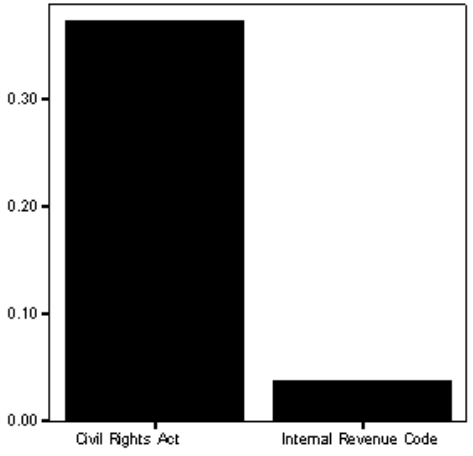
16. Lee Epstein & Jeffrey A. Segal, *Measuring Salience*, 44 AM. J. POL. SCI. 66, 72-73, 76-77 (2000).

Figure 3
A Comparison Between the Proportion of Civil Rights Act of 1964 Cases and Internal Revenue Code Cases Receiving Front-Page Coverage in the *New York Times*



Note: N=67 (Civil Rights Act); N=184 (Internal Revenue Code). Pearson Chi-Square=49.579 ($p < .001$). Bars represent the proportion of statutory civil rights and tax cases that appeared on the front page of the *New York Times* on the day after the Court announced its decision.[17]

If this difference in media attention had no effect on Court behavior it would not impede our ability to learn about general statutory interpretation from a focus on civil rights. That is not, however, the case. Many studies have shown that the behavior of the justices varies according to whether or not they are resolving an especially salient case.[18] Numerous scholars, for example, claim that Chief Justices tend to assign opinions of great public interest to themselves—with some even suggesting that over-self-assignment of

17. These data are from Epstein & Segal, *supra* note 16, and are available at http://www.artsci.wustl.edu/~polisci/epstein/ajps/articleie.html, with analu=0, dec_type=1, 6, or 7, and law=CRA7 or IRC.

18. *See* Epstein & Segal, *supra* note 16, at 66-67, 77-79 (reviewing studies that test whether the Court is affected by the relative salience of cases or issues).

salient cases has all the makings of a norm on the Supreme Court. As Danelski explains:

> The Chief Justice has maximal control over an opinion if he assigns it to himself, and undoubtedly Chief Justices have retained many important cases for that reason. The Chief Justice's retention of "big cases" is generally accepted by the Justices. In fact, the expectation is that he should write in those cases so as to lend the prestige of his office to the Court's pronouncement.[19]

Other scholars suggest that the Court is more likely to produce unanimous opinions in salient cases. Indeed, the literature is replete with examples of justices, especially Chief Justices, going to great lengths to unite their colleagues behind a single opinion when they believe that the Court is resolving a dispute of great public moment.[20] This may reflect a perception by Chief Justices that other political actors are more likely to acquiesce in unanimous decisions.[21]

We could list many more examples, but the general idea would be the same: a large amount of evidence suggests that the justices exhibit different behavior in cases likely to generate public response. Because civil rights cases are significantly more likely to generate such a response (at least compared to the tax area), there is good reason to be wary of the quality of inferences we can make about statutory interpretation in other fields from a focus on civil rights.[22]

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19. *See generally* David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, *in* COURTS, JUDGES, AND POLITICS 496 (A. Sarat ed., 1989).

20. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 42 (1998). RICHARD KLUGER, SIMPLE JUSTICE 878-83 (1976).

21. *See* BRADLEY C. CANON & CHARLES A. JOHNSON, JUDIGICAL POLICIES: IMPLEMENTATION AND IMPACT 51 (2d ed. 1999); Eskridge, *Overriding*, *supra* note 2, at 346, 349-50.

22. There are other reasons to be suspicious of the usefulness of inferences drawn from civil rights cases. If the justices are indeed attentive to other branches when deciding cases and consider the possibility of a congressional override, then the judicial concerns in civil rights cases may be very different from those in tax cases. *See* Eskridge, *Overriding*, *supra* note 2, at 379-82, 385-87 (positing a difference between the relative preferences of the Court and Congress in tax and civil rights cases and tracing the strategic implications of that difference). Many studies indicate that corporations and business entities lobby Congress for specific tax rules, which may lead legislators to pay particular attention to the Court's tax decisions, even if the media virtually ignores them. On the government side, the Treasury's oversight of the tax laws is so intensive that it occasionally convinces congressional tax-writing committees to

B. Scholarly Accounts of Statutory Interpretation

As observed earlier, scholars have offered numerous explanations for the outcomes of cases that require the Court to interpret statutes. Many of their accounts, however, rest in one way or another on the notion of preferences. The simple attitudinal model posits that justices generally vote in accordance with their sincerely held political preferences, and that no other factors come into play except perhaps case-specific facts.[23] Most variants of the strategic decision model also start from the premise that justices seek to maximize their political preferences, but posit that in doing so they take into account the likely behavior of other justices and institutions.[24] Specifically, the strategic decision model asserts that to maximize their policy preferences justices must take into account the institutional context in which they make their choices, including the responses of actors in the other branches of government. This position is founded on the observation that, under a system of checks and balances, government policy is not the separate sphere of any single branch, but is the product of interactions between them. It follows that for any set of actors—be they justices, legislators, or the executive—to make authoritative policy, they must attend to this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices.[25]

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include provisions in omnibus tax reform bills that overturn trial court statutory interpretations. *See, e.g.*, Tax Reform Act of 1984, Pub L. No. 98-369 § 79(a), 98 Stat. 494, 597 (rejecting the interpretation of I.R.C. § 752 that was adopted in *Raphan v. United States*, 3 Ct. Cl. 457 (1983)).

23. *See* SEGAL & SPAETH, *supra* note 1, at 86.

24. Virtually every existing strategic account of judicial decisions posits that justices pursue policy. Their goal is to see public policy—the ultimate state of the law—reflect their preferences. But this need not be the case. Under the strategic account, as we suggested earlier, researchers could posit any number of other goals, be they jurisprudential or institutional. *See generally* John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992).

25. EPSTEIN & KNIGHT, *supra* note 20, at 12-17; Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583, 585, 592-95 (2001); Eskridge, *Overriding*, *supra* note 2, at 334, 378-79; Eskridge, *Reneging*, *supra* note 2, at 642-46; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Decision Making with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263-300 (1990); Martin, *supra* note 2; Andrew D. Martin, *Congressional Decision*

Scholars have leveled a number of criticisms at these preference-based approaches, one of which is particularly relevant to us: these models—even strategic accounts, which are attentive to the institutional context—neglect the larger socio-political context in which justices operate. These scholars assert that variables designed to take into account socio-political context are essential. The crime rate, for instance, may have a bearing on Court decisions involving crime legislation, and so it should be factored into the analysis.

The force of this critique, as applied to studies of the interpretation of civil rights-type legislation, may be debatable. The simple, one-dimensional, liberal-conservative metric may adequately capture decisional inputs in the voting rights or employment discrimination context, for example. But in litigation over things economic, the relevance of macroeconomic conditions seems beyond debate. In our view, models designed to explain statutory interpretation in tax ought take into account not only the general political preferences of the justices (and other relevant actors), but should also build in a factor to account for the economic context in which justices are laboring. The justices may be strategic policy maximizers, seeking to etch their personal political preferences into law, but we surmise that the state of the economy figures into their calculus when making decisions that may well impact the economy. Flowing from this belief are hypotheses that would not readily emerge from a continued focus on civil rights. For example, perhaps the state of the federal budget affects how the Supreme Court resolves litigation involving the IRS, such that when the deficit is relatively large, the justices are more receptive to the tax collector's arguments.

This, of course, is casual conjecture; it is not our aim here to do much more than speculate either about particular hypotheses or about the importance of the economy in general. We only wish to say here that that we believe that the posited effect does not come about willy-nilly, via some magical preference change on the part of justices. Instead, it is the product of continued pursuit of personal political

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Making and the Separation of Powers, 95 AM. POL. SCI. REV. 361, 362-66 (2001) (legislators); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 97-99 (1994); Spiller & Gely, *supra* note 4, at 467-68.

ideology in the face of varying economic contexts[26]—contexts that traditional separation-of-powers-type analyses (even with their emphasis on the preferences of relevant political actors) may fail to capture. There is, we believe, some link or interplay between prevailing economic conditions and the Court's decisions concerning business and economic affairs. Thus, a model that incorporates these conditions may yield more satisfying results.

At this juncture we cannot offer definitive empirical support of our claim. Suffice it to note that a mini-test confirms its plausibility. To be precise, the data supports one of many possible observable implications flowing from this idea—namely, that the U.S. Supreme Court is more likely to rule in favor of the U.S. government in tax cases when the U.S. budget deficit is large. To conduct the test we estimated a very simple (and admittedly entirely underspecified)[27] logit model using maximum likelihood (ML) estimation:[28]

$Y_i \sim \text{Bernoulli}(\pi_i)$ and $\pi_i = 1/(1+\exp(-\mathbf{x}_i'\beta))$,

where Y_i is a dichotomous variable representing U.S. government victory in tax cases heard by the U.S. Supreme Court (1=U.S. wins tax case; 0=U.S. does not win tax case),[29]

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26. *See, e.g.*, Robert H. Durr, *What Moves Policy Sentiment?*, 87 AM. POL. SCI. REV. 158, 158-59, 166-67 (1993).

27. Other problems also exist. Note that the use of logit/probit models with binary time-series cross sectional data can be problematic because of the temporal nature of the data, which may lead to underestimated standard errors and inflated test statistics. Nathaniel Beck et al., *Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable*, 42 AM. J. POL. SCI. 1260, 1261, 1263 (1998). Given our very modest goals, we simply put these potential problems aside for the moment.

28. Case outcome, the dependent variable in our analysis, is dichotomous; the United States either wins a tax case or it does not. This makes the use of common models, such as linear regression, inappropriate. Accordingly, we estimated logit models using maximum likelihood. All coefficients reported in the text are logit estimates, and all probabilities are derived from logit estimates.

29. The data are for the 1946–1997 Terms, and are from the U.S. Supreme Court Judicial Database, with analu=0 or 1; dec_type=1, 6, or 7; and value=12. These data present additional problems, as the two tax experts on this paper are dissatisfied with the way Spaeth, the compiler of the Database, defines Federal Taxation. This issue is discussed further *infra* Part III.

and $\mathbf{x}_i$' is a 1 x k+1 vector of observations on the U.S. budget deficit/surplus[30] for the given year and the Segal/Cover preference scores[31] for the median justice on the Court for the given year.

The results support the hypothesis of interest: the coefficient on the budget deficit/surplus variable is statistically significant (at the α=.05 level), and in the expected direction.[32]

More interesting, though, may be the substantive implications of the results, for which we can get a feel by examining counterfactuals. Consider Table 1. Here we present a summary of the probability that the Supreme Court will decide a tax case in favor of the U.S. government as the budget deficit/surplus variable increases from its

30. LYNN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY 361-62 (1998) (measuring budget deficit/surplus in billions of current U.S. dollars).

31. *See generally* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559-60 (1989) (discussing and assigning "Segal/Cover scores" to the Supreme Court justices). The authors devised measures of the ideological preferences of the Justices by examining editorials written prior to Senate confirmation. The scores are highly satisfactory predictors of votes in many areas of the law, particularly civil rights and liberties, but are less so in others (including tax, which presents yet another potential problem with our analysis). We assume, in line with the social science literature, that the more liberal the median, the more likely the Court will support the government in tax cases—even though this assumption, too, is probably flawed for many kinds of disputes in this area. For more on this point, see *infra* Part III.

32. The results are as follows:

Variable	**ML Logit Coefficient (Standard Errors)**
Constant	.42399 (.25833)
U.S. Budget Deficit/Surplus	-.00587 (.00281)
Median Justice	1.28454 (.50519)
N	298
Pseudo R^2	.0182
LR-test (2)	6.37

minimum observed value (-$290.1 billion) to its maximum observed value ($8.9 billion), holding the median justice variable constant at its mean.[33]

Table 1
Predicted Probability of a U.S. Government Win in a Tax Case Before the Supreme Court.

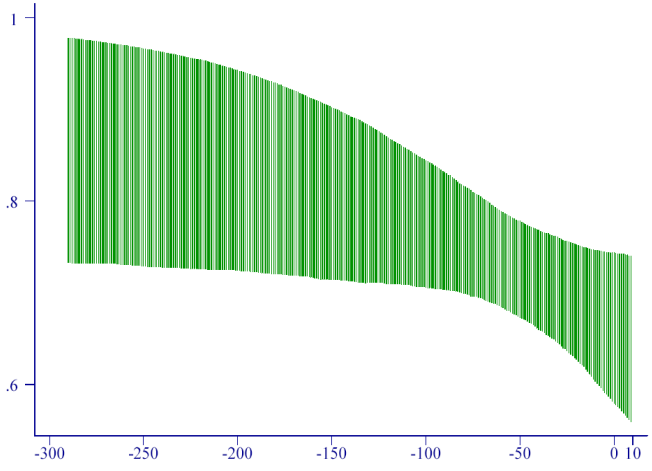
	Predicted Probability of U.S. Government Win	**95% Confidence Interval**
Budget Deficit of -$290.1 billion	.9013	[.7499, .9772]
Budget Surplus of $8.9 billion	.6557	[.5623, .7380]

Note: The median justice variable is held constant at its mean value.

What we see is that, as the budget deficit/surplus increases from its minimum observed value to its maximum observed value, the probability that the Court will rule in favor of the U.S. government *decreases* by .2456. As indicated by the 95% confidence interval, this change in probability is not attributable to chance. Figure 4 displays a graph of this changing probability as budget deficit/surplus increases from its minimum observed value to its maximum observed value.

33. We used CLARIFY to derive the predicted probabilities and confidence intervals. For information on CLARIFY, see Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 341, 360 (2000).

Figure 4
Changing Probability of a U.S. Government Win in the Supreme Court as the Budget Deficit/Surplus Moves from Minimum to Maximum Observed Values



Note: The Y-axis represents the probability of a win by the U.S. government in tax cases; the X-axis depicts the value of the budget surplus/deficit. The length of the lines represents the width of the 95% confidence interval.

Of course, given various problems in the analysis, one cannot draw grand conclusions from these preliminary results. They nonetheless suggest that in the tax area we should view the Court's work in terms of a political economy of judicial decision making. An exclusive focus on civil rights cases would continue to miss this interesting phenomenon.

II. "LAW" VERSUS "OUTCOMES"

Thus far, we have attempted to make the case that problems exist in drawing general inferences about the enterprise of statutory interpretation from an exclusive focus on civil rights. But this is not our only concern about the existing state of the literature. Another concern is that virtually every large-*n*, quantitative investigation of statutory interpretation, whether centered on civil rights (as most are) or not, has the limited objective of explaining *outcomes.* The analysis above is typical—it examines only government wins and losses. Similarly, the focus of Segal's work on civil rights is on predicting whether justices will rule in a "conservative" or "liberal" direction.[34]

That social scientists like Segal have produced many such large-*n*, outcome-oriented studies is no surprise. Quite the opposite: it reflects their theoretical and methodological orientations toward judging. On the theoretical front, many social scientists—especially political scientists—believe that the "law" boils down to outcomes, and that whatever rationales or justifications judges invoke are mere smokescreens designed to hide the fact that politics drives the result. Political scientists might ask, "Why bother to study smokescreens when it is the outcome that matters to all the relevant actors, including the judges?" On the methodological side, most social scientists view their primary job as one of making inferences—they desire to use facts they know (or can collect) to learn about facts they do not know. Making "good" inferences can be accomplished by writing down hypotheses derived from theory, developing valid and reliable measures of the concepts contained in hypotheses, and assessing those operational hypotheses against data systematically drawn from the population. Social scientists could apply this procedure to study narrow areas of the law (such as Title VII litigation, as opposed to all "civil rights" cases) or features of court decisions other than outcomes, but they do not. Their goal is to understand judicial decision making generally, which pushes them away from the narrower, and toward the broadest plausible legal area. Moreover, their interest in reliability moves them away from the

34. *See* Segal, *supra* note 1, at 35-36.

difficult-to-quantify things (like legal rationales) and toward things that they can easily code (like outcomes). Theory and method thus conspire to lead social scientists to large-*n*, outcome-oriented studies.

This approach, of course, troubles many legal academics. To them, explaining decisional law solely by examining case outcomes is as absurd as reducing a legal argument to "my client should win in this controversy with the IRS because she is the taxpayer, and the taxpayer prevailed in the last tax case decided by the Court." Instead, lawyers base their arguments on the facts of the case and on relevant legal principles, which principles may be related to, but do not mechanistically follow from, prior outcomes. Legal arguments draw on the language of the tax statutes, past court decisions, canons of statutory interpretation, theories of fairness, and economic rationales. The Court uses these documents, concepts, and ideas to produce a judicial opinion, which lawyers regard as "law" that constrains lower courts and influences future actions of the Supreme Court.

That is why legal academics tend to eschew large-*n* analyses and focus on small samples. (Often, unfortunately, such samples are selected unscientifically or in some undisclosed manner.)[35] In assaying whether, for example, the Court has created a coherent doctrine in a particular area of the law, legal academics are most interested in the facts of the cases, the legal authorities relied upon, the policy justifications put forward, and the effects of the opinions on various individuals and groups.[36] Likewise, when legal academics

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35. *See generally* Moran & Schneider, *supra* note 15 (presenting a systematic study with a small-n sample). Moran and Schneider's study examines forty-six tax cases decided from 1969 to 1985, providing the frequency with which the Court relied upon one of four methods for reaching a decision on the tax controversy: (1) a plain meaning approach, (2) an intent-based approach that encompasses references to the statute's legislative history, (3) deference to the Executive through reliance on Treasury regulations, and (4) a court-centered approach that eschews reliance on the statute, legislative history, and regulations. *Id.* at 875. The authors of the study did not attempt to explain the outcomes or even to predict how the Court will decide cases in the future. Rather, they note: "[T]he picture reveals a moderate Court that was knowledgeable about tax law and the tax system. And more important, the Burger Court used its knowledge to good result." *Id.* at 942.

36. *See, e.g.*, Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditure?*, 112 HARV. L. REV. 380 (1998) (investigating eight Supreme Court cases and tracing the origins of the constitutional equivalence issue); William A. Klein, *Tailor to the Emperor With No Clothes: The Supreme Court's Tax Rules for Deposits and Advance Payments*, 41 UCLA L. REV. 1685 (1994) (arguing the court developed and relied upon a misguided theory for distinguishing between deposits and advance payments).

seek to understand the judicial philosophy of an individual jurist, they generally do not examine *every* case authored by that justice, or even a systematically drawn sample. Instead, they review a small collection of opinions that seem interesting and arguably representative of his or her contribution to the law as a whole.[37]

In this project, our sympathies in the debate over "outcomes" versus "law" lie with the legal academics. We believe that their more nuanced understanding forces the researcher to consider how the decision-makers conceptualized the legal problem under consideration. To take but one example, social scientists code cases addressing the Internal Revenue Code as involving one issue: "federal taxation." This description is certainly accurate as far as it goes, but it ignores all the subsidiary questions the Court may have addressed, including problems of statutory interpretation, concerns about the federal budget or the national economy, and general notions of equity and efficiency. Moreover, the legal academic's approach to law affords more realistic explanations for the outcomes that the social scientists seek to explain. To see this, consider that the social scientists' rule of thumb with regard to tax cases is: code the outcome as "liberal" if the government's position prevailed, and "conservative" if the taxpayer won. While this may be a plausible first approximation, there are many cases in which it is demonstrably false, such as when the government contests Earned Income Tax Credit claims by low-income individuals.[38]

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37. *See*, *e.g.*, Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171 (2001) (exploring "five landmark cases" that Justice Jackson authored); Darlene Addie Kennedy, *Eschewing the Superlegislative Prerogative: Tax Opinions of Justice Clarence Thomas*, 12 REGENT U. L. REV. 571, 582 (examining five tax cases authored by Justice Thomas and arguing that Justice Thomas is "refreshingly direct and unaffected by personal predilection or ideological bent"); Stephen B. Cohen, *Thurgood Marshall: Tax Lawyer*, 80 GEO. L.J. 2011, 2011 (1992) (exploring five "landmark" tax opinions authored by Justice Marshall and arguing that he "wrote better opinions on the law of federal income taxation that any of his fellow justices"). *But see* BERNARD WOLFMAN ET AL., DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES (1975) (describing *every tax case* in which Justice Douglas participated, arguing that his later opinions can be explained by a growing dissatisfaction with administrative agencies and antipathy towards the tax code).

38. As a further example, Justice Douglas, widely considered to be among the most liberal members of the Court (with a Segal-Cover score of .46 on a scale of -1 (most conservative) to 1 (most liberal); *see generally supra* note 31), voted in favor of the taxpayer in 73% of the tax cases on which he sat during the period from 1959 to 1964, while the Court majority ruled for

At the same time, we do not deny the importance of outcomes. Outcomes are, as the social scientists maintain, important to a range of political actors and, of course, to the parties themselves. Indeed, one question we hope to address in our project is whether certain rationales and policy considerations that come into play when interpreting the Internal Revenue Code lead to predictable outcomes. For example, is discussion of administrative concerns (such as the advantages of uniform, low-cost enforcement, minimizing bureaucratic discretion, or reducing the need for intrusive monitoring, information gathering or record keeping), generally associated with a government victory?

We also appreciate the rigor with which social scientists approach their work, and we follow their general rules and procedures in conducting our study.[39] So, for example, we do not hand-select cases that seem interesting; we are investigating all tax cases decided by the Court.[40] Likewise, we are not basing our analyses on impressions of rationales and doctrines that we could (albeit unsystematically) gather from a close read of cases; we are carefully and methodically coding this information in line with standard procedures in the social sciences. In short, we hope that our project will merge and incorporate the positive features of the legal and social science programs, while leaving the problematic aspects of each method behind.

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the taxpayer in only 17% of those cases. His frequent dissents were often issued without opinion. WOLFMAN ET AL., *supra* note 37, at 43-44. Professor Wolfman and his coauthors speculate that this enigmatic behavior is founded on "a contempt for the Internal Revenue Code and the burdens he believes it unfairly imposes on those not able to lobby successfully for their special preferences." *Id*. at 125.

39. *See generally*, Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1, 54-114 (2002).

40. While we focus entirely on the Supreme Court, there is a burgeoning literature on tax opinions in the Tax Court and in federal district and appellate courts. *See, e.g.*, Schneider, *supra* note 4, at 332-33; Leandra Lederman, *Which Cases Go To Trial? An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 327 (1999); James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 367 (1999); Andre J. Judd & John L. Kramer, *An Empirical Analysis of How the Tax Court Determines When Stock Becomes Worthless For Purposes of Loss Recognition*, 66 TAXES 518 (1998); Sean Bryan et al., *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 133 (1989).

III. OUR PROJECT

Our primary objective is to develop a richer and more systematic understanding of how judges interpret the Internal Revenue Code. In addition, we seek to make use of this understanding in order to develop a richer and more systematic account of statutory interpretation—one that moves beyond civil rights and outcomes. As indicated in Part I, we plan to explore whether existing political preference-based accounts of judicial decision making that scholars have put to the test in the civil rights area (including the simple attitudinal and strategic decision models) hold up equally well in the tax area. We also hope to determine the extent to which economic context figures into the interpretation of the tax law, even after controlling for the political-institutional context. In addition, we will investigate whether certain rationales and policy considerations, which come into play when interpreting the Internal Revenue Code, lead to predictable outcomes. For example, is discussion of administrative concerns (such as the advantages of uniform, low-cost enforcement, minimizing bureaucratic discretion, or reducing the need for intrusive monitoring, information gathering, or record keeping) generally associated with a government victory? And are tax scholars correct in their view that policy considerations motivate tax opinions more than traditional canons of statutory interpretation?

Addressing these and a host of related questions requires us to collect reams of data on the relevant cases and variables of interest. We have already started this process, having now identified every tax case decided by the Supreme Court since 1912. We did so by, first, undertaking a broad Lexis search in an effort to identify every Supreme Court case that mentioned the word "tax."[41] We then

41. The Lexis search that we conducted read 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!).

reviewed each case produced by the search, retaining only those cases that involved an interpretation of a federal tax statute. Thus, we excluded state taxation cases, as well as cases that involved tax fraud but no statutory interpretation problem.[42] This resulted in a collection of 2,116 distinct cases,[43] dispersed over ninety Supreme Court terms (1912–2000).

As Figure 5 depicts, the distribution is uneven. Whether we consider the sheer number of suits (the left panel) or their proportion of the docket (the right panel), the bulk were heard rather early in the twentieth century, and then the numbers dropped rather precipitously. Indeed, from a high water mark of .41 in 1935—meaning that tax cases occupied 41%(!) of the plenary docket—the proportion fell as low as .07 fifty years later, in 1985.

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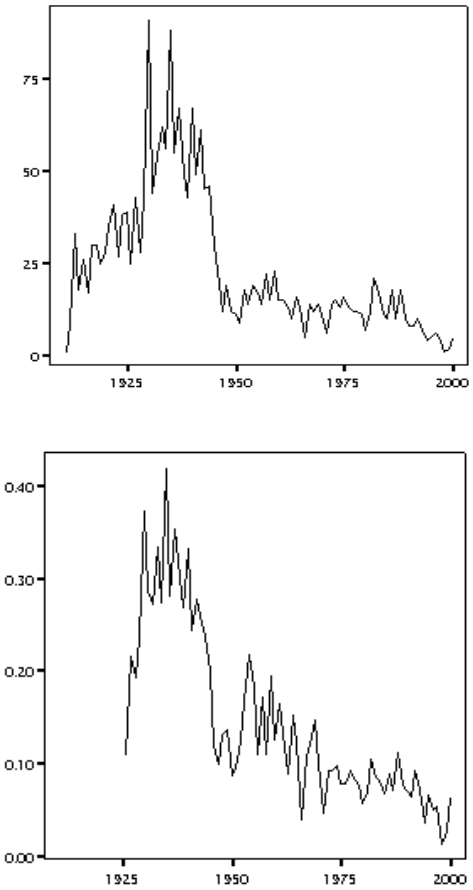
42. While we are confident that we identified every tax case in the Supreme Court, and thus have not run an under-inclusive search, we may have produced an over-inclusive list of cases. For example, we have not checked the list to ensure that customs taxes have been excluded—a collection of cases we have chosen not to study, given the fact that these taxes have come to be used more as a device for trade regulation than (as in the 18th and 19th centuries) as a principal source of revenue.

43. The unit of analysis used to compute this figure is the docket number (analu=0 or 1), not the case citation (0). If we use case citation, the figure falls to 1,744. We included only orally argued cases that resulted in a *per curiam* judgment or an opinion of the Court.

Figure 5
Tax Cases in the U.S. Supreme Court, 1911–2000 Terms



Note: N=2,116. The left panel shows the number of cases per term; the right panel depicts the proportion of the Court's plenary docket occupied by tax cases.[44] Data on the Court's plenary docket are from LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM (3d ed. 2003) (Note that data for the number of cases on the Court's plenary docket are unavailable prior to the 1926 Term). For the absolute number of cases, the analu=0 or 1; for the relative proportion, the analu=0, which corresponds to the available caseload data.

44. Data on the tax cases will be available soon at: http://www.artsci.wustl.edu/~polisci/epstein/.

Nonetheless—and this is a key point—despite their falling numbers, tax cases have continued to take up a considerable portion of the Court's year-in and year-out business. Figures 1 and 2 make this point clear, and the data offered by Figure 5 underscore it. Across the entire ninety-year period, the Court ruled on an average of 23.51 tax cases per year;[45] in no single term did the Court fail to resolve at least one such controversy, and in some terms it resolved more tax cases than it now does all cases *combined*.[46] On average, tax disputes occupied nearly 15% of the Court's docket per term.[47] Even as recently as the 2000 Term, the proportion was greater than 5%.

For obvious reasons, the sheer number of cases presents an opportunity. But, because the *n* is so large, it also confronts us with a considerable challenge in the form of collecting data on the requisite variables. To be sure, many are relatively "easy" to collect, presenting few interpretive or judgmental issues, and therefore not raising concerns of reliability. These include the standard variables compiled by Spaeth in the U.S. Supreme Court Judicial Database for decisions issued since 1953. Because of the temporal limits of the Spaeth database, we have had to compile corresponding information for the large number of tax cases handed down before the 1953 Term. These straightforward, case-specific independent variables include:

- Administrative action preceding the litigation: this variable pertains to administrative agency activity prior to the onset of litigation.
- Court that first heard the case: the focus of this variable is the court in which the case originated, not the administrative agency.
- Source of the case: this variable identifies the court whose decision the Supreme Court directly reviewed.

45. Standard deviation=19.13; median=16.00.
46. For example, in 1935 the Court decided 91 tax cases.
47. The mean is .15, with a standard deviation of .09; the median is .11.

- Reason for granting *certiorari*: Occasionally, the Court states why it granted review; when so, we coded the reason given as a variable.[48]
- Party 1/Party 2: Party 1 refers to the party who petitioned the Supreme Court to review the case, known variously as the petitioner or the appellant. Party 2 is conventionally labeled the respondent or the appellee.[49]

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48. The categories for this variable are: 0=case did not arise on *certiorari*; 1=to resolve conflict in the federal courts; 2=to resolve conflict in the federal courts and to resolve an important or significant conflict; 3=to resolve putative conflict; 4=to resolve conflict between federal and state courts; 5=to resolve conflict in the state courts; 6=to resolve confusion or uncertainty in the federal courts; 7=to resolve confusion or uncertainty in the state courts; 8=to resolve confusion or uncertainty in the state and federal courts; 9=to resolve important or significant questions; 10=to resolve the questions presented; 11=the Court did not give a reason; 12=the Court gave a reason, but it is not one of the categories listed above.

49. We are coding parties into one of 23 categories: 1=Individual (not in capacity as Trustee, Beneficiary, Fiduciary, Proprietor, Partner, Shareholder, or Transferee); 2=Trust—arrangement for the management of property by one or more persons (Trustees) for the benefit of others (Beneficiaries), that is sometimes treated as a taxpaying entity (does not include trusts or funds classified under Employee Benefit Plan); 3=Trustee—legal owner and manager of property held in trust for the benefit of beneficiaries; 4=Beneficiary—of a trust or decedent's estate; 5=Fiduciary—executor, administrator, or personal representative of the estate of a deceased individual; 6=Proprietor—individual as sole owner of an unincorporated business; 7=Partner—includes member of joint venture, general partnership, limited partnership, or limited liability company (Partner may be an individual, corporation, or even another partnership); 8=Partnership—unincorporated business with multiple owners, including general and limited partnerships, joint ventures, and limited liability companies; 9=Corporation—corporation that is *not* an S Corporation, Bank, Insurance Company, or Financial Intermediary; 10=Shareholder—owner of stock in a corporation other than an S Corporation (may be an individual in any capacity, or a corporation or partnership); 11=S Corporation (a/k/a Subchapter S Corporation)—corporation electing to have profits and losses taxed directly to shareholders, rather than to the corporation as a separate taxpaying entity; 12=S Corporation Shareholder—owner of stock in an S Corporation; 13=Bank—includes savings and loan associations; 14=Insurance Company; 15=Financial Intermediary—financial intermediary other than banks or insurance companies, including regulated investment companies (RICs or mutual funds) and real estate investment trusts (REITs); 16=Employee Benefit Plan—plan, fund, or trust to provide employee pensions or health or welfare benefits; 17=Charity—public charity or private foundation exempt from tax under I.R.C. section 501(c)(3); 18=Exempt Organization—tax-exempt organizations other than Employee Benefit Plans and Charities (e.g., labor unions, trade associations, chambers of commerce, social welfare organizations, veterans groups, etc.); 19=Transferee—recipient of property allegedly subject to tax lien; 20=Tribe—Indian tribal government; 21=Federal—federal government; 22=State—state government; 23=Local—local or municipal governmental body (cities, counties, school districts, sewer districts, etc.).

- Date of oral argument.
- Date of decision.

Other variables, however, present a far greater challenge, and have not previously been amassed by social scientists studying legal outcomes. We are collecting extensive data from the opinions to track the Supreme Court's rationales in tax cases. As described below, these data focus on five major areas: (1) the textual and substantive canons of interpretation used by the Court; (2) the legislative documents relied upon; (3) consideration of the executive's interpretation of the provision; (4) the policy concerns articulated; and (5) the constitutional issues addressed.

We are coding decisions by the section(s) of the tax statute that they address. We made this decision, in part, because we plan to investigate the interpretive trends (if any) in particular areas of the tax law. And as noted above, we believe that the decision-makers' preferences and behaviors are tied not only to the particular party in the litigation (taxpayer or government), but also to the specific issue in dispute. Considerations and constraints that affect judicial choice may differ, for example, if the controversy involves the Earned Income Tax Credit than if it involves the taxation of stock dividends. Consequently, the disputed section—not the case—constitutes our primary unit of analysis.

For each section of the tax statute construed, we collect data on the interpretive methodology invoked in the Court's opinion. These data are of three sorts. First, we inventory the canons of construction purportedly applied. Although numerous and sometimes contradictory, when invoked these canons effectively establish a presumption as to the statute's intended meaning, based either on the linguistic structure of the provision (the textual canons) or the subject matter addressed (the substantive canons).[50]

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50. The textual canons inventoried include the plain meaning rule, *noscitur a sociis*, *ejusdem generis*, *expressio unius est exclusio alterius*, the whole act rule, and the effects of punctuation, headings, and the placement of the section within the statute. The substantive canons investigated include the rule of lenity, avoidance of constitutional problems, federalism concerns (deference to state authority), the presumption against implied repeals, the presumption in favor of coordination and consistency, the presumption against irrationality and injustice, the principle that exceptions to general rules should be narrowly construed, the

Second, we record whether the Court looked to the statute's legislative background, and if so, we compile detailed information on the sources and documents cited in the opinion. In this connection, we obtain information on the Court's discussion of the legislative history of the disputed provision,[51] of post-enactment developments (subsequent legislative action or inaction), and of the relationship between the section at issue and other statutes (whether other sections of the tax statute, or other federal or state legislation). Again, in each instance we record only the articulated rationales—what the Court expressly said in its opinion—carefully refraining from reading in an implicit meaning or otherwise supplying an expert's gloss.

Third, we check for judicial consideration of the executive branch's interpretation and application of the section. (Here again, we refer only to consideration that is acknowledged in the Court's opinion.) Where executive interpretation is addressed, we inventory the administrative sources cited and the Court's treatment of each (e.g., followed, rejected, found inconclusive).[52]

Fourth, we measure the tax policy content of the Court's opinion. Scholars and policy analysts from both law and public finance generally contend that concerns about revenue generation, distributive justice, and economic efficiency *should* (normative) impact judicial decision making in tax cases, and many believe that they often do. Apart from some specific instances, however, there is no systematic quantitative study of the extent to which the Court actually *does* (positive) attend to tax policy concerns. The policy

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presumption against implied exemptions from taxation, and the general rule that tax statutes should be strictly construed.

51. We record the following sources of legislative history: citations to the Congressional Record, with a specification of the type of material (bill, vote, member's statement, written material submitted for publication, etc.); committee reports; committee hearings, with a specification of the type of material and author (for example, testimony of a Member of Congress, executive branch official, private witness, etc.); and studies and analyses prepared by the staff of the Joint Committee on Taxation. We also specifically look for assertions that Congress knew or might have known about prior relevant administrative actions or judicial decisions.

52. The administrative sources canvassed are Treasury regulations, other administrative regulations, revenue procedures, revenue rulings, private letter rulings, technical advice memoranda, IRS acquiescence or non-acquiescence in Tax Court decisions, and other administrative documents (including chief counsel memoranda, actions on decisions, and field service advice).

criteria we look for includes revenue effect,[53] vertical[54] and horizontal equity, transition problems,[55] administrative practicality[56] (including the potential for tax evasion), macroeconomic issues of growth and stability, as well as the effect of the decision on tax subsidies or penalties.[57]

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53. If the opinion addresses revenue effect we also record whether the asserted direction of the effect is positive (the opinion asserts that the decision is likely to increase aggregate tax revenues or prevent a substantial decrease in tax revenues), neutral or indeterminate (the opinion asserts that the decision is likely to have little impact on aggregate tax revenues, or the effect is indeterminate), or negative (the opinion asserts that the decision is likely to decrease aggregate tax revenues or prevent a substantial increase in tax revenues). The directional effect of the other policy criteria is recorded similarly.

54. The Codebook explanation currently contains the following instruction on vertical equity:

- Progression means that as income rises a larger *proportion* of the taxpayer's income is taken in taxes (not simply that taxes increase with income). Similarly, regression means that as income rises a smaller *proportion* of the taxpayer's income is taken in taxes, even though the dollar amount of tax may increase monotonically with income.
- Vertical equity implies that the difference in treatment between taxpayers at different income levels is fair.

55. The Codebook explanation contains the following instruction on transitional equity:

> The issue here is whether a change in tax rules imposes windfall gains or losses on taxpayers who acted in reliance on prior law. Delayed effective dates, phase-in rules and grandfather clauses are typical devices used to cushion the impact of tax transitions, and cases involving such transition rules are likely to invoke transitional equity as a rationale of decision.

56. Under the administrative practicality category we look for discussion of considerations such as promoting uniform, low-cost enforcement, minimizing bureaucratic discretion, and reducing the need for intrusive monitoring, information gathering, or record keeping.

57. The Codebook explanation contains the following instruction on tax subsides and penalties:

> These categories—subsidies and penalties—reflect the tax expenditure analysis, that Congress often uses the tax law to promote other goals (non-tax objectives) by offering tax-based inducement (special exclusions, deductions, credits, reduced rates, or deferral privileges) to engage in behavior the Congress deems socially desirable. Ordinarily, this rationale would be present only if the case involves a provision of the statute that Congress enacted for the purpose of promoting such extrinsic (i.e., non-tax) goals, and so the issue would be the proper or intended trade-off between tax and non-tax objectives. Accordingly, this rationale is likely to be present only if the legislative history of the provision sub judice indicates that the tax system is being used to promote other goals, so be sure to code the statutory interpretation and legislative history rationales.

Fifth (and finally), if the Court's opinion included consideration of a provision of the U.S. Constitution, we record which section of the tax statute was the subject of a constitutional challenge, the asserted constitutional basis for the challenge, and the approach to constitutional interpretation announced in the opinion.

IV. OBJECTIVES

By examining all of these features of the opinions, we hope to be able to answer several important questions. These include:

- Whether or to what extent the Court's approach to statutory interpretation in tax cases differs from its handling of civil rights statutes.
- Whether judicial assay of particular interpretive rationales or policy considerations in tax cases leads to predictable outcomes.
- Whether expressed reliance on one or more specific canons of construction is associated with either a government or a taxpayer victory.
- Whether attentiveness to legislative inaction or post-enactment legislative history is a strategic move to ward off a legislative override of the Court's interpretation.
- Whether recourse to executive interpretation is negatively correlated with consideration of legislative materials or canons of construction.
- Whether the Court's reliance on canons of construction, legislative history, or particular policy considerations has changed over time.

The two preceding categories (i.e., Economic Growth and Economic Stability) also present (in principle) instances of the use of the tax system to achieve non-tax social objectives. They are listed here as separate categories because use of the tax system to achieve those macroeconomic goals is more common and accepted. Code growth and stabilization concerns under their own categories only; reserve this category for other non-tax objectives.

- By supplementing our decisional database with information on the socio-economic context at the time the Court rendered its decision, we plan to explore whether certain outcomes or rationales are correlated with particular societal conditions.

The ultimate goal of this project is to sort out the relative contributions of "law" and "politics" in Supreme Court decision-making in tax cases. We hope to determine whether law (in the sense of reasoned decisions from pre-established principles) actually constrains the Court's choices, or whether at the Supreme Court level law is indeterminate, with interpretive rationales serving merely as smoke screens to hide the Justices' political preferences and preserve the Court's political capital. Of course it is difficult to establish causality. Yet, if the results show that political preference-based models do a poor job of explaining outcomes in cases where the Court's opinion focuses on pre-enactment legislative history, for example, then we may well have discovered evidence that other forces are at work.