CHAPTER 5

THE JUDICIAL BUSINESS CYCLE

BY
NANCY STAUDT
NORTHWESTERN LAW SCHOOL

The information theory of crisis jurisprudence, along with the empirical results supporting it, naturally raise the question of whether *domestic crises* such as prolonged periods of economic downturns, pandemics, severe crime waves, or unexpected immigration trends affect federal courts. Rational judges prefer safety and security to danger and chaos, but a second realistic account of the judiciary would theorize that judges favor prosperity over deteriorating economic conditions. Yet a third approach would posit judges, like virtually all policymakers and citizens, desire vigor and health to a life plagued by disease, virus, and ailment. The theory and evidence presented in the previous chapters may, in short, be the tip of the judicial iceberg: judges could well wield Article III powers as a double-edged sword in a range of contexts heretofore left unexplored in an effort to advance individual goals and aims in the policymaking context.

This chapter commences an investigation of these topics by exploring judicial behavior in one domestic arena—economic policymaking. As discussed in detail below, the information theory can easily be modified to account for judges' economic preferences, and the *preliminary* evidence suggests that at least one group of decision-makers, Supreme Court justices, utilize their docket as hypothesized: judicial decisions trend with the macro-economy a manner that suggests the justices hope to foster competent policymaking inside the elected branches of government. This component of the study is not the final word on judicial preferences vis-à-vis the economy, indeed, it sets the stage for more complete analyses of this subject as well as others in a follow up book, *A Macro-Theory of the Court: How National and Local Trends Affect Judicial Decision-Making*, underway with two co-authors, Thomas Brennan and Lee Epstein.

THE INFORMATION THEORY IN ONE *DOMESTIC* CONTEXT: NATIONAL ECONOMIC POLICYMAKING

The information theory of jurisprudence as applied to economic policymaking begins with a claim similar to that presented above with respect judicial preferences on foreign matters: justices prefer national prosperity to an economy plagued by high unemployment, high inflation, and low productivity. It is possible that this preference emerges from the justices' role in the development of law and legal policy, or perhaps it comes about from their status as individuals who care very much about their own private investments and purchasing power. It is not necessary to explain *why* the justices prefer national economic success to failure, rather the point is this: the justices gain utility from certain economic conditions and suffer disutility from others

This version of the theory, of course, does not stop with the simple claim that the justices prefer an expanding to a contracting economy, rather the theory posits that the justices are instrumentally rational actors and thus will seek to advance their economic interests through their Article III decision-making power. More specifically, members of the Court will seek to promote federal policies that encourage economic growth and development, but will attempt to deter policymaking perceived to steer the nation into economic stagnation, or worse, the serious economic decline associated with a depression.

The justices, of course, are not in a position to craft economic policy: they have neither the constitutional authority nor the expertise and knowledge necessary to succeed in such an endeavor. The framers formally placed economic policymaking power into the hands of the elected branches of government. Article I, section 8, for example, grants legislators the authority to "provide for the general welfare of the United States" and to "regulate commerce," and Article II, section 3 mandates the president "shall take care that the law be faithfully executed." Just as federal courts have no foreign policymaking powers but are theoretically able to influence military strategizing via Article III decision-making power, so too can we expect the justices to facilitate and impede the elected branches' economic policy choices through judicial decision-making authority, thereby affecting the substance of these policies at the margin.

To understand how and why the justices are in a position to influence economic policy, it is useful to recall that Congress and the president continually exercise their constitutional powers through a range of programs implemented in legal contexts such as taxation, bankruptcy, antitrust, securities regulation, transportation regulation, and so forth. Indeed government action in the economic field is so widespread, it touches virtually every aspect of our daily lives in some form or another. Private parties, in turn, routinely challenge these policies in federal court, and it is this line of cases and controversies that enables the justices to affect domestic economic issues. By systematically issuing votes and outcomes in favor of the government's position, the Court effectively supports the elected branches' policy preferences, while disfavoring the government in these disputes undermines its economic aims and goals.

There is an important distinction in the judicial strategies likely to emerge in the economic context versus the foreign policy arena discussed above. In the latter, the information theory hypothesized the justices would utilize the judicial power of the purse to augment or pinch the size of the fiscal pie, thereby facilitating or impeding the elected branches' ability to pay the costs of expensive military programs. When it comes to the nation's economy, the justices are also apt to make use of their fiscal authority to advance and undermine costly economic programs but they are also likely to perceive the substance of the cases—not simply their budgetary consequences—as relevant to their goals. Put differently, issuing anti-government decisions in taxation, securities regulation, and other economic disputes is not only an indirect means to squeeze the fisc, it is also a direct mechanism for undermining the very programs believed to be problematic. Not every economic case or controversy, of course, implicates an important or even relevant component of the elected branches' macroeconomic policy, but the justices need not make such a fine distinction; systematically favoring and disfavoring the government will assure their sanctioning scheme promotes their goal of supporting good policy and undermining bad policy.

ECONOMIC CUES AND SIGNALS: THE STATE OF THE ECONOMY, ITSELF

The information theory in the economic context is grounded in the idea that economic prosperity is more likely when policymaking resets in the hands of competent officials and for this reason the justices will maximize their own utility by promoting the work of skilled decision-makes and deterring ineptitude when it emerges. At first cut, the idea that Supreme Court justices, experts in law and constitutional matters, will seek to distinguish economic competence from incompetence in the elected branches of government might seem peculiar and more than a bit unrealistic. After all, trained economists are often unable to agree upon or determine, as an empirical matter, the policies and programs that advance the nation's economic interests, and a thus a theory of judicial behavior that rests on the assumption that the justices are able to do so is entirely implausible. Just as the Court need not rely on its own (limited) expertise on military and defense matters in the foreign policy context, however, it need not rely on its own expertise vis-à-vis economic policymaking. The justices, being rational, will rely on credible cues and signals to determine how and when to use their decision-making powers to advance their preference for economic prosperity.

Indeed, unlike the foreign policy context in which the justices must rely on the elected branches of government, on Congress' and the president's verbal statements and positive actions, for purposes of determining the merits of the government's foreign policy choices, a far more reliable cue exists for the justices seeking to assess the merits of the government's economic policymaking choices: the economy, itself. Rational justices can and will draw inferences *not* from politicians' claims about the economy or the policy positions they take, but from economic conditions.

The justices will interpret an expanding economy as a cue that the legislative and executive branches are doing a good job—or at least have not imposed unnecessary harm on the economy—and thus should be supported. Judicial interpretation of the cues associated with economic downturns, however, will be slightly more nuanced. Rather than assuming that the justices will treat each and every contraction equivalently, the theory posits that minimally informed justices will understand that economic downturns are likely to be associated with the choices made by the nation's leaders but *also* with unrelated and unexpected shocks to the economy such as wars, oil price fluctuations, trade barriers imposed by foreign governments, harvest failures, and so forth.[1] This is a distinction with meaning: When the justices view the downturn as a product of substandard government policy choices—not to uncontrollable and exogenous shocks—they will punish the elected branches in courtroom proceedings as a means to deter incompetent policymaking. But should the justices believe that the negative economic conditions are the result of factors largely beyond the control of the government, they will not sanction federal policymakers but will seek to work as a team with the other branches of government in order to remedy the nation's s economic problems.

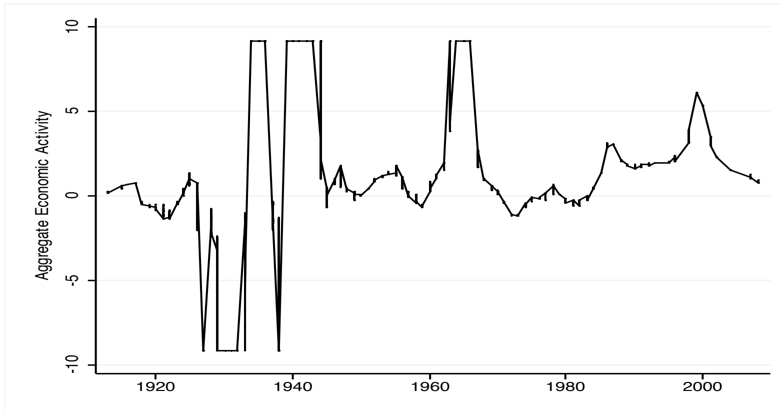
In the foreign policy context investigated above, a similar judicial calculus emerged when the justices made the choice to support or oppose the nation's military strategies. In the wars both prior to and after the cold war era—wars when the nation was directly attacked by outside aggressors and thus arguably in a state of crisis caused by factors beyond the control of either Congress or the president—the justices systematically sought to support the government in the decision-making process. But in the cold war era, the justices appeared to question whether the wartime conflicts were truly a crisis or perhaps manufactured by military planners and thus harmful to the nation's interests; this uncertainty led the justices to look unfavorably on the government's actions during the Korean, Vietnam, and Gulf Wars with adverse consequence in the courtroom. Similarly, the information theory in the economic context will take judicial notice of cues that suggest the nation is facing the type of crisis that requires inter-branch collaboration to remove the threats, or whether the financial problems are the result of unfortunate policymaking choices that should be anything but supported.

Of course, in the context of economic planning, even the experts cannot hope to distinguish precisely between different types of economic downturns—those caused by policymaking failures and those that emerge from outside forces—and the justices certainly do not have a have higher level of economic proficiency than trained professionals. The economists Andrew Abel, Ben Bernanke, and Dean Croushore note that national economic conditions often materialize due to a complex amalgamation of factors both inside and outside the government's control, making it extremely difficult for anyone to distinguish useful federal policies from those that impose harm across the nation.[2] Importantly, the theory does not hypothesize that the justices have skill and expertise with respect to the modern macroeconomic theory, but it is possible they are able to distinguish *typical* and recurrent economic downturns, recessions, from *atypical* and rare conditions associated with widespread poverty and hardship such as that observed in the 1930s and described as a depression.[3] When it comes to the typical upswings and downswings that routinely take place in the economy, the justices will assign blame (credit) to Congress and the president out of a belief (rightly or wrongly) that the economic and peaks and troughs lie within the policymakers' control. In atypical catastrophic periods, however, the justices will view economic conditions as primarily attributable to a series of unexplained and exogenous shocks beyond the control of the government and so will not seek to hold policymakers accountable. Actually, quite the opposite: the justices will join with the government to fend off the crisis in the effort to return the nation to a state of prosperity.

Why the theory posits that the economic downturns associated with typical business cycle—or more technically, the repeated sequence of recessions, giving way to periods of prosperity, which are then followed again by recessions—serve as a judicial proxy for government policy-making failure is no mystery. The account reflects the extant literature in both economics and political science on the political business cycle. Researchers such as Torsten Persson and Guido Tabellini, among others, have noted that elected officials, specifically the president and members of Congress, are often willing to ignore, tolerate, or even risk short-term national economic losses in off-election years for political gain.[4] When an election becomes immanent, however, politicians have an incentive to appear competent and perform well to assure reelection. At the same time, the economics literature suggests that elected officials will work hard to fend off protracted periods of (costly) economic distortion given that such conditions not only cause widespread and serious damage to citizens across the nation, but also to the long-term political reputations of incumbents. In fact, the idea that economic crises induce different types of policymaking choices than observed during the typical business cycle is the "new orthodoxy."[5] Economic researchers have proposed a number of theories to explain why crisis-related policies are unique including the weakened nature of ideological interests, the short-term suspension of self-interested behavior, and increased levels of teamwork in times of emergency.[6] For our purposes the underlying theory is less relevant than the twin ideas that elected officials have an incentive to shirk in the short term but work for the benefit of the nation in times of crisis. If it is true they are willing to risk a series of minor recessions but not vast and widespread depressionary conditions, then it is perfectly reasonable for the justices to believe that the economic downturns that take place during the typical business cycle are the product of inept policies, while economic crises (i.e., precisely the economic conditions elected officials seek to avoid) are beyond their control.

Figure 1 provides historical data on the state of the nation's economy; the figures presents a lowess smoother of the business cycle, where periods of economic decline are coded as equal to -1, and periods of economic expansion are code as equal to +1. As indicated in the figure, the economy suffered a major setback in the early 1930s, followed by a short period of recovery and then a second setback in the late 1930s. Although the conventional wisdom suggests that the entire decade of the 1930s exhibited one prolonged period of economic contraction, in fact, there appear to be two distinct periods of depression as indicated in the figure below.[7] Importantly, both before and after the 1930s, the economy cycled through various expansions and contractions, they were relatively modest when compared to that observed in the 1930s.

Figure 1
U.S. economy cycles through contractions and expansions



Note: Lowess smother of business cycles; economic expansions coded as equal to +1 and economic contractions coded as equal to -1. Depressions occurred only in the 1930s, all other economic downturns can be labeled recessions.

That the justices have information and knowledge of the general state of the economy and are willing to consider it in the decision-making process is evidenced in the text of their opinions. In *Atchison, Topeka & Santa Fe v. U.S.*, the Court in 1932 considered whether the petitioner was entitled to a rehearing on an agency decision vis-à-vis shipping rates given the substantial changes in the economy. The Court noted,

> [t]here can be no question as to the change in [economic] conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country . . . a depression such as the country is now passing through is a new experience to the present generation . . in such depressions the railroads suffer severely.[8]

Again in the 1937 case, *Ohio Bell Telephone Company v. Public Utilities Commission,* the justices noted that while they were not able to identify the effects of economic decline on specific industries, they were well aware of aggregate economic factors. "Courts take judicial notice of matters of common knowledge," the justices noted, "[t]hey take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants."[9] In

Helvering v. Davis, the Court upheld taxation rules funding the social security laws and noted both the economic calamities associated with the depression, but also the need for policymakers' collaboration to remedy it. In the Court's words,

> The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation.[10]

Of course, that the justices were aware of changes in the macro-economy in the 1930s, does not necessarily lead to the conclusion that they follow aggregate fluctuations throughout the typical business cycle. As it turns, judicial opinions, litigant's briefs, and clerk's memoranda are filled with rhetoric and commentary vis-à-vis the economy throughout the entire 20th century, suggesting courtroom actors are continually apprised of the nation's economic conditions and believe they are relevant to the justices' votes and outcomes. Even if the justices take judicial notice of increasing and decreasing levels of economic factors, which they do, the more difficult question is whether they account for these cyclical changes in their decision-making process.

If the information theory of decision-making in the economic context accurately captures the Court's interest in promoting proficient policymaking, then its empirical implications are clear. Most obviously, the justices can be expected to reward the elected branches of government for periods of prosperity by adopting a pro-government position in litigation involving economic policy. Put another way, the government's winrate should positively correlate with various economic indicators, such as employment rates, industrial production levels, GDP, and so forth. Conversely, when the economy turns sour and the justices hold elected actors responsible out of a belief they have privileged their short-term electoral interests—that is, during recessionary periods—the justices can be expected to punish the bad policy choices by ruling against the government. If the justices believe, however, that Congress and the president could not have prevented the downturn if only because the crisis worked against their electoral prospects—that is, deep depressions—the justices are unlikely to hold them responsible or even to second-guess their policymaking choices. In fact, the theory suggests that the justices will support the national government in its attempt to stabilize the economy by deferring to its arguments in the economic cases that appear on the docket.

Perhaps because the justices have little-to-no expertise, skill, or knowledge with respect to economic theory, they will support the government far more often than undermine it. Indeed, given the justices' lack of macroeconomic knowledge, it is possible, as an empirical matter, that they will never seek to undermine the government in disputes involving economic policy. From a theoretical perspective, however, it would be entirely irrational for the justices to commit, *ex ante,* to a position that permits the use of a single blade in their double-edged weapon. This commitment would essentially require the justices to collaborate with the elected branches of government in all periods even when the policies clearly and unambiguously undermine the justices' preference for a strong and growing economy. In short, from a theoretical perspective, the justices *must* be prepared both to support and undermine the government depending on the *perceived* value of the economic policies and programs that emerge in the lawmaking process if they seek to promote competence in the nation's financial managers. More to the point, rational justices intent on securing national economic prosperity will use their power to the fullest extent possible in an attempt to promote their economic desires. As we will see below, the justice are not only theoretically capable of utilizing a double-edged sword to support and undermine economic policy and, in fact, they do.

THE INFORMATION THEORY AND ECONOMIC VOTING BEHAVIOR GENERALLY

The information theory as applied to judicial economic preferences has notable similarities to an account of voting behavior found in the political science and economic literatures. Researchers in both disciplines beginning with Ray Fair in the 1978, but including many others such as Michael Lewis-Beck, Tom Rice, Raymond Duch, and Randolph Stevenson have both theorized and empirically found that voting is a referendum on the state of the economy.[11] While there are many components to the extant literature, two are particularly notable. First, it is widely believed that voters and constituents seek to maximize their utility by voting for the most competent economic managers. Second, to solve the problem of information asymmetries, voters systematically rely on economic outcomes as the most credible signal of policy-making competence, and as a result reward (or punish) incumbent politicians and parties for the market conditions that emerge. Voters, in short, tend to view a declining economy as evidence of policy-making failure on the part of the president and members of Congress and thus seek to oust the inept politicians by casting votes for their opponents in the election cycle; prosperous conditions, by contrast, imply effective economic management and generally increase the vote share of incumbent parties. So important are economic indicators to the electorate that more than a few election forecasters have suggested that variables such as GDP, job creation, and consumer satisfaction are just as salient—perhaps more so—than other factors traditionally believed to predict election outcomes, such as the voters' political and ideological preferences. When it comes to voting behavior, in short, voters steadily prioritize economic issues and for this reason are apt to forego partisan preferences at the margin to obtain economic prosperity.[12]

The link between economics and politics in the voting context is an empirical reality that scholars have documented in a range of contexts; the strongest connection emerges in presidential elections, but it also surfaces at notable and significant levels in House, Senate, and gubernatorial races. Indeed, while scholars debate a number of issues—such as whether individual voting is retrospective or prospective and which economic factors have the greatest affect on election outcomes—none seem to quarrel with the idea that the macroeconomic factors work as a proxy for policy-making competence and, for this reason, trend with voting patterns.[13] Just as voters take cues from the economy, attributing good economic times to effective policymaking in the elected branches of government and (*most*) bad economic times to government incompetence, so too do the justices. And just as voters support (and undercut) politicians based on the relative state of the economy, so too do the justices. Of course, the justices, unlike voters, do not have the power to throw out (or retain) incumbents, but they can reject (or support) the government's policies through their judicial decision-making process. Assuming, as we do here, that both the voters and the justices rationally prefer economic prosperity to economic loss, the electoral success of the incumbent government along with its winrate in Court should trend with national economic conditions.

In the foreign policy context, the justices were forecast to be strategic decision-makers willing to utilize the power of the purse to shape national foreign policy; the theory as applied to economic preferences also hypothesizes strategic decision-making but implies a second feature of judicial decision-making that is somewhat more controversial: the justices are expected to be no more sophisticated than the average (perhaps largely ignorant) voter.[14] This raises the question of why the justices would, as political appointees (nominated by the president and approved by the Senate), *ever* echo or ally themselves with the voting masses on economic issues and not the Washington elite who helped place them into a position of power? The answer to this question is simple: with respect to economic policymaking, the justices can maximize their utility by siding with the voters. Recall that the information theory in this context is grounded in the idea that the justices prefer economic growth and stability to conditions associated with economic decline. If the justices believe that Congress and the president are shirking their management responsibilities for, say, political gain, and this shirking has negatively affected the economy, then it is entirely rational for the justices to punish this behavior in the effort to encourage policymakers to reform their behavior. If the justices are able to impede and undermine bad policy choices through the judicial process, Congress and the president will be less likely to make bad economic decisions in the future and will perhaps be less able to exert continuing harm the economy in the short term.

Similarly, it is rational for the justices to support the government in its economic efforts (just as the average voter will support the incumbent government) if they believe exogenous forces have led to severe economic setbacks. In these circumstances, sanctioning elected officials through the judicial decision-making process may aggravate the nation's declining economic circumstances, thereby undermining the judicial goal of a stable and growing economy. Positing a judiciary that will increase its level of cooperation with the elected branches in periods of a national crisis does not, of course, lead to the conclusion that the justices suddenly become altruistic—they do not. Rather this approach to cooperation (also hypothesized and observed in the foreign policy context), sparked by economic crises, implies that the advantages associated with putting the economy back on track aligns with the Court's own preference for national prosperity. Cooperation and teamwork, of course, does not mean the Court will work alongside Congress and the president to identify creative solutions to the macroeconomic policy problems facing the nation. Rather, it is far more likely that cooperation, if it exists, will emerge in the form of increased deference to the federal government in the cases in which it is a party. This reflects the fact that the justices are legal and constitutional experts and are unlikely to have any economic expertise, or very little of it. With limited information and know-how, they will not seek to participate in the creation of new macroeconomic policy but will defer to the elected branches of government who have the ability, experience, and knowledge to address economic issues.

That the justices have preferences in line with voters and look to similar cues and signals before making the choice to offer or withhold support for the elected branches and their policy choices should not come as a surprise, indeed perhaps it should be expected. After all, why would two groups of instrumentally rational actors who similar on important dimensions—both seek to promote economic prosperity through the reliance on economic conditions as a cue for assessing financial managers' competence levels—be expected to have divergent responses to the same stimuli? They would not. This observation does not reduce each justice to the average voter for one very important reason: the justices are *simultaneously* able to assess and respond to Congress and the president on *multiple dimensions*. The Court, for example, is theoretically able to support the government with respect to the latter's economic policy choices, while concurrently adopting an anti-government position with respect to its foreign, health, and crime policies. This multi-dimensional response is made possible due to the range of legal issues that show up on the Court's dockets, each of which could theoretically generate distinct substantive judicial responses depending on extant macroeconomic conditions. Voters, by contrast, cannot fine-tune their support or opposition; they must choose a single response and render a single vote at the poll both on Election Day with respect to each politician on the ballot. They may believe that the policymakers have succeeded in some realms but not others, but as voters they are not in a position to convey this nuance. In short, similarities between voters and Supreme Court justices exist because we expect both groups to behave rationally, but beyond this trivial point the similarities begin to dissolve.

THE INFORMATION THEORY IN ACTION: THE JUSTICES RESPOND TO THE STATE OF THE ECONOMY

The information theory of jurisprudence posits that the justices will support the elected branches of government in the economic cases that show up on their dockets when the economy performs well or in times of a severe economic crisis. In periods of minor economic downturns, recessions, by contrast, the justices will punish the elected officials on the assumption (rightly or wrongly) that they have caused the economic setback by pursuing flawed polices and programs. To investigate this theory, the Court's taxation docket is again put to use.[15]

While the theory could be explored in a range of different contexts, taxation is an excellent venue to begin the study of the effects of the economy on judicial behavior for several reasons. First, the theory implies that the government's winrate in the Supreme Court will correlate with economic conditions and thus a useful test of the theory requires a collection of cases involving the U.S. government and taxation disputes, obviously, satisfy this criterion. Second, policymakers and macroeconomists widely believe tax laws can and will be used to effectuate economic growth and stability, and thus it is reasonable to expect the justices to rely on economic outcomes in assessing government tax policies challenged in the courtroom context.[16] Finally, Congress and the president have constantly revised the tax laws over the periods of this study and this generates quite a bit of variation in the data, thereby enabling a useful investigation of our theory.[17] It is worthwhile to note, however, that the information theory as applied to economic preferences should be (and will be) investigated more fully and completely in a follow-up book, *A Macro-Theory of the Court,* mentioned above and underway with two co-authors.

The empirical tests conducted here focus on three historical periods in the 20th and 21st centuries: 1912-1929, 1930-1939, and 1940-2008. The focus on these three historical eras reflects the theoretical account set forth above. While the economy experienced ups and downs in all these eras as demonstrated in figure 1, theory anticipates judicial responses will depend not only on whether the economy is growing or shrinking, but the extent to which it is doing so. For cases in the first and third eras—eras of relative prosperity, though with the typical economic ups and downs—the Court is expected to reward the government during expansions and punish it during the (relative) contractions. In the second era—when, by any definition, the country experienced an economic crisis of epic proportions—precisely the opposite is expected: the justices will join with the other branches in an effort to prevent even further decline, deferring to, not punishing, the government in its litigation efforts. However preliminary, it might be argued that this test of the theory is a particularly difficult one. Given the voluminous literature on the showdown between President Roosevelt and the Court, it would seem—in contrast to theory—that the justices did anything *but* defer to the government in the period of severe economic crisis taking place in the 1930s.[18]

Given that theory forecasts the behavior of individual justices with a preference for economic prosperity over economic decline, the primary dependent variable of interest—the feature of decision-making that this study hopes to explain—is the individual vote of each justice. These votes are captured by a binary variable, *Vote,* indicating whether the judge or justice voted with the federal government (=1) or against the federal government (=0) in the cases under investigation. Individual judicial votes, of course, may trend with the macroeconomy but this does not necessarily lead to the conclusion that Courts' outcomes will in fact cycle with the economy; such an effect requires the majority of the justices to respond to the events as posited by the crisis theory. Accordingly, a second dependent variable, *Outcome*, is investigated, which is also binary and coded to indicate whether the federal government prevailed (=1) or lost (=0) in court. Because the dependent variables, *Vote* and *Outcome,* are binary, the empirical investigation of crises on judicial decision-making relies on probit models.

The study's key independent variables relate to the state of the economy. As noted above, it is important to tap into both the "typical" business cycle—the repeated sequence of economic expansion, giving way to a decline, and then followed by recovery—as well as the extreme conditions that emerged during the Great Depression. The business cycle as noted above captures the series of economic peaks (high points) and troughs (low points) as identified by the NBER Dating Committee; in the period after the economy achieves a peak, aggregate economic activity begins to fall and the economy is officially in a contraction or recession. At some point, however, the economy reaches a trough and returns to a period of expansion and is booming until it hits the next peak. While the NBER does not distinguish between recessions and depressions, it only dates the peaks and troughs, the nature of the economic decline and its severity can be inferred from the prolonged period of a setback. Thus the NBER *business cycle* measure is a useful measure of the economy for purposes of this study, it is coded as equal +1 if the economy is in a period of expansion at the time the justices heard oral argument and coded equal to -1 if the economy is in a state of contraction.

The business cycle is a relevant indicator, but many other macroeconomic factors exist and are potentially useful for assessing the justices' pursuit of their interest in aggregate prosperity. GDP growth, for example, is a definition of prosperity widely used by the media.

Although standing alone, it is not the variable favored by macroeconomic professionals as the best indicator of the state of the economy,[19] it nonetheless is potentially useful for the justices in identifying the state of the economy given its widespread coverage in the media. The average percentage change in *GDP* growth for the fiscal quarter prior to oral argument is the measure adopted for testing the effects of GDP on the justices' decisions. Industrial production, yet a third measure, identifies the changes in output for the industrial sector of the economy, including manufacturing, mining, and utilities. Although these sectors contribute only a small portion of GDP, they are highly sensitive to interest rates and consumer demand and thus industrial production is viewed as an important tool for forecasting national economic performances. Accordingly, *industrial production* is included into the model and measured as the average percentage change over the three-month period prior to oral argument for each case. The three-month change rates in the variables, *national income, unemployment,* and *consumer sentiment* (as measured by surveys conducted by University of Michigan researches*,* are also incorporated into the models.[20]

Owing to the lack of data, judicial responses could be assessed for all three historical periods but only with respect to two of the variables measuring the state of the economy: *business cycles* and *industrial production.* The other variables, *GDP*, *national income, unemployment,* and *consumer sentiment* are investigated but only in post-1940 era. Finally, due to the high correlation between the independent variables, each must be investigated in a separate model.[21] Accordingly, six separate models are estimated in the hopes that they produce consistent results regardless of the particular economic indicator used.

The models also include various control variables that theoretically could affect judicial decision-making, or that scholars have found to affect votes and outcomes, including: the politics of the individual judges and justices, prior experience (such as time served in the military), whether the judge was appointed by the president who initiated the war, the identity of the appealing party (government or private party), whether the law was war-related, the politics of Congress, the politics of the president, a time trend, and fixed effects for the justices and chief justices, when relevant. The appendix includes a full list of the controls, a description of how the variables were measured and coded, as well as summary statistics.

To identify the effects of the state of the economy on Supreme Court votes and outcomes, the data will be fit to six separate probit models:

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 BusinessCycle) + B\mathbf{X}_i \tag{1}$$

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 IndustrialProduction) + B\mathbf{X}_i \tag{2}$$

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 GDP) + B\mathbf{X}_i \tag{3}$$

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 NationalIncome) + B\mathbf{X}_i \tag{4}$$

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 ConsumerSentiment) + B\mathbf{X}_i \tag{5}$$

$$\Pr(Y_{ij} = 1) = \Phi(B_0 + B_1 Unemployment) + B\mathbf{X}_i \tag{6}$$

where y is the Court's vote or outcome in case i in term j. In the first, the variable $ß_1$ is a binary variable coded equal to 1 if the nation is in a period of prosperity and coded equal to 0 if the nation is in a recessionary period, both as determined by the NBER; in models 2 through 6, $ß_1$ is a continuous variable equal to the relevant change rate of the variable indicated at the date of oral argument. $ß\mathbf{X}$ is a vector of variables listed in the appendix.

Recall that the theory forecasts that the justices will act like voters prior to 1930 and after 1940 and thus will reward the federal government for observed economic growth and productivity, but will also punish policymakers for national economic decline. If the "justices as voters" model aptly characterizes the Court's decisions, then economic downturns can be expected to cause a decrease in the government win rate. Accordingly, the variables, *economic cycle, GDP, industrial production, national income,* and *consumer sentiment* should yield positive coefficients, but the variable *unemployment* should produce a negative coefficient given that unlike the latter 6 variables, unemployment is countercyclical variable and thus decreases as the economy expands.

In the 1930s, a period when the nation experienced a severe depression, the theory suggests the justices will not attribute economic outcomes to policymaking incompetence but to exogenous shocks beyond the control of the economic managers. In this context, the theory suggests the justices will not seek to punish elected officials for the economic conditions, but instead will work as a "team" in an effort to stimulate national recovery. Thus variables *economic cycle, GDP, industrial production, national income,* and *consumer sentiment* should yield negative coefficients, but the variable *unemployment* should produce a positive coefficient in this era. As the economy declines, in times serious economic crisis, the government winrate will increase.

Table 1 presents the empirical findings. Each separate model is listed in the right–hand column of the table and only the coefficients of interest are presented—the full and complete results for each of the six separate models are included in the appendix for interested readers. The models include 16 controls for variables such as judicial politics, congressional politics, identify of appealing party, wartime activity, and so forth. The first thing to note is that when the years are pooled together, the findings do not exhibit statistical significance at meaningful levels, this is the expected result given that the theory forecast that the coefficients would go in different directions in different economic periods. When the three different eras are disaggregated, the findings become substantially more interesting and support the theory set forth above, especially in the context of judicial votes (as opposed to outcomes).

The findings vis-à-vis the justices' voting behavior are depicted in the top panel of table 1. They indicate that the justices supported the government prior to 1930 and in the later era, from 1940-2008, when the economy was performing well. That is to say, when the NBER dating committee's work identified an on-going economic expansion, when industrial production, GDP, national income, and consumer sentiment were increasing, and when unemployment was decreasing—all indicators of a prosperous economy—the justices favored the government in the taxation cases that showed up on their dockets. Or put a different way, when these economic indicators flipped signs, thereby suggesting the economy had entered a period of contraction, the justices responding by punishing the government in the taxation disputes. These findings not only support (at least one component of the theory), they are substantively strong and statistically significant in nearly every context. The only anomaly in the twelve findings presented in the top panel of table 1 is a negative coefficient on the business cycle in the post 1940s era, a finding that is not statistically significant but nonetheless goes in the opposite direction hypothesized.

In the depressionary period, from 1930-1939, the justices shifted their strategy and offered support for the government in the taxation cases. As the economy cycled into a depression and as industrial production decreased, the justice adopted a pro-government stance in courtroom proceedings. These finding are also consistent with hypothesis that suggested in times of crisis, the best legal strategy for justices' preferring economic prosperity to economic decline is to collaborate rather than undermine the government's policymaking efforts.

Table 1
Supreme Court Votes and Outcomes in Taxation: Six Separate Models

Marginal Effects on Votes and Outcomes in Taxation Cases				
	Pooled	Pre-1930	1930-1939	1940-2008
Six Separate Models	Votes			
1. Business Cycle	-.003(.009)	.12(.007)**	-11(.01)**	-.01(.01)
2. Industrial Production	.03(.07)	.36(.11)**	-.004(.09)	1.03(.25)**
3. GDP				.84(.42)**
4. National Income				1.16(.35)**
5. Consumer Sentiment				.20(.11)~
6. Unemployment				-.18(.10)~
	Outcomes			
1. Business Cycle	-.07(.06)	.21(.06)**	-.22(.08)**	-.02(.06)
3. Industrial Production	-.21(.11)~	2.06(.90)*	-.008(.37)	-.06(.62)
2. GDP				.22(1.47)
4. National Income				.44(1.06)
5. Consumer Sentiment				.50(.33)
6. Unemployment				-.32(.26)

*Note: Coefficients represent findings in six *separate* models (not coefficients in one single model) and indicate the marginal effects of each independent variable on votes and outcomes. The models presented in the top panel include fixed effect for each justice with errors clustered by justice; the models presented in the bottom panel include fixed effects for each chief justice with errors clustered by chief justice when possible. The full and complete empirical results, including the full set of 16 controls, are presented in the appendix A. ~ indicates $p \leq .10$, * indicates $p \leq .05$, and ** indicates $p \leq .01$.

The findings with respect to the judicial outcomes are presented in the bottom panel of table 1 and suggest that the number of votes cast for and against the government were sufficient to affect outcomes in the pre-1930s period, in the 1930-1940 period, and in the expected direction. In the pre-1930s when the nation was in the midst of an economic contraction or when industrial production was increasing, the majority of the justices voted to support the government, thereby expressing approval for the government's policies in times of economic prosperity. But when the economic declined in this same period, as measured by either the NBER or industrial production, the justices sought to punish the administration by issuing increased numbers of anti-government decisions.

From 1930-1939, however, the justices adopted the opposite strategy. The economy was in a virtual free-fall and rather than punishing the government, the justices adopted a pro-government position. Rather than punishing the elected official for the bad state of the economy, the justices sought to work with and collaborate with Congress and the president in the hopes of returning the nation to a period of prosperity. This finding, however, is statistically significant only with respect to the business cycle.

The findings in the post-1940 period suggest that even if the individual justices' propensity to punish the government for bad economic times exists, the majority of justices do not shift their views vis-à-vis the government, thereby affecting outcomes. Indeed, while four of the coefficients go the expected direction, the effects of the business cycle and industrial production are both negative in the most recent era and thus go in the opposite direction than hypothesized. These findings, however, are not reliable given that none achieve statistically significance.

These findings suggest preliminary support for the information theory in the macroeconomic context. They also present a serious challenge to the existing constitutional literature arguing that the Court consistently decided cases against the U.S. government in the 1930s, sparking President Roosevelt's Court packing plan. In fact, during the 1930s—at least in the context of taxation cases—the Justices exhibited a strong and unambiguous preference *in favor of* the federal government not against the government as the conventional wisdom holds. Importantly, the results are not driven by decisions rendered after February, 1937, the date the

Court packing plan was unveiled; the models were re-estimated with only the cases orally argued prior to that date and obtained nearly identical results.

CONCLUSIONS AND FUTURE PLANS

Member of the federal bench, like citizens and policymakers generally, gain utility from increasing levels of national safety and security as well as heightened levels of and economic prosperity. The information theory of jurisprudence offered an account for how and why the justices would advance their preference for these outcomes in the decision-making process and uncovered substantial evidence supporting the hypotheses in both contexts. This chapter, along with the empirical evidence presented in the chapters 3 and 4 indicate that the justices seek to support the government in order to foster success in various policymaking arenas, but do not hesitate to punish government actors for perceived policymaking failures. The justices achieve these aims and goals by rendering increased numbers of votes and outcomes for and against the government, conditional on their view of the governing regimes' ability to promote national safety and security and economic growth. The justices, being experts in law and constitutional matters, do not seek to assess policymakers' ability in either the foreign or domestic policymaking context based on their own knowledge, but instead take judicial notice of the best and most credible cues and signals on the issues of interest.

The theory and findings presented in this book begin rather than end the investigation of judicial responses to macro-level trends. Are the justices willing to promote various other aims and goals, such as those associated with good health, domestic law and order, speedy responses to natural disasters, and so forth? And, are the justices willing to promote these goals at the both federal *and* state levels? These are puzzles well worth investigating, and will be investigated in a subsequent study of the judicial decision-making, a *Macro-Theory of the Court,* underway with two co-authors.

While the theory and evidence presented here invites further investigation of the issues, it nonetheless advances our understanding of judicial decision-making on a number of fronts. First, the justices may very well care very much about legal and political issues as widely discussed in the extant legal, political science, and economic literatures, but they are also concerned with macro-level issues that are often quite distinct from the legal and political implications of the cases and controversies that show up on their docket. This concern for matters involving issues such as foreign and domestic policy leads the justices to employ their decision-making powers in a complex and strategic manner intended to have far-reaching effects, well beyond the individual litigants in each case. Indeed, as noted in chapters 3 and 4, the justices were apt to decide taxation, tort and contract cases having nothing to do with wartime crises in a manner intended to augment the size of the federal budget, thereby smoothing the way for the elected branches of government to pursue costly military policies in times of crises. And in this chapter, the evidence indicated justices utilized taxation cases to promote competent economic policymaking inside the federal government.

Second, a voluminous literature in law, political science, and economics offers a rich and nuanced explanation of the judicial decision-making in the civil rights and liberties context, but only recently have scholars begun to make headway in explaining and forecasting judicial decisions with respect to the financial and economic components of the judicial docket. The information theory offers a new understanding of judicial decision-making, one that has predictive power in areas of the law that have consistently been difficult to explain and understand from a legal, political, or policy perspective. In these areas, it appears the justices may be motivated by macro-level rather than individual political and ideological preferences that emerge in their decisions in the civil rights and liberties-type cases.

Finally, and perhaps most importantly, the information theory offers a revised understanding of inter-branch policymaking dynamics. The separation of powers models in the extant literatures have historically sought to understand and explain judicial decision-making, at least in the Supreme Court, by noting that the justices would moderate their behavior to account for the preferences of Congress and the president. The information theory suggests the causal arrow can go also in just the opposite direction—the justices seek to shape the choices of Congress and the president under penalty of judicial punishment in the courtroom leading to substantive losses and massive budgetary consequences. To be sure, the notion that the justices are in a position to affect the policymaking choices of the elected branches of government has not been entirely ignored,[22] but it has not been thoroughly investigated with the help of theory and data in the context of the federal courts.

[1] Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008); Raymond M. Duch & Randolph T. Stevenson, The Economic Vote: How Political and Economic Institutions Condition Election Results (2008).

[2] Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008).

[3] As is widely understood, the U.S. economy has grown tremendously over the course of the last century, but as the macroeconomists widely note, even prosperous economies are periodically interrupted by episodes of declining production and income, and rising unemployment. Sometimes these episodes are prolonged, severe, and harsh, and the downturn becomes a "depression," but the downturns can also be relatively short and considerably less brutal, in which case the periods in which aggregate economic activity falls is a "contraction" or a "recession." Irrespective of the nature and extent of the downturn, macroeconomists note they are almost invariably followed by a resumption of economic growth. In the words of Abel, et al.,

> This repeated sequence of economic expansion giving way to temporary decline followed by recovery, is known as the *business cycle.* The business cycle is a central concern in macroeconomics because business cycle fluctuations—the ups and downs in overall economic activity—are felt throughout the economy. When the economy is growing strongly, prosperity is shared by most of the industries and their workers and owners of capital. When the economy weakens, many sectors of the economy experience declining sales and production, and workers are laid off or forced to work only part-time.

Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008).

[4] Torsten Persson & Guido Tabellini, Political Economics: Explaining Economic Policy (2000); see also K. Rogoff & A. Sibert, Elections and Macroeconomic Policy Cyles, 55 Rev. Econ. Stud. 1-16 (1988).

[5] Allan Drazen, Political Economy in Macroeconomics 444 (2000)

[6] Id.

[7] Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008).

[8] 284 U.S. 248, 260 (1932).

[9] Ohio Bell v. Public Utilities, 301 US. 292, 300-02(1937).

[10] Helvering v. David, 301 US 619, 641 (1937).

[11] Ray C. Fair, The Effect of Economic Events on Votes for President, 60 Rev. Econ. & Stat. 159-173 (1978); Raymond M. Duch & Randolph T. Stevenson, The Economic Vote: How Political and economic Institutions Condition Election Results (2008); Michael S. Lewis-Beck & Tom W. Rice, Forecasting Elections (1992).

[12] See James E. Campbell , Editor's Introduction: Forecasting the 2008 National Election, P.S.: Political Science and Politics, October 2008, Helmut Norpath, On the Razor's Edge: The Forecast of the Primary Model, P.S.: Political Science and Politics, October 2008, Roberts S. Erikson & Christoher Wlezien, Leading Economic Indicators, the Polls, and the Presidential Vote, P.S.: Political Science and Politics, October 2008.

[13] An important component of the debate is whether voters simply punish and reward politicians for economic conditions or whether they seek to select the politicians that are most capable of producing positive economic outcomes. In either context, voters appear to adopt the belief that inept politicians should be punished and avoided and effective politicians should be rewarded and retained. For a thoughtful discussion of the

extant literature, see Raymond M. Duch & Randolph T. Stevenson, The Economic Vote: How Political and economic Institutions Condition Election Results (2008).

[14] The literature, however, does not assume voters are completely ignorant of economic matters—in fact, just the opposite. See id.

[15] The database, constructed by the author, is available at .xx.

[16] Farrokh K. Landgana, Macroeconomic Policy: Demystifying Monetary and Fiscal Policy (2002); Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008).

[17] Steven A. Bank, Kirk J. Stark, & Joseph J. Thornike, War and Taxes (2008); John F. Witte, The Politics and Development of the Federal Income Tax (1985).

[18] William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995).

[19] Andrew Abel, Ben Bernanke, Dean Croushore, Macroeconomics (2008).

[20] The economic data was obtained from the Federal Reserve of St. Louis' website—the Federal Reserve Economic Data (FRED) located at http://research.stlouisfed.org/fred2/.

[21] Jack Johnston & John Dinardo, Econometric Methods (1997).

[22] Andrew Martin, Congressional Decision Making and the Separation of Powers, 95 Am. Pol. Sci. Rev. 361-378 (2001).