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Responses

JUSTICES AS ECONOMIC FIXERS: A RESPONSE TO *A MACROTHEORY OF THE COURT*

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INTRODUCTION

In *Economic Trends and Judicial Outcomes: A Macrotheory of the Court* (*Economic Trends*),[1] Professors Thomas Brennan, Lee Epstein, and Nancy Staudt advance a new theory of judicial decisionmaking. They posit that Justices respond like voters to economic conditions. In the typical recession, Justices punish bad economic policy by deferring less to the government. In the typical boom, Justices do the opposite; they reward the government for good policymaking by granting more deference. The shifting nature of deference impacts the government's win rate before the Supreme Court. All else equal, in a normal recession the government is more likely to lose. In a normal boom, the government is more likely to win.[2]

The authors refine their theory so that the size of the business cycle matters. When the recession is dramatic, Justices do not blame it on policy shortcomings. A large recession results from unexpected shocks, rather than misfiring government policies. And so, Justices

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1. Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191 (2009).

2. *Id.* at 1219.

rally around the flag and grant the government more deference during unexpected economic events.[3]

Professors Brennan, Epstein, and Staudt look for evidence to support their theory by examining two pockets of tax cases. The first set involves cases filed between 1912 and 1929, a time period when the economy experienced several conventional business cycles. The second set involves cases filed during the Great Depression, 1930 to 1940. The regression results are consistent with the theory. In the first set of cases, the government's win rate positively correlates with the business cycle. It goes down in the recessions and up in the booms. In the 1930s, the reverse occurs. The win rate increases as the depression deepens and decreases when the economy picks up steam.

As the authors explain, *Economic Trends* is part of their larger project on a macrotheory of judging that examines the effects of national and local trends on judicial decisionmaking.[4] The project is extraordinarily creative and merits serious engagement and discussion. We begin that dialogue here.

We start, however, with one caveat. In the pages that follow, we focus only on the authors' conclusions regarding judicial behavior in typical economic upturns and downturns and do not address their review of court actions in times of severe economic crises. We do so because there is already a significant body of scholarship that suggests that courts behave differently in times of profound national trauma such as war.[5] It is consistent with this literature to learn that courts have similar "rally around the flag" reactions in economic emergencies.[6] The authors' finding that typical economic cycles also

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3. *See id.* ("In 'atypical times,' when the economy moves into a state of crisis, the Justices do not adopt the role of a disciplinarian but seek to support the government in an effort to help return the economy to a state of growth and stability.").

4. *Id.* at 1191.

5. *See generally, e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Vintage Books 2000) (1998) (examining how the courts have treated civil liberty issues arising in times of war from the 1860s to the 1940s); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) (investigating how civil liberties are compromised in wartime); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)) (critiquing Chief Justice Rehnquist's book for downplaying the severity of rights deprivation in times of war and expanding upon some of Rehnquist's examples).

6. The question whether emergency conditions *should* influence judicial decisionmaking has also received significant scholarly attention. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043–45 (2004) (proposing a framework to be utilized in states of emergency that would prevent the "normalization of emergency conditions" whereby the

affect how Justices decide cases is, therefore, the more intriguing aspect of the analysis.

Our Response proceeds in three Parts. Part I unpacks the theoretical model. The authors' regression results are consistent with three different motivating models. First, it could be that the Justices, like voters, act reflexively. They get angry at the government in a recession and pleased in a boom, and they express these emotions in the votes they cast.[7] Under this model, the Justices, like a single voter in a national election, do not act because they necessarily believe their votes will actually affect policymaking. Rather, they use their vote to reflect their satisfaction or dissatisfaction with the government. We refer to this as the reflexive model.

Second, it might be that the Justices are using their votes to *generally* encourage good policymaking and discourage bad policymaking at the margin by deferring to or rejecting the government position based on economic conditions. This model differs from the reflexive model in that the Justices are attempting to use their votes to actively attempt to influence government policy.[8] It is similar to the reflexive model, however, in that the Justices' actions are based on their reactions to general economic conditions and not on case-specific assessments as to the economic wisdom or effect of the particular tax provision at issue in the case before them. Simply stated, under this model, the Court treats the specific tax issue in the case as, in effect, a proxy for the government's economic policies generally. The Justices assess the competence of these policies by the conditions observed at oral argument. We denote this as the untargeted-incentive model.

Third, the model might be that the Justices assess the economic effects of the specific tax provision under review by examining economic conditions at oral argument. Then, the Justices decide cases, at least in part, based on these economic effects. Thus, they will

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judiciary creates an environment perpetually conducive to the widespread adoption of "oppressive measures").

7. *See* Brennan et al., *supra* note 1, at 1197–98 ("Our account, thus, indicates that Justices act like voters during election cycles. 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 do the Justices.").

8. *Id.* at 1203 ("If the Justices believe that Congress and the president are shirking their management responsibilities for, say, political gain, and that this shirking has negatively affected the economy, then it is entirely rational for the Justices to punish this behavior in an effort to encourage policymakers to act in the best interests of the nation.").

reject the government's tax position in the case at hand if they perceive it to be harmful to the economy and will accept it if they believe it to be beneficial.[9] As such, they create incentives for adopting tax policy that contribute to economic prosperity. We call this the targeted-incentive model.

The implications of the empirical results depend on which model is being tested. If the Justices are expressing emotional gut reactions to economic conditions, as the reflexive model would have it, there should be a deference effect in every case with the government as a litigant, not just tax cases. If the Justices are trying to actually influence the government's overall economic policies by how they rule on tax cases, as the untargeted-incentive model suggests, there should be some indication of that purpose in the opinions. If the Justices are trying to promote better policymaking in tax cases, as in the targeted-incentive model, then the likelihood the tax policy at issue will have an observable effect on the business cycle and, if so, the precise lag of that effect become increasingly important.

With these three models in hand, Part II comments on the authors' statistical analysis and suggests ways to potentially increase the robustness of the results. Part III discusses the normative implications of the authors' study. We ask in that Part if the judicial behavior described in any or all of these models constitutes good judging, a healthy jurisprudence. We conclude that it does not.

I. THE THEORETICAL MODEL

A. *The Reflexive-Voting Model*

Under the reflexive-voting model, the Justices reflect their satisfaction or dissatisfaction with economic conditions through the votes they cast in tax cases. This theory is akin to an expressive model of voting behavior. The chance that a single vote will turn an election is close to zero.[10] So, the rational voters do not believe that their vote

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9. *Id.* ("Instead, we argue that Justices may view their ability to refuse to implement flawed policies and programs as a way to encourage better economic management in the elected branches of government at the margin. More importantly, we posit that judicial refusal to implement perceived policy failures could work to limit possible damage to the economy, thereby advancing the interests of the Justices.").

10. Dr. Anthony Downs wrote the seminal work on this well-known paradox of voting. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); *see also* William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 25 (1968) ("We describe a calculus of voting from which one infers that it is reasonable for those who vote to do so and also that it is equally reasonable for those who do not vote not to do so.").

could actually be determinative in influencing policy. The voter, nevertheless, exercises the franchise to send a message of approval or frustration to the governing entities.[11] And the evidence suggests that voters, as a whole, tend to vote to cast politicians out in a recession and reelect in an expansion.[12]

The statistically significant results that *Economic Trends* uncovers are consistent with, and are plausibly explained by, Justices expressing their approval or disapproval of government through their voting behavior. Justices' moods change with the economic conditions, and perhaps without even knowing it, they take out these emotions on the government. That is a potentially important take-home point of the regressions because it is so different from the standard story of judicial behavior.

As such, the reflexive-voting account stands in contrast to the strategic models of judicial behavior that posit far more deliberate judicial behavior.[13] Yet it rings true. Why would Justices be immune

11. Riker & Ordeshook, *supra* note 10, at 28 (including "the satisfaction from affirming a partisan preference" among the utility benefits that a prospective voter may consider when determining whether to cast a solitary ballot).

12. *See* Gianluigi Galeotti & Antonio Forcina, *Political Loyalties and the Economy: The U.S. Case*, 71 REV. ECON. & STAT. 511, 516 (1989) (finding that, in times of economic turmoil, Democratic voters remain steadfastly loyal to their party to a greater extent than do Republican voters); Gerald H. Kramer, *Short-Term Fluctuations in U.S. Voting Behavior, 1896–1964*, 65 AM. POL. SCI. REV. 131, 140–41 (1971) ("Economic fluctuations, in particular, are important influences on congressional elections, with economic upturn helping the congressional candidates of the incumbent party, and economic decline benefiting the opposition."); Joseph P. McGarrity, *Macroeconomic Conditions and Committee Re-election Rates*, 124 PUB. CHOICE 453, 472 (2005) ("[E]conomic conditions influence the probability of reelection for members on committees that manage the economy or provide a public good."). *But see* William Levernier, *The Effect of Relative Economic Performance on the Outcome of Gubernational Elections*, 74 PUB. CHOICE 181, 182 (1992) (finding that, in gubernatorial elections, "economic conditions have only a minor effect on the share of the vote received by the incumbent party").

13. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE *passim* (1998); THOMAS H. HAMMOND, CHRIS W. BONNEAU & REGINALD S. SHEEHAN, STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 65–238 (2005); RICHARD A. POSNER, HOW JUDGES THINK 29–31 (2008); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 97–109 (2002); Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review*, 14 SUPREME CT. ECON. REV. 1, 5–6 (2006) (exploring the conditions under which dissenting appellate court judges become increasingly likely to "promote a case for review" by a supreme court); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 373–74 (1991) (finding discernible preferences reflected in the Court's approach to statutory interpretation); Michael J. Gerhardt, Essay, *How a Judge Thinks*, 93 MINN. L. REV. (forthcoming 2009) (manuscript at 105, 107–09, on file with the *Duke Law Journal*); Symposium, *Positive Political Theory and the Law*, 15 J. CONTEMP.

from the pressure to release frustration at government policy during a recession? The model raises the some interesting questions: Are Justices more like knee-jerk voters or savvy strategic players, as the bulk of the literature suggests? Can Justices be both simultaneously? If reflexive voting is largely subconscious, are there other subconscious factors, such as latent hostility to, say, certain types of litigants, that also drive outcomes?[14]

B. The Untargeted-Incentive Model

The untargeted-incentive model suggests that Justices intend to affect overall government economic policy through tax rulings. By deferring to the government when times are good and not when times are bad, the Court can provide incentives for the adoption of more effective economic policies.

Notably, this model does not suggest that the Justices consider the economic pros and cons of the particular tax issue before them on review. Rather, the model works in the aggregate. All government positions in tax cases are treated as bad during recessions and as good during upturns. Thus, in a downturn, the Court is less likely to defer to the government in a tax case even when the government's position is economically sensible and, conversely, in an upturn the Court is more likely to defer to the government even when the government's position is economically flawed.

Although this behavior might seem counterproductive at one level, it is explicable. Because the Justices do not have the economic expertise to determine which government policies are economically sound and which are economically weak, they can only respond to

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LEGAL ISSUES 1, 1 (2006) (explaining how positive political theorists generate models to predict "the outcome of the lawmaking game").

14. This point relates to work on how social background affects judicial decisionmaking. *See, e.g.*, Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280 (1988) (exploring the distinct predictive impact of various background characteristics on judicial voting behavior in equal protection cases); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Towards Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1682–85 (1999) (detailing the concerns raised by detractors of the "social background" approach to analyzing judges' behavior); Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1349–56 (2008) (exploring the movement to analyze judicial behavior in light of the salient characteristics of judges' lives present before their ascent to the bench); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, *1916–88*, 35 AM. J. POL. SCI. 460, 478 (1991) (devising "personal attributes models for Supreme Court justice voting behavior").

economic conditions with a broad brush. Thus, if the Justices believe that they should "mitigate the impact of bad policy choices through the judicial process [so that] Congress and the president will be less likely to make bad economic decisions in the future,"[15] it is plausible they would do so by reacting to economic conditions generally and not by calibrating their actions to the economic merits of the specific issue before them.

We are skeptical, however, that even the savviest of Justices looking to influence macroeconomic policy would actually decide cases in this manner.

First, for this punishment-reward scheme to work, government officials would have to know about it. Yet we are unaware of an opinion that references economic conditions during oral argument as a relevant factor in the decision. Sure, the Justices might not be transparent. Like an attitudinalist Justice, they might not want to be seen as deciding a case based on anything other than the "law."[16] But unlike Justices seeking to impose their policy preferences, Justices hoping to alter government policymaking would not want to hide their pleasure or disappointment with the government. Instead, Justices hoping to alter government policymaking would want the government to know that they were going to lose during a recession and win during a boom so the government could remedy its actions accordingly. And, presumably, those Justices would indicate as much in the opinion.

Second, a Justice's belief that shifting levels of deference in tax cases would, in fact, induce government officials to engage in better overall economic policymaking is unrealistic. There are far more powerful political pressures placed on elected officials than decisions of the Supreme Court. The fact that government officials are more likely to be reelected in a boom and ousted during a recession is a powerful incentive for those officials to try to improve the economy. Additionally, tax revenues go up in booms and down in recessions, meaning government officials have more resources to devote to favored policy initiatives in times of economic prosperity. Simply put, regardless of what the Court does, government officials will want to dampen a recession and prolong a boom.[17]

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15. Brennan et al., *supra* note 1, at 1201.

16. POSNER, *supra* note 13, at 252–53.

17. The model also treats the government as a single actor. The same entity that litigates conducts the macroeconomic policymaking. It is not clear why, for example, the Federal

Third, a Justice's decision to level untargeted incentives against the government must be made on the margin. The elected officials' behavior is already subject to strong incentives. The question for the Justice is what additional motivation will shifting deference bring. The marginal benefit in terms of better policy is likely to be small. If such actions have any cost, the rational Justice would not do it. And there could be costs.

For one, such a move might provoke a public backlash against the Court, with the political actors asserting that the Court is deciding cases on illegitimate grounds. The executive might argue that the Court is meddling in macroeconomic policymaking and, as such, extending its influence too far.

A second cost to a Justice involves the sacrifice of other values. Take a Justice who harbors a policy preference: she prefers tax policy that favors the poor.[18] The same Justice cares about better economic policymaking. A case comes before the Court in a recession. Suppose that to satisfy her preference for the poor, the Justice would want to rule in favor of the government. To motivate better overall economic policymaking, however, the Justice would want to rule against the government. The cost to creating untargeted incentives is forgoing the chance to help poor people. This sacrifice will not be worthwhile if the untargeted incentives fail to provide much in the way of incentives for better policymaking.

C. The Targeted-Incentive Model

The targeted-incentive model posits that the Justices take economic success or failure into account when they adjudicate tax issues. Justices lack economic expertise. Therefore, they use the conditions at oral argument as a rough proxy for whether a tax policy had a good or bad effect. Under this model, the Court defers to the government's tax positions that have beneficial economic consequences and does not defer to the government when the latter's position is economically detrimental.

Reserve chair would care or know about shifting deference in tax cases before the Supreme Court. If the chair does not care, it is unclear why the deference scheme would alter decisions regarding monetary policy.

18. The question of whether a judge *should* decide cases based on policy preferences is another matter. Our point here is that only deciding cases based on economic conditions may interfere with a judge's own jurisprudential approach.

Certainly this is a plausible account of judicial decisionmaking. Justices regularly take broad consequences into consideration when deciding cases. And they might be particularly attuned to the economic implications of their decisions when cases come before them during economic upturns or downturns. Further, the fact that the Court rejects the government's position more frequently in times of recessions than in times of boom may reflect that the bad economic consequences of particular government positions may be more apparent during downtimes than in upturns.

Nevertheless, we are unsure if this model explains the authors' findings. First, the study reviews all tax cases, not just cases in which a Justice could reasonably assume that the tax question at issue would have any economic impact whatsoever, much less be a contributing factor to the business cycle. The Court's decision in *United States v. Shelley*,[19] for example, which held that mixing smoking opium with the residue of opium that had been smoked should not be treated as the manufacture of opium under the tax laws, does not address a matter of broad economic import.[20] Similarly, the question addressed in *United States v. Whitridge*,[21] whether or not receivership income should be subject to the corporate income tax,[22] is unlikely to have significant and observable effects on economic upturns or downturns. Therefore, it is difficult to see how the Court's decisions ruling against the government in cases like *Shelley* and *Whitridge*, in which the tax issues in question are relatively insular, could be seen as an effort to refuse "to implement perceived policy failures [so as to] to limit possible damage to the economy."[23] Why would a rational Justice use a business cycle proxy to assess the success or failure of the government's positions at issue in *Shelley* and *Whitridge*?

Second, the study itself does not code between economically sound and economically flawed governmental positions in the tax cases collected. Instead, it posits that Justices think a tax policy is flawed if, at oral argument, the economy is in recession, and they think a tax policy is economically sound if, at oral argument, the economy is in a boom. Indeed the major insight of *Economic Trends*

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19. United States v. Shelley, 229 U.S. 239 (1913).

20. Brennan et al., *supra* note 1, at 1209–10 (indicating that the authors compiled their dataset by conducting a Lexis search on the word "tax" for cases decided between 1913 and 1940 and retained cases that involved the Justices' interpretation of a tax statute).

21. United States v. Whitridge, 231 U.S. 144 (1913).

22. *Id.* at 149.

23. Brennan et al., *supra* note 1, at 1203.

is that the Court's decisions in tax cases are broadly based reactions to economic conditions and not finely calibrated responses to particular governmental initiatives.

As such, however, the targeted-incentive model raises many of the same problems as the untargeted-incentive model. After all, if the Court has never said it would assess the strength of a tax case by reference to economic conditions at oral argument, it is difficult to believe that it would use that indicia to achieve its presumed targeting goals. Even assuming that (1) the government could be motivated to make better tax policy by shifting Court deference and (2) better policymaking in certain tax cases would ultimately show up in the business cycle, those results cannot accrue unless the government knows about the incentive scheme. Accordingly, if the Justices wanted to provide these incentives they would have to have said so in the opinions.

Third, as will be discussed in the next Part, the targeted-incentive model raises timing problems regarding the case samples in the study.[24] If the Court is looking at the economic effect of a tax provision, it is not clear that it would be concerned with the economic conditions at the time of oral argument rather than the economic conditions surrounding the time the position was adopted.

II. THOUGHTS ON STATISTICAL METHODOLOGY

The statistical analysis in *Economic Trends* is carefully constructed and the authors should be commended for their skill and creativity in compiling their results and for their refreshing candor in acknowledging the limitations of the data. We do, however, in this Part, suggest two areas in which the robustness of the statistical results might be improved. First, Part II.A considers issues of timing and case selection in the sample. The authors focus on economic conditions at the time of oral argument in coding the sampled cases, but to us, it makes a significant difference as to which theoretical model the authors are testing for that time to be the relevant factor. Second, Part II.B discusses the unrelated selection bias problem identified by the authors: the idea that the cases litigated before the Supreme Court in times of economic booms might not have the same characteristics as cases litigated before the Court in time of economic

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24. *See infra* Part II.A.

busts. In that Section we suggest some alternative ways to deal with this issue.

A. Timing Issues

Economic Trends posits that the economic conditions on the date of oral argument trigger the Court's response. The authors' choice of oral argument as the key date for measuring economic conditions makes sense under the reflexive and untargeted-incentive models. There, the Court does not specifically consider the economic policy implications of the tax issue before it. The Court simply rewards or penalizes the government irrespective of the actual policies at issue in the case.[25]

The authors' choice of oral argument as the appropriate date to measure economic conditions does not as readily comport with the targeted-incentive model, however. Assume that the there is an economic downturn at oral argument. The authors' theory posits that the Court would be less likely to defer to the government because the Court would assume that the fact there was an economic downturn at the time of oral argument meant that the government's policy had a bad economic effect.

One concern with this analysis is that it assumes the Justices would ignore whether the policy at issue actually helped precipitate the economic downturn. It may be, for example, that the government made its taxation decision during an uptick in the economy and its impact on the business cycle, if any, enhanced the existing boom. In that case, the Justices should be granting the government more deference (the policy worked, after all), even though after working its way through the system the case ended up on the docket during a recession.

The targeted-incentive model thus presumes two propositions. First, as noted above, it assumes that the tax policy at issue had an economic effect which would show up in the business cycle. Second, it

25. The only difference between the reflexive and untargeted-incentive models in this respect is that whereas under the reflexive model the Court's action simply expresses a message of approval or disapproval, the Court's action under the untargeted incentive is to encourage the government to engage in better policymaking across the board. The expressive model has consequences, of course. Litigants win or lose; the law is changed. Under the expressive model, the Justices do not anticipate that these consequences will impact overall macroeconomic policy.

assumes that the lag in the economic effect coincides with the date of oral argument.

Consider again *United States v. Whitridge.* As noted, the issue in *Whitridge* was whether receivership income was subject to the corporate income tax.[26] In 1908, the assets of a few distressed street railways in New York City had been placed in receivership. The receiver's job, as articulated by the appointing court, was "to run, manage, and operate said railroads and properties, to collect the rents, income, tolls, issues, and profits of said railroad and property, to exercise the authority and franchises of said defendant, and discharge its public duties."[27] The case was consolidated with a second distressed railway case.[28] In 1911, the government filed a petition demanding that the receivers declare the net income of the railway corporations as income for corporation tax law purposes.[29] The receivers balked, claiming they managed the assets as officers of the court,[30] not as the directors and officers of the corporations.[31] In 1912, the district court ruled for the receivers. The court of appeals affirmed, and the government appealed to the Supreme Court.

The Court heard oral argument on October 21, 1913 and ruled against the government on November 10, 1913.[32]

In evaluating the economic impact of the decision to tax receivership income, the relevant macroeconomic data are likely to be what was happening in 1911, shortly after the decision was made, not what was happening at oral argument in 1913. Moreover, in 1912, the lower court invalidated the taxation decision, dampening, if not eliminating, any economic effects of that initial decision that might be felt in 1913.

Even in cases where the lower court upholds the government's tax decision, the only way the assumption of the oral argument marker makes sense is if the lag in the effect of the taxation decision tracks the time it takes for the case to reach the oral argument stage at the U.S. Supreme Court. But why would this be so?

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26. *Whitridge*, 231 U.S. at 144.
27. *Id.* at 146.
28. *Id.* at 145.
29. *Id.* at 146.
30. *Id.* at 147.
31. *Id.*
32. *Id.* at 144.

All this is to say that timing can be important. One coding question then leaps to mind: are economic conditions at oral argument the relevant markers for determining whether the Court is, in fact, actually reacting to the economic impact of the government's tax decisions in deciding tax cases?

B. Selection Effects

In normal times the data reveal a positive correlation between economic conditions and government win rates. For the data to be consistent with any of the models, the only difference between a boom and bust must be the Justices' perception of the government as a litigant. The theory requires that the Justices consider the same cases independent of the economic climate. The cases must have the same merits; they must be litigated with the same vigor; and the settlement behavior of all affected parties must be similar. If not, the relationship might be the result of the appeal of different cases, rather than the same type of cases being adjudicated differently. The government, for example, might bring more legally questionable tax cases in a recession because it needs the revenue. Or the government might devote fewer resources to litigating cases in a recession because of a tighter budget constraint. Either way, the relationship between win rates and the trough of the business cycle reflects something special about the cases the Court considered at that time, rather than the punishment of bad policymaking or knee-jerk expressive reactions. Disentangling the two explanations is dicey.[33] The authors assume that selection effects are not driving the results.[34] As commentators, we wanted to offer some constructive suggestions for checking the validity of this assumption.

To tease out the effects, the authors first might consider unexpected shocks to output. By definition, litigants cannot anticipate an unexpected shock. As a result, unexpected changes in economic conditions should not change the kinds of tax cases the government appeals. But the Court's perception of those cases will change. The Court observes the unexpected shock and then decides whether to punish or not. A relationship between win rates and unexpected

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33. For a discussion of the statistical consequences of selection bias, see WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 926–34 (4th ed. 2000).

34. Brennan et al., *supra* note 1, at 1194–95 (describing the authors' theory that Justices respond to economic prosperity or downturns by expressing support or disapproval for government management, but not addressing selection effects).

shocks would suggest that the Justices' perceptions—rather than differing attributes of the cases being reviewed—are the driving factor.

The literature on economic forecasting is massive and sophisticated.[35] We do not delve into the details here. One simple way to uncover unexpected changes in output is this: use the simplest forecasting model.[36] Suppose that industrial production in period t is a linear function of industrial productions in the prior periods. Compare the forecasted industrial production in period t with the actual industrial production in period t. The difference is one measure of the unexpected change in production that period. The authors might then regress the unexpected change in output occurring on or around the date of oral argument against the government win rates and see what happens.

Alternatively, the authors might consider using changes in industrial production between the grant of certiorari and the oral argument as the core variable. The Court normally grants certiorari a few months before oral argument. After certiorari has been granted, the appeal has already happened. And so, the concern that the government pursues legally suspect cases in a recession and slam dunk cases in a boom dissipates. The only thing changing is the economic condition between the certiorari date and the oral argument.

This second approach is not a perfect fix, however. The government might litigate the same case differently depending on the economic climate, especially if the budget impacts the resources the government can devote to pursuing appeals.

III. JUSTICES AS ECONOMIC FIXERS

Economic Trends describes judicial behavior; it does not critique it. But the normative aspects of the judicial behavior depicted are as intriguing as the behavior itself. We therefore offer some preliminary observations on this issue.

Our reaction, of course, depends in large measure on the nature of the judicial behavior one thinks the study depicts. If the implication

35. For an overview on economic forecasting, see generally PETER ABELSON & ROSELYNE JOYEUX, ECONOMIC FORECASTING (2000); NICOLAS CARNOT, VINCENT KOEN & BRUNO TISSOT, ECONOMIC FORECASTING (2005).

36. On this simple model, see JAMES D. HAMILTON, TIME SERIES ANALYSIS 72–77 (1994).

of the study is that Justices subconsciously take economic conditions into account when deciding cases, then the Justices can be criticized for not being appropriately self-aware to correct against their intuitions.[37] Indeed, if subconscious behavior explains the results captured in *Economic Trends*, one of the article's most significant contributions is that it will alert sitting judges to be aware of and guard against such reactions in future cases.[38]

If the claim, however, is that Justices intentionally rule for or against the government in tax cases based on economic conditions unrelated to the legal merits of the case, the normative implications of the study are far more serious. Consider the untargeted-incentive model. Although, under this model, the Justices may be acting with an understandable desire to encourage the government to improve the economy, it is troublesome to think that they would do so by deciding cases based on economic conditions unrelated to the merits of the legal issue before them. They have no constitutional authority to act in this manner. Courts, after all, decide cases, not economic policy. Indeed, if, as the Supreme Court has explained, "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws,"[39] they can hardly be considered roving commissions assigned to pass judgment on the Nation's economy.

The judicial behavior described in both the untargeted-incentive and reflexive models is also problematic for other reasons. First, the public's faith in the Supreme Court (or any court for that matter) depends on a consistent application of law to facts. Consequently, if Justices deliberately choose not to decide like cases alike simply because of extraneous economic conditions, they risk violating that faith and damaging their own credibility. Justices, like voters, may react to economic conditions, but they are not empowered to make

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37. There is a growing body of literature on debiasing judges and the relative strengths of various debiasing strategies, though this literature generally focuses on addressing the effects of cognitive biases. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 *passim* (2006); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 586–88 (1998); Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 313, 313–23 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002). A groundbreaking work in this field was Baruch Fischhoff, *Debiasing*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422, 422–44 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

38. One judge on the panel at the Symposium praised the study for this exact reason.

39. *See* Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973) (discussing why the application of the First Amendment overbreadth doctrine should be limited).

judicial decisions based on those factors. In a world of judicial review and life tenure, it is unsettling that Justices would choose the outcome based on a knee-jerk response to economic conditions, rather than a careful consideration of the consequences of alternative rulings specific to that case. (This is not to say that such judicial behavior does not occur. Justice Douglas, for example, was seriously criticized for reflexively voting against the government in tax cases because of his purported dislike of the Internal Revenue Service.)[40]

Second, the untargeted-incentive and reflexive-voting models lead to instability in the law, which poses significant costs. Parties lose the ability to structure their transactions when the law lacks predictability, which would be the case if legal interpretation was tied to economic conditions. The lack of predictability also discourages settlement.[41] In deciding whether to appeal a case—in candidly assessing the legal merits—lawyers would have to engage in economic forecasting, trying to pin down the likely dip or uptick in the economy around oral argument. Few lawyers would be able to do this successfully.

Third, these models may simply lead to bad results. As we have seen, under both the untargeted-incentive and reflexive models, Justices may reject a sound governmental economic position if the case serendipitously happens to come before the Court in an economic downturn, and the Court may uphold flawed economic policies if those positions are reviewed in good times. The end result is a jumbled jurisprudence with no legal coherence because neither legal doctrine nor sound policy ties cases together.

The behavior under the targeted-incentive model is normatively more defensible. If the Court determines that a government position fosters economic weakness, it can take that into consideration in reviewing the legality of that position.

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40. *See* Bernard Wolfman, Jonathan L.F. Silver & Marjorie A. Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 270–76 (1973).

41. *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1852 (2006) ("If the point of clear legal rules is to allow the expectations of parties to settle, then private ordering is compromised to the extent that imprecise legal rules defeat the needed predictability for parties to make informed assessments of their rights and responsibilities."). *But see* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 573 n.35 (1992) ("The likelihood of litigation rather than settlement may also be affected [by the choice of rules versus standards]. Lower litigation costs make litigation more likely under rules, but the greater predictability of outcomes makes litigation less likely."). On settlement, see generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

But there are normative problems inherent in this model as well. The first is transparency. If the Court is using this model it should explain itself accordingly. Second, and relatedly, is lack of notice to the litigants. For this model to work, the litigants would need to be aware that economic effects will drive the Court's decisions so they can brief and analyze the legal issue in question from an economic perspective. Moreover, because the triggering time to adjudge the economic viability is oral argument, the litigants would have to speculate as to what the economic conditions will be at oral argument when they first seek certiorari and then again when they write their merits briefs.

Even with transparency, the effect of the Court's choosing to view the economic success or failure of the government's position by referencing the state of the economy at the time of oral argument may lead to only short-term, rather than long-term, economic gains. Assuming it works at all, it encourages the government to tie tax policy to the business cycle rather than long-term growth. Finally, using the timing of oral argument as the key point to proxy the economic success of a government position is a bad idea, especially if the tax policy at issue is unlikely to have played any observable role in the business cycle.

CONCLUSION

Economic Trends offers a unique and novel perspective on judicial behavior. The regressions are especially interesting because they find a significant relationship between economic conditions and vote outcomes. Why is that so? Assuming the statistical results are robust, we find the most theoretically plausible explanation to be that Justices subconsciously let their mood relating to the economic climate bleed into their decisionmaking. If this is true, the same deference effect should arise across many areas of law and time periods. We are curious whether the same sorts of effects would be found elsewhere and hope the study, like the first empirical tests of the attitudinal model, stimulate new research on these questions.

Alternatively, the study could be read to suggest that Justices are intentionally attempting to use judicial power to fix economic conditions. If so, it suggests that Justices are acting both beyond their constitutional powers and their economic expertise. As such, the judiciary should be broadly criticized for this behavior.

Finally, this work represents a place where the rising barrier between the judiciary and the legal academy should be crossed.[42] Judges need to know about this study because it can alert them to their own subconscious motivations. The next time a case comes up in a recession, the judges can then make an affirmative effort to stifle their anger at government mismanagement and instead pay closer attention to the arguments made and the consequences of the decision.

42. A number of judges have articulated this concern. *See, e.g.*, Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2001 (2002) ("The most serious concern that I have with legal scholarship is that too much of it is useless."); Richard A. Posner, *In Memoriam: Bernard D. Meltzer (1914–2007)*, 74 U. CHI. L. REV. 435, 435 (2007) ("What has happened since the 1960s . . . is the growing apart, especially but not only at the elite law schools, of the lawyer and the judge on the one hand and the law professor on the other hand.").