

EMPIRICAL RESEARCH ABOUT USE OF JUDICIAL DOCTRINES IN FEDERAL TAX CASES

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I've engaged in empirical research using social science methodology for several years, hoping to get a more accurate sense of how federal tax cases have been decided than is available through current legal scholarship. While "thinking like a lawyer" has its benefits, legal reasoning tends to generalize after examining a few cases, while social science methodology generally draws more specific conclusions by analyzing a large number of cases. Lawyers have increasingly engaged in such research, instead of deferring to research historically done by political scientists. Scholars have tended to focus on civil rights and criminal law instead of areas of economic regulation such as tax, and have also tended to look at the Supreme Court instead of lower courts. Thus, lower court decisions about tax are relatively unexplored areas of research.

One line of research has been about the effect judges' social backgrounds – race, gender, apparent political affiliation, education, and seniority – have had on their decisions in federal tax and has led to my publication of four articles over the last several years: *Using the Social Background Model to Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?* 25 VA. TAX REV. 201 (2005), *Statutory Construction in Federal Appellate Tax Cases: The Effect of Judges' Social Backgrounds and of Other Aspects of Litigation*, 13 J.L. & POL'Y 257 (2003), *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473 (2002), and *Empirical Research About Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001). Two of these articles analyzed trial court decisions and the other two examined appellate decisions. Two of them looked at the effect of judges' social backgrounds on who won (one at each level) and two at the effect of social background on statutory construction (also one at each level).

Traditional legal scholarship might assume that a judge would look at each case dispassionately, and that, given the opportunity, all judges would decide the same case alike. My research draws the opposite conclusion. I have found a strong connection between judges' social backgrounds and who won the cases and many social background factors play into the taxpayer winning in these cases. In my databases, I could predict that a judge is more likely to decide in the taxpayer's behalf than the government's if the judge is the appointee of a Democratic president, was educated at a less elite law school, female, or African-American.

I'm currently working on another long-term project, about how "judicial doctrines" are used in federal tax cases. It is commonly thought that doctrines in tax such as "looking at the substance of a transaction instead of its form" or "whether the taxpayer had a business purpose for the transaction in which it engaged" are raised in litigation by the government or the court itself (the other three doctrines are the sham, step transaction, and economic substance doctrines). In theory, these doctrines are used by courts or advanced by the IRS to counterbalance a taxpayer's narrow and formal compliance with the terms of a statute, by which it seeks to minimize tax. Even though a taxpayer deducts an expense, for example, the IRS might argue and the court might agree that the "economic substance" of the transaction was such that the taxpayer be denied her deduction. This commonly held view of judicial doctrines is intuitively attractive –

taxpayers are free to structure transactions as they wish, so why would they ever argue that they have not complied with a statute's strict requirements? Instead, it's up to the IRS or the court to argue or determine that such compliance was formalistic and should be disregarded.

My research refutes this common wisdom. Among other results in one database I have already developed involving trial decisions, it is apparent that the taxpayer frequently raises doctrines, that the player that raises a doctrine most is the court, and that neither litigant was entirely successful in having courts apply doctrines to benefit them instead of their opponents. Other than authors' dated impressions, there was little evidence about the areas of tax law in which doctrines were raised and which doctrines were raised the most and raised the least, and my research has examined these two issues. I have also been able to predict circumstances in which litigants might prevail; some judicial doctrines favored the government and others favored the taxpayer. Litigants' apparent failure in successfully raising doctrines, I can nevertheless predict that a litigant's raising a doctrine increases its ability to prevail with respect to that doctrine's application. The article in which these results are set forth will be published in an article that will appear in the Cleveland State Law Review.

I am developing a second database asking similar questions about the use of judicial doctrines in appellate decisions and hope to replicate the trial court results at the appellate level.