

Northern Illinois University College of Law  
*The Professor's Column*  
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### Recent Faculty Scholarship

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Over the last several years, I have been engaged in empirical research using social science methodology, hoping to get a more accurate sense of how federal tax cases have been decided than current literature suggests. There are a growing number of scholars doing this, and I am one of the few to do so in tax.

One line of my inquiry has been about the effect judges' social backgrounds – race, gender, apparent political affiliation, education, and seniority – have had on their decisions in federal tax. I have published four articles on this topic 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 reasoning might suggest that a judge would look at each case dispassionately, and that all judges might decide the same case alike. Who the judge is would not play into her decision. My research reaches the contrary conclusion.

I found a strong connection between judges' social backgrounds and who had won the cases. My conclusion is that many social background factors play into the taxpayer winning in the cases included in my database. A judge was more likely to decide in the taxpayer's behalf than the government's if the judge were the appointee of a Democratic president, educated at a less elite law school, female, or African-American. No research has been done about how who trial and appellate judges were might affect how they decide federal tax controversies. While there were some connections between who the judge was and the method of statutory construction she used to justify her decision (*e.g.*, strict construction, reliance on regulations, legislative history), the results were not as "robust" as they were about who won.

I currently am finishing another project, about how "judicial doctrines" are used in trial decisions about federal tax. 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. These doctrines seemingly act as a balance to taxpayers' narrow and formal compliance with the terms of a statute, by which it seeks to avoid tax. My research refutes this common wisdom. Among other results in the trial decisions I examined, I discovered that the taxpayer frequently raised doctrines, that the taxpayer and the court did not raise doctrines as much as the court *sua sponte*, and that (according to his review of available briefs for the cases he examined) the litigants actually tended to avoid raising doctrines, so that the court took the most active role in raising judicial doctrines. I also was able to predict circumstances in which litigants might prevail; some judicial doctrines favored the government and others favored the taxpayer. This article will be published in the *Cleveland State Law Review*. My project this summer will be to conduct similar research at the appellate level.