Columbia Law School

Tax Policy Colloquium

“The Judicial Business Cycle”

Nancy Staudt

Thursday, December 2

Jerome Greene Hall, Room 940

A copy of the abstract is available at
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The Judicial Power of the Purse
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The Judicial Power of the Purse

How Courts Fund National Defense in Times of Crisis

NANCY STAUDT

The University of Chicago Press
Chicago and London
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The Executive . . . holds the sword . . . the legislature . . . commands the purse.
The judiciary, on the contrary, has no influence over either the sword or the purse. . . .

ALEXANDER HAMILTON, The Federalist No. 78
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This manuscript owes a debt to more than a few people. William Howell, my friend, advisor, and intellectual compatriot, helped shape this project from start to finish. His interest in wartime issues and interbranch dynamics is contagious, and his constant enthusiasm for the subject a true intellectual motivator. Bill Landes is an unbelievably fast and insightful reader; as an economist he continually highlighted portions of the manuscript that could be improved by drawing on fundamental economic concepts and ideas. Duncan Snidal understood the core of the project after just a short conversation and helped to identify connections with extant political science literatures that otherwise may have gone unexplored. Tyler VanderWeele offered fantastic insights with respect to the empirical component of the project; with his help I learned and applied new methodologies that will continue to serve well into future projects.

My colleague, Marty Redish, an expert in law and constitutional matters, was the first to read the first three chapters and offered countless and thoughtful suggestions for improving and clarifying my ideas. Emerson Tiller, Ezra Friedman, Jide Nzelibe, and Eric Posner offered wonderful insights that pushed the project along. I am also indebted to the group of sixteen scholars who showed up in Chicago for a two-day roundtable discussion of the manuscript, and to the workshop participants at the University of Chicago Harris School of Public Policy, Boston College Law School, University at Buffalo School of Law, Indiana Law School, Northwestern Law School, Texas Law School, and various conferences, all of whom offered useful comments and ideas on various chapters along the way. Various current and former government officials, including Nathan Hochman, Ed Kleinbard, Edwin Meese, and Ted Olson, agreed to be interviewed for this
book. Their thoughts and ideas are weaved throughout the chapters—immeasurably improving the substance.

David Pervin is an editor-extraordinaire. He, and the reviewers he chose, offered insights and proposed revisions that improved the book in countless and important ways. Without David, the book would have been less fun to write and, more importantly, a lot less fun to read. Lisa Wehrle and Francesca Celestre also provided fantastic copyediting and cite-checking assistance. Diane Whitmore Schanzenbach, April Wu, Haeil Jung, and my law school dean, David Van Zandt, offered enormous support along the way; in fact, without DVZ’s encouragement and backing, I am certain this book would not exist.

Finally, my biggest supporter, my best friend, and the most patient person I know, Lee Epstein, must be thanked. Ironically, she refused to read the manuscript and routinely declined to discuss methods of any sort. Instead, she made sure of two things: the manuscript (1) would be entirely my own, and (2) would not interfere with hiking, fiction reading, or dining at high and low restaurants all over Chicago.
I n t r o d u c t i o n

Two months before Germany surrendered, six months before the United States dropped atomic bombs on Hiroshima and Nagasaki, and well before Congress repealed the World War II revenue laws, the U.S. Supreme Court heard oral arguments in the case Commissioner v. Court Holding Co.\(^1\) This 1945 controversy involved a three-way property transaction in which the Court Holding Company distributed real estate to its shareholders as a dividend; the shareholders then immediately sold the property to a predetermined third party. The evidence unambiguously indicated that the shareholders were involved in the deal for one reason: to enable Court Holding to avoid the status of seller, thereby steering clear of the high federal taxes imposed on the sale of corporate assets. Justice Black, writing for a unanimous Court, held in favor of the government, noting that “[t]o permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.”\(^2\)

Four years later, in 1949, and six months before North Korea’s surprise attack on the Republic of South Korea, the Court heard oral arguments in United States v. Cumberland Public Service Co.,\(^3\) a case that involved remarkably similar facts to those in Court Holding. A corporation, its shareholders, and a third party engaged in a three-way property transaction undertaken to enable the Cumberland Public Service Company to sell its property while avoiding the negative tax consequences associated with the sales of corporate-owned assets. Justice Black, again writing for a unanimous Court,\(^4\) noted the transaction looked “shadowy and artificial,”\(^5\) but this time rendered a decision in favor of the taxpayer, thereby allowing Cumberland to avoid paying taxes. The Court acknowledged the “oddities in [the] tax
consequences," but justified the decision on the grounds that Congress had not enacted legislation specifically barring the use of shareholders as conduits to evade corporate taxes, and, moreover, the lower court tribunals themselves had reached a pro-government result in *Court Holding* and one that favored the taxpayer in *Cumberland*.

Scholars, courts, and commentators have attempted to reconcile the two cases, but conventional wisdom holds that the Supreme Court did nothing more than foster confusion and incoherence in an important area of the law. After all, the two cases involved identical legal provisions and virtually identical facts and circumstances, yet the justices unanimously agreed to issue divergent outcomes. Moreover, changes on the bench in the interim period were minimal: The Court had eight Democratic appointees in 1945 and nine Democratic appointees in 1949. In short, while the justices decided *Cumberland* to "clear up doubts arising out of the *Court Holding* case," they seemed to do just the opposite.

This book argues that while *Court Holding* and *Cumberland* appear confusing and irreconcilable on their face, the cases are in fact wholly predictable if important factors are taken into account, namely the existence of wartime conditions. The justices considered *Court Holding* at a time when the United States was fighting major wars against enemy states on several fronts, but *Cumberland* emerged after World War II had dissolved into peacetime. Why would wartime emergencies cause Supreme Court justices to transform their decision-making calculus in a manner that favors the government in the taxation cases that appeared on the Court’s docket? Because in the words of President Roosevelt, and quoted by the Court itself: “War costs money.” In light of the massive and unavoidable financial costs that emerge in times of foreign policy crises, the justices have suggested in various ways and in various cases that “[i]n total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.” Indeed, the Court has gone so far as to suggest that it has a role to play in raising the revenue necessary to meet the nation’s wartime needs. In a dispute involving World War II taxes, the justices noted, the country was “faced with revenue needs and a tax program of a magnitude unthought of in modern times, and we all realize it is necessary to raise every dollar of additional revenue that can be raised without seriously disturbing or shattering our national economy.”

The justices, of course, are not in a position to adopt revenue-raising laws or directly seize property for the nation’s war effort, but they are able to render decisions in a manner that systematically favors the government in
cases and controversies that implicate the fiscal pie in times of war, thereby indirectly providing economic assistance to the nation in times of need. This book aims to convince readers that the justices use cases such as Court Holding and Cumberland to advance not only their own but also the nation’s goals—providing access to economic resources, when necessary, to increase the probability of success on the battlefield. In short, the thesis of the book is that Supreme Court justices (as well as lower federal court judges) hold an implicit power of the purse, a power that can be used to realize extralegal and budget-related objectives.

Not surprisingly, quite a few scholars have documented the manner in which Congress and the president have dealt with fiscal issues in wartime emergencies,11 but the extant literature is virtually silent on the financial role of the federal courts in times of crises. Students of the judiciary, to be sure, have investigated legal challenges to emergency funding measures, such as property seizures, banking regulations, and excess profits taxes, and have noted that courtroom disputes enable judges both to support and derail economic policy.12 But the literature has failed to explore the possibility that judges are in a position to engage in revenue raising and spending polices in their own right. More to the point, scholars have not identified federal judges as fiscal actors positioned to influence the size and use of the federal budget.

A handful of scholars in both law and political science have explored federal judges’ ability to affect state and local funding decisions, and more than thirty years ago, the legal scholar Gerald Frug aptly characterized a series of federal judicial mandates as an exercise of the “judicial power of the purse” given that courts were able to force state and local governments to spend public funds on certain activities, irrespective of their own preferences or those of their constituents.13 The title of this book, of course, derives from Frug’s early and important insight vis-à-vis judicial powers. The substance of this study, however, moves far beyond Frug’s descriptive point and demonstrates that judges are able to both raise and spend federal monies irrespective of the preferences of the other two branches of government. Federal judges, in short may not have the formal power of the purse (it lies with Congress), but, as evidenced in the chapters that follow, they nevertheless can—and do—systematically exercise control over a surprising portion of the federal budget.

Uncovering and describing federal judges’ roles in the national budgetary process charts new territory, but it also raises two important questions: Do judges have any penchant to employ their fiscal authority in times of crisis, thereby increasing the nation’s ability to adequately respond to perceived threats? If so, do judges in fact use their budgetary powers differently
in times of crisis than in periods of relative calm? This study seeks to answer these inquiries through the lens of emergencies brought about by military threats or attacks from abroad. Stated most directly, the book sets aside the interesting questions that emerge in the context of domestic emergencies and focuses on the exercise of judicial purse powers in times of foreign policy crises. Foreign policy crises, as defined here, are emergencies that raise national defense issues associated with military safety and security, but not issues that implicate nonmilitary foreign aid, diplomatic and trade relationships, and so forth.¹⁴

The Plan of the Book and Its Place in the Extant Literature

To investigate if, how, and when judges use their fiscal powers, this book sets forth an information theory of crisis jurisprudence, a theory that posits rational judges, like individuals and policymakers generally, prefer periods of safety and security to those plagued by danger and chaos. Given this preference, judges are likely to render decisions in the cases and controversies that show up on their dockets in a manner calculated to keep the nation safe. Preparing and readying the nation for possible engagement in military hostilities is an extremely costly endeavor, and thus the information theory argues that instrumentally rational judges will seek to enable the nation to fend off foreign threats by strategically using the judicial power of the purse.

Judges, of course, are experts in legal and constitutional matters, and not foreign policy matters. Accordingly, they will have difficulty identifying foreign policy crises, yet they will want to deploy their decision-making powers to help fund national defense in dangerous times. Consequently, the information theory posits that judges will take judicial notice, perhaps sub silencio, of credible cues emerging from the elected branches of government that signal potential foreign policy crises. These cues can take a range of different forms, such as a congressional declaration of war, a major troop deployment by the executive branch, or the conscription of men into the army in preparation for military engagement. The important theoretical point made below is not the specific cue relied on, but the idea that judges will look to experts to determine the existence of a foreign policy crisis, not to their own perceived expertise or to that of the parties litigating before them.

The cues received by the courts will generally contain consistent messages (that is, both Congress and the president will take action indicating a crisis either exists or does not exist), and in these circumstances judges will have no difficulty discerning the presence or absence of a foreign policy
crisis. It is possible, however, that the elected branches will convey contradictory messages: Congress may refuse to support the president’s decision to deploy troops by withholding funds or through some other formal and public mechanism, suggesting the two bodies of government have diverging views on whether a foreign policy crisis is at hand. In this context, judges must assess the credibility of the messages and, in effect, side with one branch or the other on the question. For a number of reasons outlined below, including the long-standing judicial deference to legislative actions in times of foreign policy crises—but not necessarily to those undertaken by the executive branch—the information theory of crisis jurisprudence posits that judges will often trust cues emanating from Congress more than those sent by the president when the two branches are at odds and when the nation’s finances are implicated.

The president, as the nation’s commander-in-chief, certainly has valuable information and expertise in the foreign policy context. The political scientist Aaron Wildavsky proposed the “two presidencies thesis” more than forty years ago, arguing that policymakers systematically support the executive branch in the foreign policy arena given the president’s foreign policy information, knowledge, and experience, but not in the domestic context where the two branches are assumed to be on equal footing. More recently, the legal scholars Eric Posner and Adrian Vermeule have focused specifically on federal courts and have made a strong case for federal judicial deference to the president’s foreign policy choices on grounds similar to Wildavsky’s two presidencies thesis. The information theory presented and empirically investigated below, however, is not in conflict with the idea that judges and policymakers should or do privilege presidential cues on specific wartime policies because it is a theory that addresses judges’ use of their budgetary powers in periods of crises more generally—not their decisions with respect to specific executive branch policy choices. Indeed, the cases and controversies that allow judges to operate as fiscal agents often do not involve military matters at all, but routine disputes in taxation and other financial areas of the law. The information theory posits that court-induced financial assistance is apt to emerge when Congress and the president send consistent cues indicating that the nation’s safety and security are threatened. If the president is supportive of increased levels of defense but Congress is silent or even opposed to military action, courts are unlikely to offer a funding boost on the grounds that military success does not depend on it.

The information theory of crisis jurisprudence does not imply that when federal judges choose to act, they will always attempt to loosen budgetary
Introduction

constraints in an effort to enable the nation to consume greater levels of defense. Rather this new understanding of the courts posits that judges will deploy the judicial power of the purse both negatively and positively. More specifically, judges will support the government in times of crisis by rendering decisions that expand the fisc when they believe extant safety and security are inadequate and thus greater levels of defense are necessary to protect the nation’s interests. But if judges receive trustworthy cues indicating that current policy has gone astray—that military activities have become excessive—courts will seek to tighten the fisc by siding with private parties in litigation and against the government, thereby forcing the latter to make unwanted payouts and limiting the amount of public funds available for continued military endeavors. In these circumstances, judges will seek to shrink the size of the fiscal pie to promote their desire for the optimal level of defense spending. To see why judges are likely to adopt this strategy, consider a situation in which Congress formally repeals its prior support for a president’s wartime activities and reduces funds available for defense generally. In this scenario, judges are likely to employ their powers in a manner also intended to squeeze the budget and, in the process, implement judicial incentives for the executive branch to reconsider its course of action and possibly reduce the level of military activity perceived to be excessive.

The information theory, in short, focuses on the trade-off that judges routinely face between “all other goods” (such as law, policy, institutional stability, personal legacy, and so forth) and “safety and security.” Judges seek the ideal level of defense, but must rely on the cues and signals emanating from the elected branches of government to determine whether extant levels are too high or too low. When they receive credible information that defense levels are insufficient to keep the nation safe, they will trade off all other goods for more defense; if they receive cues indicating defense levels have become disproportionate to the amount needed for safety and security, they will decide cases in a manner that enables greater consumption of the other desired goods, such as law and ideology. Absent such cues, judges will issue opinions that reflect their belief that current defense levels are optimal and thus they need not increase nor shrink the size of the budget: The ideal bundle of goods is already being consumed.

This study builds on the extant literature in that it conceptualizes judges as instrumentally rational actors seeking to implement individual preferences over a range of goods, but it also presents a new understanding of the courts. Judicial scholars have long theorized and investigated the role of micro-level factors, such as the facts of a case, specific laws, and judicial
political preferences (identified as “all other goods” above). Far less attention has been paid to macro-level factors in judicial decision making, and no study has provided an explicit model of judges’ willingness to use their budgetary authority in times of national danger.

To be sure, legal and political science researchers have not entirely ignored macro-level factors and their effects on the judicial decision-making process. In one recent contribution to the literature, the legal scholar Barry Friedman has noted that judges account for the political and social environments when rendering decisions on important issues to maintain a certain level of popularity and public acceptance.17 As well, Robert Erikson, Michael MacKuen, and James Stimson have investigated the effects of political and economic trends on courts by devising a measure that simultaneously incorporates features of both.18 This study on the judicial power of the purse, unlike the existing literature, however, posits that judges account for the broader environment not to maintain legitimacy and popular support—but rather to shape national policy in ways that accord with their own (and the nation’s) preferences on safety and security.

More on point are the studies that investigate the effects of macro-level events, such as foreign policy crises, on federal courts. Numerous legal and political science researchers have explored these effects, including Lee Epstein, Daniel Ho, Gary King, and Jeffrey Segal; Richard Posner; Eric Posner and Adrian Vermeule; Bruce Ackerman; Mark Tushnet; and Justice William Rehnquist.19 All have made important and noteworthy contributions to the literature. Because each of these studies, as well as many others, advances our understanding of judging in times of foreign policy crisis, it is worthwhile to investigate briefly just how this book builds on and extends this literature.

First, the chief similarities: The contributions to the literature just listed, like this book, explore the reality that foreign policy crises exert an influence on the judicial decision-making process. Moreover, the existing studies, taken together, like this book, present a range of both qualitative and quantitative evidence, documenting how, why, and when judges are likely to privilege the views of the federal government vis-à-vis private parties during ongoing military crises. These commonalities exist, but important differences also distinguish this book from existing studies.

First and foremost, scholars investigating judging in times of foreign policy crisis, including those listed above, have explored whether judges do or should decide civil rights and liberties cases differently in times of peace than in periods when the nation is in peril. Put differently, scholars have
devoted their time and energy to understanding what might be labeled the judicial *policing hand*—they investigate whether judges should or do make trade-offs between individual rights and liberties, on the one hand, and law and order, on the other, in times of crisis. This study investigates the judicial *fiscal hand* to identify and understand judges’ financial role in fending off military threats from abroad. Scholars have entirely ignored the idea that judges operate as federal fiscal actors seeking to assure the country consumes the optimal level of defense, thereby assuring necessary trade-offs between safety and security and “all other goods.”

Second, this book develops a theoretical basis for why we should expect judges to respond to foreign policy crises, and perhaps more importantly, why judges will rationally employ their decision-making power as a double-edged sword when pursuing their preferences. To be sure, hints of the information theory of crisis jurisprudence presented here have emerged in the literature, but scholars have all focused on one side or the other of the judicial sword, or on normative rather than positive considerations. No scholar to date has attempted to flesh out a complete theory of the federal courts in times of foreign policy crises, nor have scholars attempted to clarify just how such a theory is able to accommodate and build on the long-standing court scholarship focusing on micro-level factors, such as facts, law, and judicial ideology. From a theoretical perspective, then, this book seeks both to organize and advance our understanding of judging in periods of crises and in times of peace.

Third, this book investigates the empirical implications of the information theory with data that is quite a bit different from that used in the extant literature. With few exceptions,20 the literature has focused almost exclusively on judicial decision making at the apex of the judicial hierarchy: the U.S. Supreme Court. This study, by contrast, investigates the Supreme Court as well as the lower federal courts in times of crisis. While the Supreme Court is arguably the most important body in the judicial system given that the justices nearly always resolve issues of national significance and at the same time render opinions with great precedential value, lower federal courts also undeniably play a key role in judicial decision making given the large number of decisions they render every year and their ability to flout Supreme Court doctrine, at least at the margin. Moreover, existing studies tend to focus on narrow time frames or unique periods in court history, whereas this study investigates thousands of judicial decisions rendered both by the Supreme Court from 1900–2010 and federal appellate courts from 1925–2002, enabling far more detailed analyses of military crises than before attempted.21
Why Investigate the Information Theory of Crisis Jurisprudence through the Narrow Lens of Foreign Policy Crises?

Why it is useful to set forth and investigate an information theory of crisis jurisprudence through the lens of foreign policy crises, and not crises more generally? In short, why not conduct a far more expansive and comprehensive study with military crises as just one component of a larger investigation? To answer to these questions, consider the following.

A large extant literature investigates how the federal government—all three branches—responds to foreign policy crises, but no study has sought to identify the judicial power of the purse or to document just how these financial powers are used to facilitate the nation’s military success in times of crisis. This book, then, fills a surprising and unfortunate gap in the literature and, in doing so, aims not only to expand our current understanding of judicial preferences, but also to illustrate the manner in which judges interact with and possibly influence the other two branches of government. This latter insight is important: Scholars have generally sought to identify the means by which Congress and the president seek to influence judicial decision making, but this study flips the causal arrow, demonstrating that judges will seek to influence the policymaking that transpires in the elected branches of government. Whether judges successfully transform the policymaking choices of Congress and the president is an empirical question that is not addressed here; the point is that judges will act as if they are able to exert such influence.

The information theory of crisis jurisprudence can (and should and will) be investigated in a range of different crisis contexts, but it is worthwhile to flesh out and scrutinize this new theory in the milieu in which it is likely to have the greatest purchase: foreign policy crises. These crises are truly national events, posing a threat to the country’s interests and, perhaps, its very survival, while at the same time inflicting considerable costs on the public fisc. For these reasons, military crises involving high-risk situations are likely to take priority in policymaking circles, perhaps, in part, because the incidents tend to have homogenous effects throughout the nation in the sense that we have never observed one part of the country at war while another is at peace. Due to this experiential homogeneity, it is reasonable to expect that these crises will also have largely homogenous effects on judges all around the nation and up and down the judicial hierarchy, if they are affected at all. Of course, the local nature of military casualties and defense industry profits may lead to larger (or smaller) effects on courts located in different regions of the country, but these factors do not change the underlying
idea that a major military event will affect court outcomes throughout the country given the high stakes in every jurisdiction.

Issues involving domestic crises, such as natural disasters, crime waves, major economic downturns, and other types of macro-level events, by contrast, are more likely to be contained to relatively narrow regions. In fact, data suggest that regional differences in many of these circumstances persist over time, and that different localities (even within the same state) often experience events quite a bit differently from the national average. To give just one example, hurricanes are far more likely to strike in the eastern and middle parts of the southern United States; they are unlikely to affect the Pacific Northwest. Local natural disasters such as hurricanes, then, are unlikely to exert a strong influence on the average federal judge, who will have very little—or no—information about the event or its costs to the federal budget. Whether the information theory, or a macro theory of the court more generally, could accommodate such issues is intriguing and certainly worthy of future consideration, but these issues will be investigated in a follow-up project rather than here.

The notion that foreign policy crises pose distinct and all-encompassing threats to the nation as whole does not, of course, originate with this study. Judges themselves have suggested as much. In *Yakus v. United States*, for example, the Supreme Court considered a dispute involving wartime price controls implemented in the 1940s. The justices issued a series of opinions in *Yakus* implying that the ongoing wartime crisis was reason enough to sanction the new laws—even if a different view would likely prevail in peacetime. In the words of Justice Rutledge, who questioned the law’s procedural aspects but not the government’s substantive decision on price controls:

> Judged by normal peacetime standards, over-all nationwide price control hardly has accepted place in our institutions. . . . Whether control so extensive might be upheld in some emergency not created by war need not now be decided. That it can be supported in the present circumstances and for the declared purposes there can be no doubt.23

The justices are not alone in their view that foreign policy crises such as wars create unique circumstances warranting extraordinary federal actions, often at great expense to the budget. As the legal and political science scholar Edward Corwin notes in his well-known work *Total War and the Constitution*, “war, public war, total war, is still, no doubt, the emergency par excellence,” and this, in turn, justifies government intervention of a sort and
level unseen, and perhaps, undesirable in times of peace, as suggested by the Yakus Court.

Consider other views also emanating from the political science literature. A prevailing view in the realist school of international relations posits that because the international system is plagued by a great level of competition and danger, a nation's top priority is (and must be) its security and survival.25 This preference leads many realists to make strong claims about foreign versus domestic policymaking: While the latter is rife with conflicting viewpoints, partisan politics, and regional disagreements, the former is characterized by unanimity and accord given the high stakes involved.26 Scholars subscribing to this view of realism have investigated these contrasting dynamics in the context of Congress and have noted that in times of foreign policy crises, legislators rationally offer bipartisan support for the president to assure a successful resolution of the issues, thereby facilitating national safety and security. While a number of recent scholars, including William Howell and Jon Pevehouse, David Rohde, and John Tierney, convincingly challenge the realists’ assertion that partisan politics dissolve in times of crisis,27 no scholar has questioned the underlying claim that resolving foreign policy crises is a top priority in policymaking circles given the risks involved. Similarly, this study of the federal courts posits that foreign and military crises weigh heavily on the judicial mind given the severe national consequences of failure; to disregard crises is to jeopardize not only the well-being of the judges and the judiciary, but also the whole nation.

Similarly, the idea underlying the “rally-around-the-flag effect” is linked to the unique nature of international and foreign policy events. Rally events, as defined by the political scientist John Mueller, are specific, dramatic, and sharply focused international events involving the United States, and the president in particular, that lead to sudden and substantial increases in presidential approval ratings.28 Rally events that have sparked notable and increased popularity ratings include the onset of the Korean War, the Iranian hostage crisis, and 9/11. The precise cause of the rally-around-the-flag effect is disputed; some argue these events are associated with patriotic feelings that Americans experience in times of danger, while others argue they are linked to political leaders’ willingness to refrain from publicly criticizing the commander-in-chief during an ongoing foreign crisis. Irrespective of the underlying cause, there is no dispute that international and foreign policy crises are unique incidents in American history involving high-stake issues that generate popular views unobserved in times of domestic crises or other macro-level events. Similarly, this study expects federal judges to respond to foreign policy crises in a way that differs from the decision making that
transpires in periods of domestic disorder and peacetime generally—they will decide cases in a manner that enables the nation to purchase the preferred levels of defense.

There is one final reason why foreign policy crises are well suited for an initial investigation of the effects of macro-level events on courts—they impose massive costs on the nation, and thus it is reasonable to expect that judges will deploy their fiscal authority in a manner intended to aid the nation’s financial needs in these periods. While many of the costs are incommensurable and difficult to estimate, such as the suppression of individual rights and liberties, human suffering, and death, other costs, such as direct expenditures on military equipment, training, and deployment, can be calculated with some precision. Since the turn of the twentieth century, for example, U.S. policymakers have spent nearly $12,700,000 billion defending the nation from military threats abroad, an average of $115,000 billion every year (all numbers here and below are in 2009 dollars unless indicated otherwise). As the legal academics Steven Bank, Kirk Stark, and Joseph Thorndike have noted in their excellent history of fiscal policymaking in times of emergency: Wartime activities engender sheer necessity. “There is simply no other government activity that requires as much revenue,” the authors argue, “as fighting a war. Success on the battlefield requires economic resources, [and the nation must find a way] to marshal those resources.”

These military costs, of course, have not been constant throughout all time periods, an empirical fact that will play an important role in both the theory and empirical findings presented below. In the first half of the twentieth century, defense outlays spiked in both world wars and then returned to near-peacetime levels at the end of each foreign policy crisis. Between 1900 and 1916, for example, the government spent an average of $266 million on military activities, but mean spending in 1917 and 1918 was $3,383 million, the years when the nation was involved in World War I. Similarly, the government invested $1,029 million on average between 1920 and 1940, but incurred roughly $52,180 million in defense operation expenses on average every year during World War II.

This defense expenditure cycle—from high levels in times of foreign crises to low levels during peacetime and then back again—was the norm up through World War II, but after that time the cycle began to fade as military costs remained high and relatively constant in all years. Beginning with the cold war period, policymakers chose to devote substantial funds to military activities in all periods at least in part to assure the nation’s readiness to respond quickly to military hostilities as they emerged.

Table I.1 depicts the costs incurred in the years the United States was
involved in “major wars” throughout the twentieth and early twenty-first centuries, totaling more than $6 trillion above what the nation would have incurred in military expenses absent a foreign policy crisis. World War II cost the nation more than $4 trillion and is, by far, the most expensive foreign policy crisis to date. The Iraq and Afghanistan Wars have led the government to spend close to $1 trillion in public funds; the other wars involved expenditures of far less monies: $686 billion (Vietnam War), $253 billion (World War I), $320 billion (Korean War), and $96 billion (Gulf War).

Table I.1 informs on the cost of major wars, but it is misleading in two important respects. First, when the nation employs the military draft, as it did during the two world wars and the Korean and Vietnam Wars, recruits are paid below-market wages, and thus the costs depicted in table I.1 indicate actual outlays but substantially understate social costs. Second, the table ignores defense costs incurred by the nation in the absence of major military deployments. Accordingly, figure I.1 presents military spending in real dollars and as a proportion of the GDP, which addresses the second problem but not the first. The solid line in the figure depicts outlays in billions of 2009 dollars and is linked to the y-axis on the left-hand side of the figure; the dotted line presents defense outlays as a proportion of the GDP and is linked to the y-axis on the right-hand side of the figure.

Figure I.1 suggests that major wars are often, but not always, correlated with high levels of defense expenditures. World War I, World II, the Korean War, the Vietnam War, and the Iraq/Afghanistan Wars all led to spikes in defense spending as represented in constant dollars and as portions of the GDP. The spike in spending correlated with the Vietnam War, however, did not take place until the late 1960s, notwithstanding the fact that the war is widely believed to have begun as early as 1963 when Congress passed the Tonkin Gulf Resolution supporting President Johnson’s military activities.

### Table I.1 The financial costs of major U.S. wartime activity since 1900

<table>
<thead>
<tr>
<th>War</th>
<th>Period of Active U.S. Involvement</th>
<th>Cost in Billions of $2009 U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>World War I</td>
<td>1917–1919</td>
<td>$253</td>
</tr>
<tr>
<td>World War II</td>
<td>1941–1945</td>
<td>$4,114</td>
</tr>
<tr>
<td>Korean War</td>
<td>1950–1953</td>
<td>$320</td>
</tr>
<tr>
<td>Vietnam War</td>
<td>1964–1972</td>
<td>$686</td>
</tr>
<tr>
<td>Gulf War</td>
<td>1990–1991</td>
<td>$96</td>
</tr>
<tr>
<td>War on Terror</td>
<td>2001–present</td>
<td>$859</td>
</tr>
<tr>
<td><strong>Total Costs</strong></td>
<td></td>
<td><strong>$6,328</strong></td>
</tr>
</tbody>
</table>

in Indochina; perhaps even more notable, real defense spending decreased several times during this wartime period, as did defense spending as a proportion of GDP—suggesting that neither Congress nor the president were prioritizing the Vietnam War in their appropriations and spending decisions. Moreover, spending increased notably in the 1980s during a period of heightened tension and perceived international conflict, and yet there were no major troop deployments on the scale of those observed during the wartime periods. Finally, real defense spending increased sharply in the early twentieth century and has continued to increase throughout the Iraq/Afghanistan Wars, but has increased only a small amount vis-à-vis the GDP during this time period.

While both figure I.1 and table I.1 indicate that defense activities are costly, the nation also spends substantial monies responding to various other macro-level events, such as natural disasters, economic downturns, crime, immigration, and so forth. Unlike defense activities, however, these expenditures are not widely and routinely publicized in the media, extensively discussed in academic scholarship, or analyzed as unique budgetary items in policymaking circles. Indeed, identifying the costs of major military crises, and defense spending generally, is an easy task given that the costs are listed separately in the annual federal budget, which the government makes
widely available in print publications and on Internet sites. The federal costs associated with domestic crises and other macro-level events, by contrast, are not aggregated nor estimated in any single location and, with few exceptions, are virtually impossible to identify with any precision given that agency protocols do not require these costs to be singled out in the budget reporting process. These differences in budgeting practices, again, increase the likelihood that federal judges will strategically employ their budgetary powers to help the nation fund emergency costs brought about by foreign policy crises but not other types of crises or large-scale events that affect the nation.

The Organization of the Book
Chapter 1 describes the judicial power of the purse from the perspective of each branch of government. With the help of published data and interviews with various current and former government officials, the chapter establishes the possible upper and lower bound of judicial fiscal power, thereby setting the groundwork for an investigation of how this budgetary authority is exercised in times of foreign policy crises.

Chapter 2 sets forth the information theory of crisis jurisprudence, positing that judges wield their fiscal power as a double-edged sword with the goal of assuring the nation consumes the preferred level of defense. When military spending is perceived to be insufficient (perhaps due to unforeseen military threats from abroad), judges will employ their purse powers with the intent of expanding the size of the fisc and enabling consumption of greater levels of defense; when judges perceive defense spending to be excessive, they will seek to pinch the fisc in an effort to reduce the military activities undertaken by Congress and the president. Having neither information nor expertise with respect to foreign policy issues, judges will have difficulty determining whether they (and the nation) should trade off consumption of “all other goods” for greater levels of defense. For this reason, they will rely on cues and signals emanating from the elected branches. When these cues are consistent, judges will have no difficulty discerning whether the nation needs more or less defense to maintain the optimal level of safety and security, but when Congress and the president send conflicting messages, judges must side with one branch over the other on the issue at hand. The information theory hypothesizes that judges will often side with Congress rather than with the president when it comes to decision making in times of crisis for a number of reasons, which are suggested above and explored in detail below.
Chapter 3 conducts a large-$N$ quantitative study of judicial decision making and finds substantial support for the information theory of crisis jurisprudence in the context of the Supreme Court but not the lower federal appellate courts. More specifically, the findings show that during World Wars I and II, the justices systematically sought to augment the size of the fisc, but after that period, judicial strategies became substantially more complex. Major troop deployments led the justices to markedly disfavor the government throughout the cold war period, yet during this same time the justices favored the government if defense spending increased. These twin findings in the cold war era suggest that the justices were willing to aid the nation financially when the elected branches of government devoted more of the nation’s financial resources to its military activities, but when Congress and the president failed to identify defense as a priority in their spending choices, the Court was apt to refuse to help fund the military efforts. Indeed, it tended to tighten the fisc as a means to encourage the government to reconsider its foreign policy tactics.

Chapter 4 turns to qualitative evidence found in judicial opinions, courtroom filings, and law clerks’ memoranda and uncovers data that substantially mirror the quantitative findings presented in chapter 3. The qualitative evidence indicates that judges not only are aware of the high financial costs of war but also eagerly use their decision-making powers to enable the nation to purchase increasing levels of defense, but only when it appears necessary for success on the battlefield.

The information theory of crisis jurisprudence presented here, along with its empirical implications, establish the groundwork for additional research exploring the effects of crises on federal courts in contexts well beyond foreign policy emergencies. These crises might include economic, health or crime issues, or natural disasters, but all would involve events beyond the control of either the litigants or the judges. The book, in short, invites further investigation of how national macro-level issues outside the foreign policy context affect courts. To explore this possibility, chapter 5 conducts an out-of-sample study of decision making in one domestic context—economic policymaking. This preliminary study finds the information theory, with minor adjustments, substantially aids in forecasting how and why judges respond to macroeconomic trends. The theory suggests, and the data confirm, that Supreme Court justices perceive the state of the economy as a credible cue of federal policymakers’ ability to manage the nation’s resources: When the economy is doing well, the justices tend to support the government in the decision-making process; but as the economy turns sour this support evaporates, and the justices begin issuing increased levels of
antigovernment decisions in financial cases. This “judicial business cycle”
corresponds to the typical macroeconomic upturns and downturns, but
with the onset of a serious economic contraction—such as the Great Depres-
sion in the 1930s—the justices are more likely to collaborate with federal
policymakers rather than punish them for extant economic conditions.

The book owes a debt to the literatures in both international relations
and judicial decision making. Accordingly, the concluding chapter summa-
rizes the extant scholarship and explores how the information theory and
the empirical findings presented here build on and extend the current litera-
tures in these areas. Finally, the chapter discusses briefly the normative im-
lications of the judicial inclination to employ the implicit judicial power
of the purse in times of crisis to advance judges’ and the nation’s goals.
The Next Stop: The Information Theory in the Domestic Context

The information theory of judging in times of crisis, 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 judicial behavior in predictable ways. 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 data presented in the previous chapters may, in short, be the tip of the judicial iceberg: Judges could wield Article III powers as a double-edged sword in a range of contexts not yet unexplored in an effort to advance individual goals and aims in the policymaking context.

This chapter commences an out-of-sample investigation of the information theory of judging by exploring court 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, use their docket as hypothesized above: Judicial decisions trend with the macroeconomy in a manner that indicates the justices hope to foster competent policymaking inside the elected branches of government, thereby increasing the likelihood of prosperity and growth.
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 identified in the context of foreign policy 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 and family members who care very much about their 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 variation on the theory, of course, does not stop with the simple claim that the justices prefer an expanding to a contracting economy. The theory also 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, 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 their Article III decision-making power, so too can we expect the justices to facilitate and impede the elected branches’ economic policymaking choices, 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 that it touches on 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 use 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 apt to use 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, but 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 a 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 the goal of supporting good policy and undermining bad policy.

**Economic Cues: 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 rests in the hands of competent officials, and for this reason the justices will maximize their own utility by promoting the work of skilled decision makers 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 on or determine, as an empirical matter, the policies and programs that advance the nation’s economic interests. 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 proficiency in the economic policymaking context. The justices, being rational, will rely on credible cues to determine how and when to use their decision-making powers to advance their preference for economic prosperity.

Indeed, unlike the foreign policy arena in which the justices must rely on Congress’s 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 extant 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 to remedy the nation’s economic problems.

In the foreign policy context investigated in previous chapters, 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 crises 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 consequences in the courtroom. Similarly, the information theory in the economic context posits that judges will take judicial notice of cues that suggest the nation is facing the type of crisis that requires interbranch 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 aptitude than trained professionals. The macroeconomists 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. Importantly, the theory does not hypothesize that the justices have skill and expertise with respect to the modern macroeconomic theory, but it is possible that 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. 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 wrong) that the economic 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.

It is no mystery why the theory posits that the economic downturns associated with the 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 policymaking failure. The account reflects the extant literature in both economics
and political science on the political business cycle. Researchers have long 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 for political gain.\(^4\) When an election becomes immanent, however, politicians want to appear competent and perform well to assure reelection. At the same time, various branches of the economics literature suggest that elected officials will work hard to fend off protracted periods of (costly) economic distortion given that such conditions cause widespread and serious damage not only to constituents but also to the long-term political reputations of incumbents. In fact, the idea that economic crises induce different types of policymaking choices than those 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 (that is, precisely the economic conditions elected officials seek to avoid) are beyond their control.

Figure 5.1 provides historical data on the state of the nation’s economy; the figure presents a locally weighted smoothed curve of a scatter plot of the business cycle, with periods of economic decline coded as equal to \(-1\) and periods of economic expansion coded 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. Importantly, both before and after the 1930s, the economy cycled through various expansions and contractions, and they were relatively modest when compared to that observed in the 1930s.

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 Railway Co. v. United States*,\(^7\) the Court in 1932 considered whether the petitioner was entitled to a rehearing on an agency decision regarding shipping rates given the substantial changes in the economy. The Court noted:
There 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.” . . . “[I]n such depressions the railroads suffer severely.”

Again, in the 1937 case of *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 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 stated. “They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants.” 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 

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5.1. U.S. economy cycles through contractions and expansions

*Note:* Locally weighted smoothed curve of a scatter plot of the business cycle. Economic expansions coded = +1, and economic contractions coded = −1. Depressions occurred only in the 1930s; all other economic downturns can be labeled recessions.
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.12

Of course, judicial awareness of macroeconomic changes in the 1930s
does not necessarily lead to the conclusion that the justices follow aggregate
fluctuations throughout the typical business cycle. As it turns out, judicial
opinions, litigants’ briefs, and clerks’ memoranda are filled with rhetoric
and commentary addressing economic conditions throughout the entire
twentieth century, suggesting courtroom actors are continually apprised
of the state of the economy and believe it is relevant to the justices’ votes
and outcomes.13 Even if the justices take judicial notice of increasing and
decreasing levels of economic factors, which they do as evidenced by the
rhetoric above, the more difficult question is whether they account for these
cyclical changes when casting votes and reaching outcomes.

If the information theory of decision making in the economic context
accurately captures the Court’s interest in promoting proficient policymak-
ing, 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 involv-
ing economic policy. Put another way, the government’s win rate should
positively correlate with various economic indicators, such as employment
rates, industrial production, GDP, and so forth. Conversely, when the econ-
omy turns sour and the justices hold elected actors responsible out of a be-
lief 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 sug-
gests 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 in periods of major economic setbacks.

Perhaps because the justices have little to no expertise in or knowledge
about economic theory, they will support the government far more of-
ten 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, \textit{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 \textit{must} be prepared both to support and undermine the government depending on the \textit{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 justices are not only theoretically capable of using a double-edged sword to support and undermine economic policy, but 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 1978 but including many others, such as Michael Lewis-Beck, Tom Rice, Raymond Duch, and Randolph Stevenson—have all theorized, and empirically found, that voting is a referendum on the state of the economy.\textsuperscript{14} While there are many components to the extant literature, two are particularly notable for purposes of this study. 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 policymaking 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 policymaking 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, the lesson from the extant political and economic literatures is clear: Voters steadily prioritize economic issues and, for this reason, are apt to forgo partisan preferences at the margin to obtain economic prosperity.\textsuperscript{15}

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 effect on election outcomes—none seem to quarrel with the idea that the macroeconomic factors work as a proxy for policymaking competence and, for this reason, trend with voting patterns.\textsuperscript{16} 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 will rational justices. And just as voters support and undercut politicians based on the relative state of the economy, so too will rational and instrumental justices intent on using their powers to advance the nation’s economic prosperity. 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 this study does, that both the voters and the justices rationally prefer economic prosperity to economic loss, the electoral success of the incumbent government along with its win rate in Court should trend with national economic conditions.

In the foreign policy context, the information theory forecast that justices are strategic decision makers willing to use the power of the purse in an attempt to affect the level of defense spending. The theory as applied to economic preferences also hypothesizes strategic decision making, but it 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.\textsuperscript{17} This raises the question of why the justices would, as political appointees (nominated by the president, approved by the Senate, and with life tenure), 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 on 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 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 are similar on important dimensions—both seek to promote economic prosperity through the reliance on economic conditions as a cue for assessing financial managers’ competence—be expected
to have divergent responses to the same stimuli? They would not. This ob-
servation does not reduce each justice to the average voter for one very im-
portant 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 military, health, and crime policies. This multi-
dimensional response is made possible by the range of legal issues that
show up on the Court’s docket, each of which could theoretically generate
distinct substantive judicial responses depending on extant macroeconomic
conditions. Voters, by contrast, cannot fine-tune their support or opposi-
tion; they must choose a single response and render a single vote at the poll
booth 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 sup-
port the elected branches of government in cases involving economic issues
when the economy performs well or in times of severe economic crisis. In
periods of minor economic downturns—recessions—by contrast, the jus-
tices will punish the elected officials on the assumption (right or wrong)
that they have caused the economic setback by pursuing flawed policies and
programs. To investigate this theory, the Court’s taxation docket is again
put to use.  

While the theory could be explored in a range of different contexts, taxa-
tion is an excellent venue to begin the study of how the economy affects
judicial behavior for several reasons. First, the theory implies that the gov-
ernment’s win rate in the Supreme Court will correlate with the state of the
economy, and thus a useful test of the theory requires a collection of cases
involving the U.S. government and taxation disputes to satisfy this crite-

rion. 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 assess-
ing government tax policies challenged in the courtroom context. Finally,
Congress and the president have constantly revised the tax laws over the period of this study, and this generates quite a bit of variation in the data, thereby enabling a useful investigation of our theory.\textsuperscript{20} 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 project underway with two coauthors. The analyses presented above and below are, therefore, preliminary and will be probed further for their robustness.

The empirical tests conducted here focus on three historical periods in the twentieth and twenty-first centuries: 1912–29 (typical recessionary years), 1930–39 (atypical depressionary years), and 1940–2010 (typical recessionary years). The focus on these three historical eras reflects the theoretical account set forth above and the fact that Congress adopted the modern tax laws in 1909. While the economy experienced ups and downs in all these eras as demonstrated in figure 5.1, theory anticipates judicial responses will depend not only on whether the economy is growing or shrinking, but also on the extent to which it is doing so. For the cases and controversies 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 \textit{but} defer to the government in the period of severe economic crisis taking place in the 1930s.\textsuperscript{21}

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, $\text{vote}$, 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. These are the identical dependent variables used in chapter 3, and because both 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 National Bureau of Economic Research (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 dates only 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 lagged by three months and coded as equal to +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. Gross domestic product (GDP), for example, is a definition of prosperity that the media uses frequently. Although standing alone, it is not the variable favored by macroeconomic professionals as the best indicator of the state of the economy, 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 the 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 performance. Accordingly, industrial produc-
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tion 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 average change rates in the variables national income and unemployment and the average six-month change rate in consumer sentiment (as measured by surveys conducted by University of Michigan researchers) over the period prior to oral argument are also incorporated into the models. Consumer sentiment is coded in six-month increments to capture the time lag that empirically exists between consumer information and the actual economic conditions that emerged. As we will see below, the average consumer takes twice the time to recognize changes in economic conditions than members of the Supreme Court.

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 the post-1940 era. Finally, due to the high correlation between the independent variables and to assure identification of the factors that have effects on judicial decision making, each is investigated in a separate model. 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 control variables that theoretically could affect judicial decision making or that scholars have found to affect votes and outcomes, including the politics of each branch of government, the identity of the appealing party (government or private party), whether the nation was at war, whether a constitutional issue was involved, maximum tax rates, a time trend, and fixed effects for the justices, when relevant.

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 punish policymakers for national economic decline. If the “justices as voters” model aptly characterizes the Court’s decision-making strategy, 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 positively correlate with the dependent variables, but the variable unemployment should negatively correlate with the Court’s votes and outcomes given that unlike the latter five variables, unemployment is countercyclical 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 posits 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 and industrial production (the only two available for that decade) should positively correlate with the dependent variables. As the economy declines in times of serious economic crisis, the government win rate is expected to increase.

Table 5.1 presents the marginal effects of each regressor on the two dependent variables; the results should be interpreted as the increased (or decreased) probability of a pro-government vote or outcome, given a unit increase in the independent variable. Importantly, the table presents the findings for twelve separate models (listed in the first column), and only the findings of interest are presented—the control variables are listed in the note below the table. The findings vis-à-vis the justices’ voting behavior are depicted in the top panel, and the outcomes are presented in the bottom panel of table 5.1. The first thing to note is that when the years are pooled, the findings indicate that the probability of a pro-government vote or outcome decreases as the economy performs better, as measured by the business cycle and industrial production. When the eras are disaggregated, however, the findings become substantially more interesting and support the theory set forth above.

As theorized, when the economy is in a period of typical economic fluctuations, the justices respond with pro-government votes during expansionary periods and anti-government votes during contractionary periods. Table 5.1, column 3, presents the findings for the pre-1930 typical period and evidences support for the theory: When the NBER Dating Committee identified economic expansions and when industrial production was increasing, the justices voted more often in favor of the government. This finding also generally holds between 1940 and 2010, the second “typical” period, but consumer sentiment is the only variable that achieves statistical significance. The problem with investigating the era between 1940 and 2010 is that it incorporates the most costly and major war in the history of the country—World War II—a time when the justices were expected to and did find for the government, but immediately after the positive correlation dissolved into a negative relationship as the war dissolved. Accordingly, it is useful to examine the data separately for the years 1950 to 2010, thereby eliminating the possible confounding effects of wartime decision making for the unique period in the 1940s. Notably the findings become substantially stronger. Indeed, the economic indicators all exert the expected effect on the
Table 5.1  Supreme Court votes and outcomes in taxation

Probit Models Depicting Marginal Effects with Robust Standard Errors

<table>
<thead>
<tr>
<th>Models</th>
<th>Votes</th>
<th>Observations</th>
<th>Avg. pro-gov’t votes</th>
<th>Observations</th>
<th>Avg. pro-gov’t outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Business cycle</td>
<td>-.06(.01)***</td>
<td>.16(.03)***</td>
<td>-.01(.02)</td>
<td>.04(.02)</td>
<td>-.16(.03)***</td>
</tr>
<tr>
<td>2. Industrial production</td>
<td>-.30(.08)***</td>
<td>.65(.26)***</td>
<td>.31(.19)</td>
<td>1.80(.40)***</td>
<td>-.28(.12)***</td>
</tr>
<tr>
<td>3. GDP</td>
<td>.07(.74)</td>
<td>1.98(.85)**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. National income</td>
<td>-.47(.62)</td>
<td>1.44(.84)*</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Consumer sentiment</td>
<td>.53(.11)***</td>
<td>.66(.11)***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6. Unemployment</td>
<td>-.09(.09)</td>
<td>-.29(.10)***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>7,900</td>
<td>.66</td>
<td>1,284</td>
<td>.58</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4,074</td>
<td>.68</td>
<td>2,568</td>
<td>.66</td>
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<tr>
<td></td>
<td></td>
<td>2,535</td>
<td>.66</td>
<td></td>
<td>.66</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Outcomes</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7. Business cycle</td>
<td>-.02(.01)</td>
<td>.10(.04)**</td>
<td>-.009(.03)</td>
<td>.005(.03)</td>
<td>-.11(.04)**</td>
</tr>
<tr>
<td>8. Industrial production</td>
<td>-.21(.23)</td>
<td>.89(.70)</td>
<td>.23(.49)</td>
<td>1.71(.11)</td>
<td>-.34(.35)</td>
</tr>
<tr>
<td>9. GDP</td>
<td>-.48(.20)</td>
<td>.15(2.3)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10. National income</td>
<td>-.72(.17)</td>
<td>-.49(.23)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11. Consumer sentiment</td>
<td>.62(.29)**</td>
<td>.71(.31)**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12. Unemployment</td>
<td>-.15(.26)</td>
<td>-.31(.29)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>916</td>
<td>.69</td>
<td>148</td>
<td>.58</td>
</tr>
<tr>
<td></td>
<td></td>
<td>474</td>
<td>.73</td>
<td>296</td>
<td>.70</td>
</tr>
<tr>
<td></td>
<td></td>
<td>294</td>
<td>.67</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: The first column lists twelve separate models; each row presents the results for the separate model. The dependent variables, votes and outcomes, are both coded = 1 if pro-government and = 0 otherwise. All the models include controls for wartime; political preferences of the Court, the House, the Senate, and the president; the identity of the appealing party; tax rates; constitutional claims; and a time trend. The models presented in the top panel also include fixed effects for each justice.

* p ≤ .10  ** p ≤ .05  *** p ≤ .01
justices’ votes—as the economy does better, the number of pro-government votes increases—and all but the business cycle achieve statistical significance. These results suggest the economy has strong and systematic effects on judicial votes.

With respect to the “atypical” period that emerged in the 1930s with the Great Depression, the last column of table 5.1 also supplies evidence that supports the theory. As the economy cycled into a depression and as industrial production decreased, the justices adopted a pro-government stance in courtroom proceedings. The results indicate that the justices voted more often in favor of the government as the economy began to tank, thereby suggesting the Court was not willing to punish the elected branches for the extant economic conditions apparently caused by exogenous forces and not the ineptitude of the policymakers themselves.

Turning now to judicial outcomes, the findings with respect to the outcomes are presented in the bottom panel of table 5.1 and are substantially weaker, suggesting that many of the economic indicators did not affect the majority of the Court. In the pre-1930 period, the NBER cycle affected the Court’s outcomes at highly statistically significant levels, but not industrial production, although both empirical findings go in the expected direction. In the post-1940 and post-1950 periods, the only indicator that is strongly correlated with judicial outcomes is consumer sentiment: As consumer sentiment regarding the economy improves, the government wins more often in Court. This suggests the justices are indeed behaving as voters in the sense that their own views of the economy seem to be correlated if not driven by those of the populace.

From 1930 to 1939, the justices adopted the strategy anticipated by the theory. As the economy was in a virtual free-fall, the majority of justices adopted a pro-government position thereby shifting outcomes in favor of the national policymakers. The justices did not seek to reprove the elected officials for the bad state of the economy; they sought to work and collaborate with Congress and the president in the hopes of returning the nation to a period of prosperity. This finding is statistically significant with respect to the business cycle, but not to percent changes in industrial production.

The findings in table 5.1 indicate that the information theory offers a useful explanation for judicial decision making not only in foreign policy context, but also with respect to macroeconomic issues. Although the theory is unambiguously better at predicting judicial votes than court outcomes, suggesting that some but not all of the justices move in the direction theorized. The findings in table 5.1 also appear to present a serious challenge to the existing constitutional literature arguing that the Court consistently
decided cases against the U.S. government in the atypical 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 and not against it, 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 reestimated with only the cases orally argued prior to that date and obtained nearly identical results.

To investigate the robustness of the findings, it is worthwhile to partition the data by the political preferences of the individual justices. This is important because the conservative justices were widely believed to have opposed the elected branches' policy decisions during the Depression, while those with more liberal political preferences were believed to have supported President Roosevelt and his administration's economic strategies. For purposes of investigating the role of individual politics on voting behavior, the justices were divided into two groups according to the party of the appointing president given that more sophisticated measures of political preference were unavailable in the early years. To investigate the effects of politics on outcomes, the Courts were divided according to the political preferences of the majority of the Court using the same measure. The models all include control variables, which are listed in the notes below tables 5.2 and 5.3.

Table 5.2 presents the findings with respect to the typical business cycles, that is, the pre-1930s, and post-1940s and 1950s—periods when the justices, irrespective of political preferences, are forecast to punish the government in Court as the economy turns sour. Beginning first with the empirical results associated with voting behavior, which are depicted in the top panel of table 5.2, the pre-1930 period shows virtually no difference between the Democrats and Republicans on the Court. All the justices, irrespective of party, voted in favor of the government in economic upturns (and thus against the government in economic downturns), and almost always at highly statistically significant levels. The findings in the post-1940 and post-1950 periods are also similar to those presented above. The important and notable difference, however, is that economic conditions appear to affect Republican appointees more strongly than Democratic ones. In the post-1950 period, for example, all the justices responded to industrial production and consumer sentiment as expected at statistically significant levels, but the Republican justices also responded to the NBER business cycle, GDP, national income, and unemployment changes. This suggests that Republicans are more attentive to economic indicators than the Democrats on the Court when rendering votes in taxation controversies, but not that
Table 5.2  Supreme Court votes and outcomes in taxation in typical cycles by political party

<table>
<thead>
<tr>
<th>Models</th>
<th>votes</th>
<th>Outcomes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Typical Pre-1930</td>
<td>Typical 1940–2010 (WWII)</td>
</tr>
<tr>
<td></td>
<td>Democrat</td>
<td>Republican</td>
</tr>
<tr>
<td>1. Business cycle</td>
<td>.13(.04)**</td>
<td>.18(.04)***</td>
</tr>
<tr>
<td>2. Industrial production</td>
<td>.36(.36)</td>
<td>.97(.39)***</td>
</tr>
<tr>
<td>3. GDP</td>
<td>−1.0(1.0)</td>
<td>2.3(1.1)***</td>
</tr>
<tr>
<td>4. National income</td>
<td>−.94(.80)</td>
<td>1.09(1.0)</td>
</tr>
<tr>
<td>5. Consumer sentiment</td>
<td>.27(.18)</td>
<td>.72(.15)***</td>
</tr>
<tr>
<td>6. Unemployment</td>
<td>.04(.112)</td>
<td>−.32(.14)**</td>
</tr>
<tr>
<td>Observations</td>
<td>577</td>
<td>707</td>
</tr>
<tr>
<td>Avg. pro-gov't votes</td>
<td>.60</td>
<td>.57</td>
</tr>
<tr>
<td></td>
<td>no obs.</td>
<td>.10(.04)**</td>
</tr>
<tr>
<td>8. Industrial production</td>
<td>.89(.70)</td>
<td>.14(.50)</td>
</tr>
<tr>
<td>9. GDP</td>
<td>−.24(2.2)</td>
<td>8.4(5.5)</td>
</tr>
<tr>
<td>10. National income</td>
<td>−.14(1.9)</td>
<td>2.4(4.5)</td>
</tr>
<tr>
<td>11. Consumer sentiment</td>
<td>−.23(4.6)</td>
<td>1.3(4.3)***</td>
</tr>
<tr>
<td>12. Unemployment</td>
<td>−.08(.28)</td>
<td>−.43(.75)</td>
</tr>
<tr>
<td>Observations</td>
<td>0</td>
<td>151</td>
</tr>
<tr>
<td>Avg. pro-gov't outcomes</td>
<td>.58</td>
<td>.74</td>
</tr>
</tbody>
</table>

Note: The first column lists twelve separate models; each row presents the results for the separate model. The dependent variables, votes and outcomes, are both coded = 1 if pro-government and = 0 otherwise. All the models include controls for wartime; the political preferences of the Court, the House, the Senate, and the president; the identity of the appealing party; tax rates; whether the case involved a constitutional issue; and a time trend. The models presented in the top panel also include fixed effects for each justice.

* = p ≤ .10 ** = p ≤ .05 *** = p ≤ .01
they are affected in divergent ways. As hypothesized above, all justices, irrespective of political party, desire greater levels of economic prosperity and will use their decision-making powers to promote this goal.

The analyses with respect to the Court’s outcomes presented in the lower panel of table 5.2 are similar to that uncovered in the context of individual votes. Note, however, that the pre-1930s’ Court was monopolized by a Republican majority, and thus it is impossible to identify the effects of the economy on a Democratic-controlled Court in this early period. In the second “typical” economic period, whether measured as post-1940 or post-1950, the models again indicate that the economy did not have a strong effect on the actual court outcomes, although the Republican Courts accounted for consumer sentiment in their decision making unlike the Courts controlled by the Democrats.

Turning now to the votes and outcomes that emerged during the Great Depression, table 5.3 presents the findings for the *atypical* period, 1930–39, and includes only the variables for which data are publicly available: the
business cycle and industrial production. The top panel presents the findings with respect to judicial votes, and the bottom panel presents the Court outcome findings in this period. As indicated in the top panel, both the Democrats and the Republicans voted with the government as the economy continued to perform poorly and nearly always at statistically significant levels. This finding further undermines the conventional wisdom about the Court in the New Deal era: The Court’s conservatives, like its liberals, systematically supported the government, at least in the taxation cases, when the economy was performing poorly.

With respect to the Court’s outcomes, the results continue to go in the expected direction for Democratic-controlled Courts at statistically significant levels, but not Republican-controlled Courts. Indeed, industrial production was positively correlated with the latter’s outcomes, suggesting that the Republican Courts were reacting to the economic environment as if it were typical rather than atypical. In fact, the rhetoric and dicta contained in the justices’ opinions issued throughout the 1930s suggest that the Democrats believed the economic conditions were atypical and depressionary, whereas the Republican justices at times suggested they viewed the nation as in the midst of a typical economic downturn, similar to those experienced in past (and in future) periods.

Consider the 1934 case *Home Building & Loan Ass’n v. Blaisdell*,25 which vividly depicts the Democratic justices’ understanding of the devastating economic conditions that had begun to curse the nation, along with their view that policymakers were in a position to offset some of the misery and, most importantly, that the Court should not interfere with these legislative efforts. *Blaisdell* involved the Minnesota Mortgage Moratorium Law, which sought to aid homeowners in a number of ways, including by postponing pending bank foreclosures. Analogizing to other types of emergencies the nation has faced and the need for a government response, Chief Justice Hughes (a Republican) wrote the majority opinion, but all the Democrats joined. Hughes discussed the prevailing economic conditions at length. Moreover, in quoting the lower court, he makes clear that the majority considered the state of the economy as similar to an “Act of God” and thus not caused by the ineptitude or incompetence of government decision making but by exogenous factors.

“The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has
destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people, in this state; it has resulted in . . . widespread want and suffering among our people. . . .”\textsuperscript{26}

Now consider the dissenting opinions of the four committed Republicans on the bench. Justice Sutherland, writing for himself and Justices Van Devanter, McReynolds, and Butler (often labeled the four horsemen because they continually voted as a block to strike down any and all commercial legislation), argued that the Minnesota legislation unconstitutionally impaired the right to contract. The dissenters took judicial notice of the economic conditions of the time, but argued that

the present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty.\textsuperscript{27}

The rhetoric contained in both the majority and dissenting opinions highlights the point of the theory—it indicates that the majority viewed the crisis as atypical and not attributable to the ineptitude of the elected officials and that the dissenters may have viewed the economic climate as no different from any other downturn; it was, in short, typical and thus most likely related to the clumsy decision making of the elected branches of government. Importantly, however, the individual justices, whether Republican or Democrat appointees, voted to support the government during the depression as posited by the theory.

In sum, partitioning the data by judicial political preferences highlights several important factors. First, divergent political preferences do not spark dramatic differences in the way the justices take account of the macroeconomy: Both Republican and Democrats exhibit behavior forecast by the information theory—although certain variables exert a stronger or lesser effect on each group. Republican and Democrat appointees both cycle with the economy as expected in the typical recessionary periods, but the Republicans appear to be more strongly affected than the Democrats. Moreover, both Republican and Democrat appointees cycle with the economy as expected in the atypical depressionary periods, but the Democrats appear to be more strongly affected than the Republicans. Second, the findings suggest that conventional wisdom about the Supreme Court’s voting behavior in the 1930s needs reconsideration and revision. The Republicans did not
systematically attempt to tie the hands of the president (at least in the taxation cases) as many scholars have argued.

**Conclusions and Future Directions**

This chapter conducted an out-of-sample study of the information theory of jurisprudence and lends further support for its arguments. The evidence indicates that the justices will use their Article III authority as a double-edged sword (sometime supporting but other times undermining the government in Court) not only with respect to foreign policy matters, but also in the context of economic policymaking. In a period of economic growth, the justices offered support for the government in Court, but in periods of economic decline this support turned into judicial opposition. This general trend emerged in every era throughout the last century except during the depressionary years in the 1930s—in that context the justices sought to support not undermine the government’s policymaking choices.

The theory and findings presented in this chapter as well as in chapters 3 and 4 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 in subsequent studies of judicial behavior.

While the theory and evidence presented in this book invites further investigation of the issues, it nonetheless advances our understanding of judicial decision making on a number of fronts. First, the justices may 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 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 and laws at play in each case.

Moreover, a voluminous literature in law, political science, and economics offers a rich and nuanced explanation of judicial decision making in the civil rights and liberties context, but scholars have long struggled to explain and forecast judicial decisions in the financial and economic areas of the judicial docket, such as taxation. 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 interbranch 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 will moderate their behavior to account for the preferences of Congress and the president. The information theory suggests the causal arrow may also go 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, various researchers such as the political scientist Andrew Martin have investigated the possibility that the justices are in a position to affect the policymaking choices of the elected branches of government, but these ideas have not been thoroughly investigated with the help of both theory and data.
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47. Id. at 540.
48. Id. at 549.
49. 343 U.S. 579 (1952).
50. Id. at 589.
51. Blum, supra note 6.
52. 460 U.S. 190 (1983).
56. 341 U.S. 948 (1951).
57. Id. at 948; see also McArthur v. Clifford, 393 U.S. 1002 (1968).
58. Id.
61. Id. at 673.
66. Id. at 2188 (citing Memorandum to the House of Representatives Returning without Approval the “National Defense Authorization Act for Fiscal Year 2008,” 43 WEEKLY COMP. PRES. DOC. 1641 (Dec. 28, 2007)).
68. 129 S. Ct. at 2187.
69. Id. at 2193–94.
70. 128 S. Ct. 2783 (2008).
72. Id.
75. 128 S. Ct. 2229 (2008).
76. Id. at 2261.
77. Id. at 2294.

CHAPTER FIVE

2. Abel, Bernanke & Croushore, supra note 1.
3. 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, 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.”

Abel, Bernanke & Croushore, supra note 1.


6. Id.


8. Id. at 260 (quoting Interstate Commerce Comm’n, 45th Annual Report (Dec. 1, 1931), H.R. Doc. No. 72-30, at 114 (1931)).


10. Id. at 301.


12. Id. at 641.


16. 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 Duch & Stevenson, supra note 14.

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

18. The database, constructed by the author, is available at https://sites.google.com/site/taxationcourtdatabase/the-data/.

19. Abel, Bernanke & Croushore, supra note 1; Farrokh K. Landgana, Macroeconomic Policy: Demystifying Monetary and Fiscal Policy (2d ed. 2009).


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22. Abel, Bernanke & Croushore, supra note 1.
23. The economic data was obtained from the Federal Reserve Bank of St. Louis, Federal Reserve Economic Data (FRED), available at http://research.stlouisfed.org/fred2/.
26. Id. at 423 (quoting Blaisdell v. Home Building & Loan Ass’n, 249 N.W. 334, 340 (Minn. Ct. App. 1933) (Olsen, J., concurring)).
27. Id. at 471.

CONCLUSION
11. Id.
12. I thank Bill Landes and Emerson Tiller for this insight.
18. Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and
the Courts (2007); Richard A. Posner, Not a Suicide Pact: The Constitution in
a Time of National Emergency (2006); William H. Rehnquist, All the Laws but
One: Civil Liberties in Wartime (1998); John Yoo, The Powers of War and Peace:
The Constitution and Foreign Affairs after 9/11 (2005); Charles Evan Hughes,
and Reforms 315 (1999).
22. Id. at 2274.