Confronting SKAT in the Højesteret: An investigation into how EU Law, Precedent, Litigant Resources, and Structural Reform shape Tax Decisions

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Abstract: *In recent years, a debate has emerged about the overwhelming success rate of SKAT (the tax authority) in cases before the Højesteret. Why does the Danish government win so many cases before the Højesteret, and what circumstances might increase a private litigant's chances of winning? In this paper, we explore a variety of trends in judicial behavior for tax cases in the Højesteret. We find that while we cannot rule out some connections between judges' social backgrounds and their votes, the primary factors influencing judicial behavior in tax cases are institutional and legal in nature. In particular, we show that corporations and associations achieve more wins in the Højesteret compared to individual citizens. In addition, inertia created by the large amount of government wins in the Landsretten also influences decisions. Finally, taxpayers have a slightly better chance of attracting favorable votes from justices in cases involving EU issues.*

Keywords: Højesteret, Tax, Judicial Decision Making

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1. Introduction

Governments need an effective tax enforcement system if citizens want to enjoy the benefits of a modern welfare state. At the same time, citizens in democratic societies look to the courts to check the actions of an overzealous tax collector. Perhaps nothing more central to the legal interaction between a state and its citizens – outside of arrest and incarceration – is the state collection of taxes.

In the last decade, some debate has arisen about the role of Denmark's highest court (the Højesteret) in the tax enforcement system. In a recent study of tax decisions in Danish appellate courts and the Danish Supreme Court, tax attorney Lida Hulgaard[1] expressed concern about the overwhelming number of times the state won against private litigants in tax cases. With respect to the Højesteret, Hulgaard examined 384 cases (between 2002 and 2011) and found that less than 17 percent of taxpayer claims were upheld.

The Hulgaard study, which was published in the Danish tax journal *Tidsskrift for Skatter og Afgifter*, precipitated discussion and self-reflection both in the Danish media and within the legal community. One media headline screamed in part »De danske domstole er et rent gummistempel for staten i skattesager«.[2] In the *Jyllands-Posten*, the newspaper interviewed Hulgaard about her study and quoted her as saying, »Har vi ikke et demokratisk problem?« (Høberg 2014).[3] Hulgaard was referring, of course, to the judiciary's expected function in a democracy to act as an independent authority against the state.

The Hulgaard study brings forth interesting questions about the role of courts in a democracy. Yet, how do we know the point at which the Højesteret is sufficiently utilizing its oversight authority of the executive branch in tax cases while simultaneously ensuring the integrity of the government's tax system? While this important normative question about the Højesteret's role in tax policy is beyond the scope of this paper, it is difficult to properly address such important normative questions without having a more empirically-based picture of what the Højesteret is doing in tax cases. For example, one may want to know whether high government win rates can be explained by a case selection system that

1. Lida Hulgaard. 2014. »Dommere holder med staten i skattesager«. *Tidsskrift for Skatter og Afgifter*, nr. 8: 838-847.
2. Translated roughly in English, the title states »The Danish courts are purely a rubberstamp for the state in tax cases«. See Steen Valgreen-Voigt. 2014. »Advokater slår alarm: Dommerne tryner skatteyderne. De danske domstole er et rent gummistempel for staten i skattesager«. *Ekstra Bladet*. March 9. Last accessed on 4 June 2018: http://ekstrabladet.dk/nyheder/samfund/article4667015.ece.
3. Translated roughly in English, the title states »Do we not have a democratic problem?« See Jesper Høberg. 2014. »Nogle dommere har kun givet medhold til Skat.« *Jyllands-Posten*. Feb. 7. Page 9.

pushes poor appeals into the Supreme Court or by a lopsided recruitment of justices from the executive branch of government. The implications of high government win rates are very different for the judicial system if the win rates are explained by easy cases rather than by recruitment of justices.

In this paper, we examine the Højesteret's behavior in tax cases. First, we provide a statistical picture of the various tax cases appearing before the court. Second, we investigate the factors that influence judicial decision making in these tax cases. As part of this effort, we seek to understand why the government wins so many cases as well as how new rules changes affect tax decisions.[4] Finally, we examine how the Højesteret employs its own precedent and EU precedent in tax cases. By examining a variety of indices in how justices behave and construct opinions in tax cases, our study sheds light on how and when the Højesteret checks government authority.

Our findings confirm that the Højesteret overwhelmingly favors the tax authorities in outcomes before the court. Though the Court infrequently sides with the taxpayer, when such an occurrence does happen, we show that one of the largest influences on this outcome concerns the relative status of the litigant facing the tax authority. Corporations and associations are more likely to win against tax authorities than individuals. This finding suggests that litigants' resources matter when they're up against tax authorities. The lack of case filtering – or gatekeeping – in most tax cases might influence the difference between different litigants. Overall, our study suggests that much of the behavior shown by the court in tax cases are due primarily to institutional factors, not sociological factors. Finally, we show that citations to precedent from the Højesteret and the Court of Justice of the European Union (i.e. the CJEU or alternatively referred to as the ECJ) correlate significantly with court outcomes, but such correlations do not equal causation. Rather, we suggest other institutional explanations for such correlations between citations to precedent and outcomes.

We begin the study by outlining the major social science theories in judicial decision making that help us understand court behavior. An explication of the process of getting tax cases to the Højesteret follows, because this legal process is important to understanding the scope of cases coming to the Court. Next, we outline the basic contours of the data for our paper. In our data analysis section, we provide several statistical examinations (including a multivariate statistical analysis located in the appendix). Then, we delve into detail about the effects of EU law on case outcomes before describing the Højesteret's citation practices with respect to precedent. Finally, we offer some concluding thoughts in our discussion section about the role of the Højesteret in tax cases over the last decade.

4. Specifically, we are referring to changes in Retsplejelovens § 226

2. Social Science Theories that Could Explain Danish Højesteret Behavior

While it is undoubtedly certain that concepts of law influence judicial decisions, political scientists and empirical legal scholars have found that judges and courts are not immune to other non-legal factors. We explore some of these concepts here to help us explain Danish Supreme Court decision making in tax cases. Judicial scholars have found that judges are influenced by institutional rules and structures.[5] By way of example, docket control is an institutional feature that can affect decision making, as demonstrated within the context of the varied American state courts,[6] and elsewhere in Canada, Australia, and Great Britain.[7] Closer to Denmark, a study of the Norwegian Supreme Court has demonstrated that levels of dissents increased after a 1996 reform of criminal procedures gave the court greater discretion over case selection.[8] Other institutional examples include the legal resources available to the litigant in a case, or the legal framework and facts of a case that a court is operating under (such as the institutional feature of EU law cases that is unique to Europe).

Furthermore, several sociological factors have been proven as influential in decision making not only within the well-known situations of a politicized American judiciary,[9] but also within Europe[10] and even in Scandinavia itself in the case of Norway.[11]

5. Lee Epstein and Jack Knight. 1998. *The Choices Justices Make*. Washington D.C.: CQ Press; Lee Epstein, William M. Landes and Richard A. Posner. 2013. *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Cambridge, Mass: Harvard University Press; Paul J. Wahlbeck, James F. Spriggs, and Forrest Maltzman. 1998. »Marshalling the Court: Bargaining and Accommodation on the U.S. Supreme Court«. *American Journal of Political Science*. Vol. 42, pp. 294-315.
6. e.g. Paul Brace and Melinda Gann Hall. 1990. »Neo-Institutionalism and Dissent in State Supreme Courts«. *The Journal of Politics*, Vol. 52, No. 1, pp. 54-70; Paul Brace and Melinda Gann Hall. 2001. »'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space«. *Law & Society Review*, Vol. 35, No. 2, pp. 393-417; Paul Brace, Jeff Yates and Brent D. Boyea. 2012. »Judges, Litigants, and the Design of Courts« *Law & Society Review*, Vol. 46, No. 3, pp. 497-522; Melinda Gann Hall. 1985. »Docket Control as an Influence on Judicial Voting.« *The Justice System Journal*, Vol. 10, No. 2: pp. 243-255.
7. Reginald S. Sheehan and Kirk A. Randazzo. 2012. »Explaining Litigant Success in the High Court of Australia«. *Australian Journal of Political Science*, Vol. 47, No. 2, pp. 239–255; Donald R. Songer and Susan W. Johnson. 2007. »Judicial Decision Making In the Supreme Court of Canada: Updating the Personal Attribute Model« *Canadian Journal of Political Science/Revue Canadienne de Science Politique*, Volume 40, Issue 4, pp. 911-934.
8. Henrik Litleré Bentsen. 2018. Court Leadership, Agenda Transformation, and Judicial Dissent. A European Case of a »Mysterious Demise of Consensual Norms« *Journal of Law and Courts* Vol. 6, No. 1, pp. 189-213.
9. Jeffrey A. Segal and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press; Neal Tate, C. 1981. »Personal Attribute Models

Though one can find countless quantitative studies on the behavior of courts and judges within various substantive areas of the law (such as human rights, economic regulation cases, or criminal cases), there are fewer judicial behavioralists who have taken the time to analyze tax cases in the courts[12]). In the Scandinavian context, two Norwegian scholars (Einar Harboe and Frederik Zimmer) have examined tax cases before their supreme court and have demonstrated that the Norwegian Høyesterett decides in favor of the government in a little more than half of all tax cases that come before the court.[13] Though these two scholars looked at somewhat different timeframes on the court (Harboe's study was 1990-2004 and Zimmer's study was 1997-2012), these two descriptive studies differed importantly in how these scholars characterized the extent that social backgrounds influenced these judges' decisions. Harboe[14] argued that the tax cases

of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978«. *American Political Science Review* Vol. 75, No. 2, pp. 355-367

10. Arthur Dyevre. 2010. »Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour«. *European Political Science Review*, Vol. 2, No. 2, pp. 297-327; Chris Hanretty. 2012. »Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals«. *European Journal of Political Research* Vol. 51, pp. 671–692; Christoph Hönnige. 2009. »The electoral connection: How the pivotal judge affects oppositional success at European Constitutional Courts«. *West European Politics*, Vol. 32, No. 5, pp. 963-984.
11. Gunnar Grendstad, William R. Schaffer and Eric N. Waltenburg. 2015. *Policy Making in an Independent Judiciary: The Norwegian Supreme Court*. Colchester, U.K.: ECPR Press; Jon Kåre Skiple, Gunnar Grendstad, William R. Shaffer and Eric N. Waltenburg. 2016. »Supreme Court Justices' Economic Behavior: A Multilevel Model Analysis«. *Scandinavian Political Studies* Vol. 39. No. 1, pp. 73-94.
12. There are, however, a few scholars who exam the American context. For example, see Robert M. Howard. 2009. *Getting a Poor Return: Courts, Justice and Taxes*. State University of New York Press: Albany, NY; Robert M. Howard. 2005. »Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions« *Justice System Journal* Vol. 26, No. 2, pp. 135-148: James J. Brudney and Corey Ditslear. 2009. »The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax law and Workplace law«. *Duke Law Journal* Vol. 58, No.7, pp. 1231-1311. Brudney and Ditslear, p. 1271; For other empirical research on the U.S. courts in tax cases (though not directly related to explaining IRS wins or losses), see Daniel Schneider. 2001. »Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases«. *New Mexico Law Review* Vol. 31, 325-358; or see Nancy Staudt, Lee Epstein, Peter Wiedenbeck, and Rene Lindstadt. 2005. »Judging Statutes: Interpretative Regimes«. *Loyola of Los Angeles Law Review* Vol. 38, pp. 1909-1970
13. Einar Harboe. 2005. »Skattesaker for domstolene – noen refleksjoner«. *Skatterett* Vol. 4, No. 24, pp. 365-380; Frederik Zimmer. 2015. »Høyesterett og skatteretten«. In *Lov, Sannhet, Rett. Norges Høyesterett 200 år,* Edited by Tore Schei, Jens Edvin A. Skoghøy and Toril Øie. Oslo: Universitetsforlaget, 2015. More precisely, Zimmer finds that the government party win 57 percent of their cases.
14. Harboe, »Skattesaker for domstolene – noen refleksjoner«.

failed to show that certain justices were government friendly, while Zimmer's[15] research suggested that justices' previous legal background experiences (either in academia or the government) were related to their propensity to vote in favor of the government. More specifically, Zimmer found that while justices who had a background in academia tended to vote in favor of the taxpayer, justices who heralded from a specific department within the Ministry of Justice (the legislation department), tended to favor the government in tax cases.[16]

Another recent Norwegian study by Skiple, Grendstad, Shaffer, and Waltenburg[17] includes tax cases as a part of a larger analysis of economic decisions from 1963 to 2012. These scholars find that case-related dynamics, such as who the plaintiff is or the amount of disagreement between justices, affect decisions. In addition, they also show that ideology – via appointment mechanisms – matters in explaining whether the government or a private party wins economic cases. Accordingly, the previous literature suggests that both institutional and judge specific factors could contribute to explain the outcomes of tax cases.

As for quantitative studies on tax cases in Denmark, there is the significant study authored by tax law expert Lida Hulgaard,[18] which, as noted earlier, caused quite a stir in Denmark due to its findings. After examining all tax cases over a decade in both the Højesteret and the Eastern and Western Landsretten, Hulgaard found that the Højesteret and the Landsretten tended to vote in favor of the government's claims in the overwhelming majority of cases that go before the judges.[19] In the Supreme Court, out of 384 cases examined (between 2002 and 2011), Hulgaard found that less than 17 percent of taxpayer claims were upheld. According to Hulgaard, the percentage win rate also appeared to be declining, from 18 percent (between 2002 and 2006) to 12 percent (between 2007 and 2011). Tax law professor Jan Pedersen, when asked about the Hulgaard study in an article in *Danske Advokaters Magasin*, said that the taxpayer was losing in a lot of these cases where tax experts had found real doubt in the interpretation of the law.[20]

15. Zimmer, »Høyesterett og skatteretten«.
16. Zimmer, »Høyesterett og skatteretten«; see also research by Jon Kåre Skiple, who finds that justices from the legislation department vote in favor of government more often than other justices in economic cases in general (Jon Kåre Skiple. 2015. »Ei konkret vurdering i kvart enkelt tilfelle, Ein fleirnivåanalyse av økonomisk stemmegiving i Høgsterett i tidsrommet 1991-2011«. Norsk Statsvitenskapelig Tidsskrift Vol. 31, No. 4, pp. 278-304.
17. Jon Kåre Skiple, Gunnar Grendstad, William R. Shaffer and Eric N. Waltenburg. »Supreme Court Justices' Economic Behavior: A Multilevel Model Analysis«.
18. Hulgaard is a former president of the National Tax Board and former lecturer in tax law at Aarhus University.
19. Hulgaard, »Dommere holder med staten i skattesager«.
20. »Dommere holder med staten i skattesager«. 2014. *Danske Advokaters Magasin*. February 17. Last accessed at on 4 June, 2017 at: http://www.danskeadvokater.dk/Admin/Public/DWSDownload.aspx?File=%2fFiles%2fFiler%2f1_For_medlemmer%2fNyheder%2f2014%2fSide+6-11.pdf

Then Professor Pedersen speculated, »Det kan være, at hensynet til det offentlige system vejer tungere i dag, end det gjorde tidligere«.[21] The welfare state costs money, but as numerous scholars have found, financing the welfare state is not getting easier.[22] Thus, it is not implausible to wonder whether some judges see themselves as protectors of the state's finances in these cases. Of course, without knowing the justices' views on the welfare state, we cannot probe for such a specific influence on the justices in this study, but multivariate analysis can aid us in understanding the broader sociological and institutional influences on Danish justices' decisions in tax cases. In this paper, we argue that institutional theories appear to best describe the decision outcomes on the court. We provide further detail of the institutional dynamics in tax cases in the next section.

Finally, while the above studies mentioned do not take into account the Court's citation practices with regard to precedent, adding this aspect to a study on tax decisions may give us insight into the context surrounding institutional influences on decision making.

3. The Institutional Context of Tax Cases in the Danish Højesteret

While previous tax studies in both Denmark and Norway have examined the sociological backgrounds that could influence judicial decisions, a more powerful theoretical explanation for the justices' behavior may be the institutional framework under which the Danish justices are operating. First, an important institutional constraint on the Danish Højesteret regards its relative lack of judicial review. While it is true that the Danish Højesteret has the power of judicial review in theory, it has only exercised the power of judicial review once in over 150 years – the Tvind case in 1999.[23] It is not clear how the absence of a judicial review culture influences justices' decisions in tax cases. Most tax cases concern statutory legal issues. Yet, the tendency in Danish courts has been one of judicial self-

21. Translated roughly as »It may be that the interests of the public system weighs more heavily today than it used to«.
22. Nathalie Morel and Joakim Palme. 2012. »Financing the Welfare State and the Politics of Taxation«. in *The Routledge Handbook of the Welfare State*. edited by Bent Greve. Routledge. pp. 400-409; Herbert Obinger and Uwe Wagschal. 2010. »Social Expenditure and Revenues«. pp. 333-352, in *The Oxord Handbook of the Welfare State*. Edited by Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger, and Christopher Pierson. Oxford: Oxford University Press; Paul Pierson. 2001. »Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies«, pp. 410-456 in *The New Politics of the Welfare State* edited by Paul Pierson. Oxford: Oxford University Press.
23. Marlene Wind. 2010. »The Nordics, the EU and the Reluctance Towards Supranational Judicial Review«. *Journal of Common Market Studies* 48(4): 1039-1063.

restraint.[24] Thus, Danish justices in general might be reluctant to challenge the executive branch position.

A second important institutional feature of the Danish Højesteret is its lack of docket control. In Denmark, the Appeals Permission Board (the Procesbevillingsnævnet) operates as a gate-keeping function to keep out frivolous appeals or appeals that have little legal importance. This board decides what cases go to the Højesteret. However, the Supreme Court justices do not control the Procesbevillingsnævnet. A Supreme Court justice does sit on the board and does have some influence, but the rest of the board is staffed by two lower court judges, a noted lawyer, and a law professor. The Procesbevillingsnævnet has the ability to limit the number of third-instance appeals of tax cases; but of course, what appeals the board does allow are those that it feels are legally important, and that may not necessarily coincide with the views of the justices who receive these third-instance tax appeals. When a court lacks control of its own docket, the cases it does hear potentially have less legal significance and engender less dissent.[25]

This lack of docket control is compounded by the ways in which the Danish Højesteret considers appeals in some tax cases. A key institutional feature examined in our study relates to the process by which tax cases jump past the byretten (the district court), moving directly into the landsretten for a trial. If a tax case begins in the byretten, litigants have a right to one appeal to the landsretten, but they do not necessarily have a right to an additional appeal (i.e. an appeal in the third-instance). To move on to the Højesteret in a third-instance appeal, the litigants have to convince the Procesbevillingsnævnet to take the case. However, up until recently, tax claimants could simply escape this arduous appeals route to the Højesteret by beginning their trial in the Danish high courts (the Eastern and Western Landsretten). Since all Danish litigants have a right to an appeal, those taxpayers who were able to hold their trial in the landsretten (the high court) would then have a key to the Højesteret. Under the pre-2007 procedural rules, tax litigants were taking their cases from the Landsskatteretten (a type of tax appeals court operating as an administrative body) directly to the landsretten for trial. According to one source on the Højesteret, Denmark's supreme court was hearing an inordinate amount of tax cases on the docket because of this pre-2007 pro-

24 Jens Elo Rytter and Marlene Wind. 2011. »In need of juristocracy? The silence of Denmark in the development of European legal norms«. *International Journal of Constitutional Law* 9(2):470-504.

25 Bentsen, »Court Leadership, Agenda Transformation, and Judicial Dissent. A European Case of a 'Mysterious Demise of Consensual Norms'«. A number of effects on judicial behavior arise due to a lack of docket control (see, for example, Paul Brace, Jeff Yates and Brent D. Boyea. 2012. »Judges, Litigants, and the Design of Courts«; Theodore Eisenberg & Geoffrey Miller 2009. Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source. *Boston University Law Review, 89*, 1451-1504; Melinda Gann Hall. 1985. »Docket Control as an Influence on Judicial Voting«.

cedural process for tax cases. Procedural reforms to the Administration of Justice Act (Retsplejelovens) in 2007 changed the appeals process for all tax cases that entered the regular (non-administrative) courts after January 1, 2007. Beginning in 2007, any tax litigants unhappy with the Landskatteretten results who then filed cases in a regular court had to begin their case in the district court (the byretten). Under Administration of Justice Act (Retsplejelovens) Rule 226, district judges could kick a tax case up to the high court (the landsretten) for trial by claiming that the tax case was of great legal importance.

Unfortunately, this change of relying on the district judges' discretion did not entirely reduce the volume of tax cases reaching the Højesteret.[26] As our data below illustrate, the 2007 procedural reform did appear to stem some of the flow of tax cases to the Supreme Court, but the continued high volume of tax cases (due to the district court judges' use of rule 226) required yet another reform in 2014. The 2014 reform requires the district judges to obtain permission from the landsretten judges before sending the case to the landsretten for trial.[27] Of course, there is delay in the effect of the most recent 2014 reforms of the rules, and tax cases do not begin to reach the Højesteret under the recent new rules until 2016. Thus, for many years, the Danish courts had very few controls in place over tax cases in order to keep frivolous appeals or non-novel legal claims from reaching the Højesteret. By way of comparison in Scandinavia, the Danish Højesteret has heard many more tax cases per capita over the last decade than the Norwegian Høyesterett.

Another institutional feature of the Danish Højesteret has to do with oral arguments. Due to resource and time constraints, the Court does not hear all cases in oral argument. In some cases, the Court will direct the parties to submit their arguments only in writing per Danish legal procedural rule (Retsplejelovens) §387. One might suspect that when the court is overwhelmed by oral arguments, less important cases – including some tax cases – will process through under Rule 387. We consider this possibility in our study.

Litigant resources constitute another possible institutional influence on judicial decision making (as opposed to sociological or psychological influences on judging).[28] If litigants in a legal system lack the resources necessary for adequate legal

26. It is not clear why the reform did not work. One Danish judge speculated to one of the authors that perhaps some district judges who already had a very full docket – and perhaps found tax cases too complicated – took advantage of the 226 rule as a quick way to remove these cases from their docket.
27. Once the landsretten agrees to take the case for trial in the landsretten, that move then guarantees a litigant a trip to the supreme court.
28. See Galanter, Marc. 1974. »Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change«. Law & Society Review, 9 (1): 95-160; see also Stacia L. Haynie and Kaitlyn L. Sill. 2007. »Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeals« Political Research Quarterly, vol. 60, no. 3, pp. 443-453.

assistance (such as the hiring of a competent attorney or expert witness), then we could assume that their chances of success decrease. In short, litigants in the Danish system who have no attorney to help them with their legal arguments before the supreme court should face the greatest obstacles to winning compared to other litigants. Furthermore, corporations and associations (such as trade associations or unions) should have a higher chance of success before the Højesteret because they typically have more resources to hire more than one attorney or more than one expert witness to assist them in the case. Resource differences are expected to be wider in courts that lack docket control.[29] Thus, the lack of a discretionary system for preventing frivolous or marginally merited appeals from reaching the highest court might lead individual citizens to appeal cases in which the government is destined to win.[30]

The decision process and opinion writing process in Denmark (as compared to, for example, the U.S. Supreme Court) is quite short and condensed.[31] The justices typically hear and decide a case and write an opinion all within a matter of days or less. Following oral arguments, the junior most justice is in charge of preparing and laying out all of the legal arguments for the other justices. Danish Højesteret opinions are often rather short in length and result from a collaborative process. Dissents are quite rare on any given case, and tax cases are no different. Less than 8 percent of tax cases in our study included a dissent. Even justices who dissent may nevertheless assist in writing the front portions of the opinion.

29. See Paul Brace, Jeff Yates and Brent D. Boyea. 2012. »Judges, Litigants, and the Design of Courts«.
30. Before 2007, Danish tax litigants had a way to maneuver an appeal on a tax decision from the administrative tax appeal board directly to the Danish Landsretten – the Eastern and Western High courts (these courts often operate as intermediate appeals courts) – where the trial would occur. Because Danish litigants are entitled to at least one appeal in a case, they were able to take these tax cases directly to the Supreme Court, bypassing the Procesbevillingsnævnet. A change to the procedural rules after 2007 forced litigants to begin their tax cases in trial courts (the byretten), but litigants were still able to jump their trial to the Landsretten using a procedural rule (Rule 226) which asked trial judges to send important cases for trial to the Landsretten. It is speculated by some tax experts and at least one supreme court justice that this loophole allowed all-to-willing trial judges – who often found tax cases complicated – to shirk their trial duties in tax cases off onto the high court judges, thus (in the terms of one supreme court justice) giving tax litigants »the keys to the Supreme Court«. Another 2016 rule change took that decision away from trial judges and put the decision into the hands of high court judges. However, nearly all of our cases occur before the 2016 rule changes went into effect.
31. Zahle, Henrik. 2007. »Judicial Opinion Writing in the Danish Supreme Court (Højesteret)«. *Scandinavian Studies in Law*, Vol. 51, pp. 559-580.

4. The Contours of the Data for this Study

The data collected by the authors for this study encompass all civil law tax cases in the Danish Højesteret from January 2006 to 2 June 2017.[32] Starting in 2006 allows us to collect a sufficient number of cases to test for the effects of the 2007 administrative rules changes, since most tax cases appearing before the court between 2006 and 2009 were operating under the old pre-2007 rules. There are 347 cases in our data (including both kendelse and dom cases), and the state won an overwhelming 303 cases, or about 87 percent of cases during the period from January 2006 to June 2017. The focus of our study, however, is primarily on dom cases, since these cases offer substantive decisions on the merits of the tax claims. Within our research timeframe, there were 325 dom cases, and the government (SKAT) won 88 percent of these cases, while taxpayers only prevailed about 12 percent of the time (See Table 1).[33] If we look at the tax cases in terms of the individual votes of justices, there were 1677 votes cast in the dom cases in our data, and of those, 1465 judicial votes (87 percent) went for the taxman (i.e. the government). Of the 325 dom cases that reach the Højesteret, the taxman won in the lower court over 94 percent of the time. Thus, most of the appeals to the Højesteret come from losing taxpayers, most of whom go on to lose again. Højesteret justices registered dissents in less than 8 percent of dom cases, illustrating remarkably low levels of disagreement among the justices as to who should win the case.

32. We collected published cases listed in Ugskrift for Retsvæsen (UfR) as well as those noted in SKAT's website but which were not necessarily published in the UfR. (https://www.skat.dk/SKAT.aspx?oid=1720451&vid=0&lang=DA&type=H%C3%B8jesteret). We excluded three cases involving municipalities (i.e., cases in which the party opposing SKAT is another government entity) and four cases for technical reasons (for example, two kendelse cases are directly about procedural issues surrounding Rule 226, but there is no adversarial position between the parties – both parties are in agreement as to how the Supreme Court should rule). We also excluded all cases involving criminal prosecutions for tax crimes. Finally, while we included kendelse cases in some of our analyses, the bulk of our analyses only examine dom cases.
33. In our study, we focused on the position of the appellant after the Højesteret's decision in order to determine who the prevailing party was. In most cases, the Court's decision as to the winner was rather straightforward. Occasionally, however, the appealing party achieved only a partial victory. If the appellant only received a partial victory, we nevertheless coded that circumstance as a win for the appellant, since the appellant is still better off compared to its status before the appeal (for example, if the court only accepted an appellant's alternative claim, we coded that as a win for the appellant). This coding method was applied equally to both taxpayer and government appeals (though it should be noted that government appeals were somewhat rare, since the government usually wins in the lower court). In coding wins and losses, we were aided primarily by the language of the Court opinion in the begrundelse section (noting whether the lower court opinion was upheld or whether the Højesteret was taking the claim of the taxpayer or the government), and such decisions were bolstered by how the Court awarded costs in the case.

Table 1 also maps out other contours of our data. For example, the Højesteret decided almost 30 percent of cases without conducting any oral argument per rule 387. Over 90 percent of the panels in our dom case data contained five justices. Table 1 also sets out the subject areas of dom claims in our data. Of note, about 18 percent of dom cases involve some issue of EU law, while less than 2 percent of cases raise human rights issues under the European Human Rights Convention (ECHR). About 7 percent of cases invoke other international law, normally double taxation treaties between Denmark and other countries. Labor issues arise in about 4 percent of tax cases.

Table 1: Descriptive Statistics for All Dom Cases 2006 – June 2017 (Kendelse cases excluded)

	Number of Cases (total 325)[d]		Number of Cases (total 325)
Dom cases	325 (# of judge votes = 1677)	Cases where taxpayer had no attorney	5.2% (17)
Cases with Dissents	7.7% (25) (# of judge dissents = 52)	Individual litigants[a]	44.6% (145)
Real Property cases	22.2% (72)	Corporations	47.7% (155)
Labor cases	4.3% (14)	Trade or Labor Associations[b]	8.3% (27)
VAT issues	13.5% (44)	Dissent in the lower court	7.4% (24)
International Law	7.7% (25)	Tax Ministry wins in the lower court	94% (306)
EU law issues	18.2% (59)	Eastern High Court appeals	65.2% (212)
European Court of Human Rights issues	1.5% (5)	Western High Court appeals	34.8% (113)
Cases with no oral argument (Rule 387)	29.9% (94)	summary opinions/orders	8% (26)
Cases before 2007 changes to Administration of Justice rules	59.4% (193)	Opinion length of cases by the number of words	Mean 1333 Median 747 Maximum 8651 Minimum 56
Cases after 2014 changes to Administration of Justice rules	2.5% (8)	Payment in kroner (DKK) due to winner of case (we have data for only 308 of 325 cases)	Mean 202,356 Median 50,000 Mode 25,000[c] Maximum 4,006,076

[a] This category represents cases where the taxpayer constitutes only an individual (or several individuals).

[b] The data for corporations, associations, and individual litigants add up to more than 325 cases because there are two cases in our data where corporations and associations were both litigants in the case.

[c] This payment amount occurred in approximately 15 percent of cases in our dom dataset. In about 5 percent of cases, the Court awarded the winning party 1 million DKK or more.

[d] Frequencies appear in parentheses in this table.

Since 2006, the number of tax cases reaching the Højesteret has been decreasing, a trend perhaps caused by the changes in the processing of tax cases under Rule 226. As Figure 1 illustrates, the Court was hearing more than 40 and 50 tax cases (dom cases) in the years 2006 and 2007, but those numbers were reduced to only 13 dom cases in 2016. Further evidence of this decreasing trend comes by way of cases where the taxpayer has no lawyer (no representation). Prior to 2010, before the 2007 rules changes came into full force for future cases, taxpayers with no lawyer before the Højesteret constituted 10 percent of tax cases per year on average. Since the 2007 reforms went into full effect by 2010, only one pro se litigant in dom tax cases has reached the court.

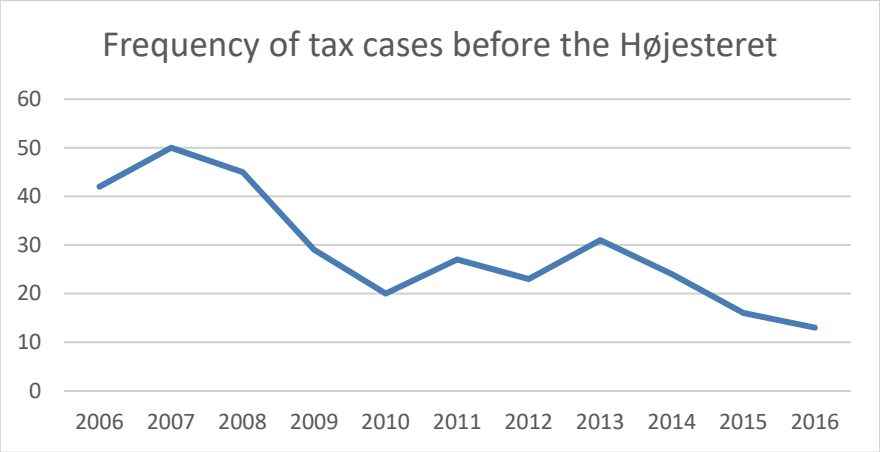

Figure 1: The number of dom tax cases between 2006 and 2016 in the Højesteret. Since we only have partial numbers from 2017, we omitted those numbers from this figure for the sake of continuity and comparability.

And, while it is the case that the Court is taking fewer tax cases, it would not appear that the cases being taken are more difficult or »closer« legal questions, because the government – with some exceptions in some years – continues to overwhelmingly win against the taxpayer year after year in our data. Figure 2 displays government wins versus taxpayer wins since 2006.

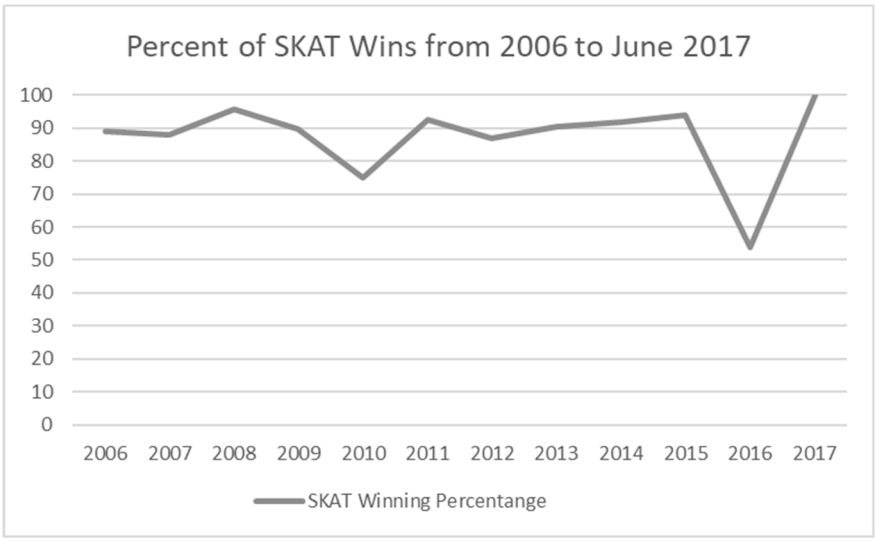

Figure 2: Percentage wins for SKAT (the government) in dom cases between January 2006 and 2 June 2017

5. Explorations into Explaining Højesteret Decision Making in Tax Cases

Why does the Højesteret decide so many tax cases in favor of the government? In this section, we attempt to distill some patterns in judicial voting using some descriptive statistics (cross-tabulations). We explore these relationships further in the appendix using a more sophisticated multivariate statistical model. Cross-tabs, on their own, can be useful for illustrating a story.[34] Nevertheless, even if we do identify differences, they may very well be phantom differences. Hence, we also test the veracity of these differences in the cross-tabs in the appendix with a multivariate statistical model.

5.1. Individual Characteristics of Judges and Their Relationship to Voting in Tax Cases

We begin by examining the relationship between the characteristics of individual justices and their votes. First, it is important to note that most of the justices covered in our study hovered right around the mean of voting 87 percent of the time for the government. Taking into account justices who had a least 10 votes in tax cases during our timeframe studied, the most pro-government justice in dom cas-

34. Christopher H. Achen. 2000. »Warren Miller and the Future of Political Data Analysis«. *Political Analysis* Vol. 8, No. 1, pp. 142-146.

es (we'll refer to her/him as Justice X) voted over 97 percent of the time with the government, participating in 44 dom cases. Meanwhile, the most pro-taxpayer justice in our data (Justice Y) voted for the government only about 75 percent of the time, participating in 58 dom cases. In terms of the groupings of the extremes, six justices voted with the government *less than* 84 percent of the time, while six justices voted with the government *more than* 92 percent of the time. As is apparent from this data, there are not large divergences in voting patterns among the individual justices. Even the most skeptical justice in the dataset was still voting with the government over 75 percent of the time. Most justices also rarely dissent against their brethren in tax cases. The justice who dissented the most in these cases was Justice X (the same justice noted above), but Justice X only dissented in about 9 percent of dom cases where she/he participated.

Table 2: Judicial Voting by Social Background 2006 – June 2017 (frequencies in parentheses)

	Votes for SKAT/ Government	Votes for Taxpayer
Total Judge Votes (1677)	87.4% (1465)	12.6% (212)
Dissenting votes (52)	38.5% (20)	61.5% (32)
Women Justices	87.8% (375)	12.2% (52)
Private Work Experience	85% (403)	15% (71)
Former academic	86.4% (286)	13.6% (45)
Prior work experience only in government	89% (776)	11% (96)
Born in Greater Copenhagen/Zealand	86.1% (867)	13.9% (140)
Born outside of Zealand	89.3% (598)	10.7% (72)

One might wonder, however, whether the small differences that do remain in individual judges' voting patterns in the Højesteret are perhaps a result of social background forces operating on the justices. Evidence in studies performed in a number of democracies demonstrate the impact of social backgrounds and ideology on judge behavior, including in nearby Norway.[35] We tested for such claims by examining whether the justice had prior work experience in the private sector or in academia. Justices with private sector experience or work in academia might be less skeptical of government claims compared with those justices who worked for the government before ascending to the bench. We also examined whether the gender of a justice might provide them with a different perspective in tax cases.

35. e.g. Grendstad et al, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* or Jon Kåre Skiple, Gunnar Grendstad, William R. Shaffer and Eric N. Waltenburg. »Supreme Court Justices' Economic Behavior: A Multilevel Model Analysis«.

Finally, we considered whether the part of Denmark in which the justice hailed from might have an effect on their votes. People who come from different regions of a country may very well develop different political viewpoints about the central government and about their role as judges.[36] We divided Denmark into those judges who came from greater Copenhagen (and Zealand) and those judges who grew up further afield from the central government (for example, in Jutland). We consider all four of these factors in our statistical model, but we also provide the results of the cross-tabs in Table 2.

Given the relatively small differences in judicial voting among the »extremes« in our data, it is perhaps unsurprising, then, that Table 2 shows little apparent variance in voting patterns after grouping the justices into a number of social background variables. Female justices behave no differently on tax cases than male justices. Justices from the periphery (born outside Zealand and greater Copenhagen) are slightly more favorable towards the government than are justices from greater Copenhagen, but if these differences are statistically significant, it seems doubtful they would have a lot of substantive impact on outcomes. Justices with backgrounds in the private sector vote slightly less often for the government compared to justices whose only experience was in government and/or the Ministry of Justice (85 percent compared to 89 percent in favor of the government). However, these differences between justices with or without private experience, even if statistically significant, are not particularly large. Justices who used to work in academia are also slightly less favorable in their votes for SKAT compared to justices who have only worked in government. In short, the differences in voting among judges with different social background characteristics is not particularly large. Moreover, as we demonstrate in our multivariate analysis in the appendix, the substantive impact of these social background factors is relatively small.

5.2. Testing Institutional Influences on Højesteret Votes in Tax Cases

In this section, we begin with examinations of institutional influences on judicial voting such as the parties to the case and the types of subject matters governing the tax cases. We conclude this section with addressing the potential impact (and non-impact) of process-related influences. The cross-tabulations of these process-related (institutional) factors appear in table 3 (both at the individual justice level vote and at the case level vote).

36. See Grendstad et al, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court*.

Table 3: Institutional Factors in Tax Cases: All Dom Cases 2006 – June 2017 (frequencies in parentheses)

	Wins for SKAT/ Government	Wins for Tax-payer	Judicial votes for SKAT/ Govern-ment	Judicial Votes for Taxpayer
All Dom cases	88.3% (287)	11.7% (38)	87.4% (1465)	12.6% (212)
Cases where tax-payer had no attor-ney	100% (17)	0% (0)	97.6% (81)	2.4% (2)
Individual litigants[a]	95.9% (195)	4.1% (6)	93.9% (694)	6.1% (45)
Corporations	82.6% (126)	17.4% (27)	83% (665)	17% (136)
Associations	81.5% (22)	18.5% (5)	78.9% (116)	21.1% (31)
EU law issues	81.4% (48)	18.6% (11)	78.3% (245)	21.7% (68)
International Law	84% (21)	16% (4)	83.7% (118)	16.3% (23)
Labor cases	71.4% (10)	28.6% (4)	64.1% (50)	35.9% (28)
Real Property cases	94.4% (68)	5.6% (4)	93% (344)	7% (26)
Cases with no oral argument (Rule 387)	89.4% (84)	10.6% (10)	88.2% (411)	11.8% (55)
Cases before 2007 changes to Admin-istration of Justice rules	90.7% (175)	9.3% (18)	87.8% (874)	12.2% (121)
Cases after 2007 changes to Admin-istration of Justice rules	84.9% (112)	15.2% (20)	86.7% (591)	13.3% (91)
Tax Ministry wins in the lower court	89.2% (273)	10.8% (33)	88.3% (1387)	11.7% (183)
Tax Ministry loses in the lower court	73.7% (14)	26.3% (5)	72.9% (78)	27.1% (29)
Dissent in the lower court	87.5% (21)	12.5% (3)	89.6% (120)	10.4% (14)

[a] This category represents cases where the taxpayer constitutes only an individual (or several individuals).

Variables that account for litigant resources appear to have one of the greatest impacts on justices' voting patterns in tax cases. The single most disadvantage to a taxpayer in the Højesteret is the failure to be represented by an attorney. In all 17 dom cases in our data where the taxpayer was operating pro se (representing herself) before the court, the Tax Ministry won every case. Every one of these cases was also a case where the pro se litigant had an automatic right to appeal to the Højesteret (either because the case moved from the landsskatterettens directly to the landsretten under the pre-2007 rules, or because the byretten moved the case

up to the landsretten under the post-2007 rules via §226). Presumably, these litigants lost in the Højesteret either because they had a frivolous case (for which an attorney would have advised was not worth appealing) or because they did not have the skill of an attorney to point out the strength of their legal arguments before the court.

Our study also illustrates another type of litigant resource influencing justices' votes. Taxpayers who were individual people (in other words, they were not corporations or trade or labor associations) were also at a significant disadvantage in winning before the Højesteret. Moreover, this significant disadvantage evidenced in the cross-tabs of Table 3 also holds out in our multivariate statistical model when one controls for other factors (see appendix). Individual citizens lose over 95 percent of dom cases taken to the Supreme Court during our period of study. Conversely, the government only wins in about 81.5 percent of cases when one of the tax litigants is an association (such as a trade, labor or housing association). In cases where the taxpayer is a corporation, the government only wins 82.6 percent of these cases.[37] Thus, while the government is still winning the vast majority of cases against corporations and associations, the lower amounts of wins by the government against these entities is statistically significantly different from the individual citizen who attempts to take on the government. In short, the individual citizen (constituting 145 of our 325 tax cases studied) only won against the government in 6 cases over more than a decade (put another way, the citizen only won in about 4 percent of all dom cases).

This paucity of wins by the individual private citizen is quite stark. It is unclear exactly why the individual citizen loses so much before the Højesteret, but given what we know about previous studies in judicial behavior,[38] the lack of resources available to these individuals compared to corporations and associations could be playing a role in their defeat. Corporations and associations have the ability to hire reams of attorneys who are able to assist them in knowing when to strategically appeal a case and in putting forth the best legal arguments before the court. It is also possible that the justices simply see the associations and corporations' claims as more important simply for who they are as parties to the case and thus give these parties more of the benefit of the doubt in their arguments against the government.

We should also note that SKAT is probably strategic in whether it decides to appeal cases that it lost in either the lower courts or the Landsskatteretten, thus

37. Some of our cases contain multiple taxpayer litigants. In these multiple litigant cases, if at least one of the parties was a corporation or an association, we categorized the case as such. We think this coding is theoretically justified because an association or corporation should bring additional resources and salience of to the case.
38. Brace et al, »Judges, Litigants, and the Design of Courts«; Brace and Hall, »'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space«.

contributing to increased government win rates. The government rarely decides to initiate a case in the court system unless the case raises a principle question.[39]

Other variables that potentially affect and color the views of justices concern the type of factual and legal subject areas of the tax cases. Of particular interest to our study was whether cases which concerned – even tangentially – legal issues surrounding European Union law (i.e. EU directives, treaties, or ECJ precedent) had an effect on justices' decision making. When examining the outcome of a case (whether SKAT wins or loses a case before the Court), Table 3 shows that SKAT tends to win about 81 percent of cases involving EU issues. Looking at the individual votes of justices (irrespective of case outcome), the percentage of votes in favor of the government is even lower, with SKAT obtaining favorable votes from justices in only about 78 percent of all judicial votes. In short, justices tend to be slightly more reticent about voting against the taxpayer in EU law cases, perhaps because they know that the ECJ is looking over their shoulder to some extent. In cases that raise some issue of EU law, the justices know from an institutional standpoint that they are not necessarily the court with a final say on the matter.[40]

Another set of tax cases that stand out are those involving labor issues. While there are only fourteen of these labor cases in our dataset, we find that the government only wins in 10 of the 14 cases (71 percent). If one looks at individual judicial votes, SKAT is able to convince only 64 percent of judges to vote with their side. We suspect that tax cases involving the labor market probably receive greater scrutiny due to the political visibility or sensitivity of such cases. Of final note are tax cases involving some element of real property. Whereas justices are more skeptical about voting in favor of the government in EU law cases or labor cases, SKAT's chances of getting a justice to vote in favor of the government increase in tax cases involving real property.

39. See Jon Stokholm. 2011. »Højesteretsfunktion som domstol på skatteområdet siden ca. 1960«. In D. Madigan, T. Melchior, J. Stockholm, & D. Tamm (Eds.), *Højesteret – 350 år* Denmark: Gyldendal. As Supreme Court Justice Jon Stockholm noted in this book chapter, »It's normally the tax payer who brings the case for the courts. The Danish tax administration law § 49, however, does allow the tax authorities to take cases to the courts. Tax authorities are careful not to use this opportunity, unless the case raises principal questions« (p. 354) (this quote has been translated into English by the authors).
40. In our statistical models, we found that the presence of EU issues has a statistically negative effect on the justices' propensity to vote for the government. Thus, we find more justices voting against the government in these cases. But the higher amount of negative votes among justices against the government in EU cases is not enough to change the overall outcome of who wins in these cases. In model 3 in our appendix examining overall case outcomes, EU issues do not tend to significantly affect the number of times that SKAT wins in the Højesteret.

Presumably, the Højesteret and others hoped that the 2007 rules changes surrounding § 226 would not only cut down on the number of tax cases coming to the court, but would also encourage tax cases with more difficult legal questions to appear before the justices. In close cases, we should expect the win rates of the government to be less than 88 percent. We tested for this influence by creating a variable that measured whether the tax case was governed by the pre or post 2007 rules. As is evidenced by our data (in Table 3), however, the differences in justices' votes before and after the 2007 rules changes appear negligible. The state does seem to win somewhat less in cases operating under post-2007 rules (wining only 84 percent of the time), but as our multivariate analysis indicates, this difference is not significantly meaningful in a statistical sense. This is not to say that the 2007 reform had no effect whatsoever. As noted earlier, the reforms practically ended litigants without attorneys from reaching the court, and those litigants always lose before the court in our data. We cannot measure that specific effect statistically because one cannot model an effect where the result is 100 percent with no variance.

What about tax cases where the Højesteret takes no oral argument but instead considers only written submissions under § 387? Though one might be tempted to think that such cases would be a bad harbinger for the taxpayer (because perhaps the justices did not think the case important enough for oral argument), the results of our study indicate that the win rates for the government under written submission are nearly the same as when a case is argued orally before the Court. The government does win slightly more cases under written submission, but as we show in our multivariate model in the appendix, this small difference is not statistically significant.

Three other process-related factors that might influence judicial behavior in the Højesteret include actions that occur in the lower courts. When judges on the landsretten dissent or when the Tax Ministry wins in the lower court, these actions send signals to the Højesteret. One plausible reading of these signals relates to the legal complexity of the case. If lower court justices are disagreeing about the outcome of a tax case, perhaps there is legal uncertainty, which should increase the taxpayer's chances of prevailing in the Højesteret. When SKAT wins in the lower court (or loses), these outcomes also send information to the justices potentially about the legitimacy of the taxpayer's legal claims. Thirdly, when claims come to the Højesteret as a third instance court (i.e. when taxpayers are not relying on § 226 to jump into the Court or are not operating under pre-2007 rules, but rather are gaining entry into the Supreme Court via the arduous route of the Procesbevillingsnævnet), the justices may view such claims as more important and without an easy legal answer, for why else would the Procesbevillingsnævnet allow easy cases into the Højesteret?

Interestingly, only one of the three lower court actions appears to have some bearing on the outcome of the tax case in the Højesteret. When the Tax Ministry

wins in the lower court, they win 89 percent of their cases in the Supreme Court. However, when the Tax Ministry loses in the lower court (which is actually quite rare), their winning percentage in the Højesteret is reduced to 73 percent (see Table 3). In cases where dissents occurred in the lower court or where the Højesteret is acting as a court of third instance, Justices appear to be unaffected by such circumstances. In fact, in instances of lower court dissents, voting for the government increases in the Højesteret (see the appendix for additional analysis). Finally, if the Justices are treating §226 cases no differently than third instance appeals, then it's not clear how the §226 process is any different in terms of the quality of tax cases reaching the Supreme Court when compared to the Procesbevillingsnævnet's choices of tax cases.

As noted earlier, we further examine the statistical relationships between these factors and judicial votes (and overall government wins) in the appendix (See Appendix). The appendix presents the results of our multivariate logistic regression analyses, which largely confirm the relationships shown in Tables 2 and 3.

5.3. ECJ Precedent and Danish Højesteret Precedent in Tax Decisions

Finally, in this last section of our study, we investigate the citation practices and opinion lengths of the Højesteret in tax cases. Understanding citation practices and opinion formation provides us with a fuller picture of how the Højesteret handles tax cases. Citation practices could provide some evidence about the motivations of justices, such as hinting at their views on the certainty or uncertainty of the law. We did not include a measure of citations to precedent in our predictive models because citations are arguably post-hoc rationalizations of the justices' decisions.[41] One can find past precedent to support nearly any decision, and thus a citation appearing in a case does not necessarily indicate a causal relationship with the justice's vote. Nevertheless, a statistical relationship between the citation of precedent and the behavior of justices could suggest a strategic use of precedent and offer other clues about the Højesteret's formulation of opinions.

First, we examine citation practices in EU cases. In a little more than half of cases concerning EU issues, the Højesteret cited precedent from the ECJ (see Table 4). The capitalizing the Højesteret is much more likely to cite court precedent in EU cases (ECJ precedent, to be exact) when compared to citing its own precedent in cases overall. Moreover, when the Højesteret cited ECJ precedent in its opinion, SKAT won about 77 percent of the cases (and about 76 percent of judicial votes). From a statistical standpoint, this number is significantly lower than the SKAT win-rates for an average tax case.

41. Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*.

Table 4: Citation practices in the Højesteret by court case

	Wins for SKAT/ Government	Wins for Tax-payer	Total citations out of 325 dom cases
Højesteret cites ECJ precedent	77.4% (24)	22.6% (7)	9.5% (31)
Højesteret cites its own precedent	81.8% (36)	18.2% (8)	13.5% (44)
Højesteret cites precedent, but no precedent had been cited by the preceding landsretten opinion	73.3% (11)	26.7% (4)	4.6% (15)
Instances where neither the Højesteret nor the landsretten cited Højesteret precedent	89% (179)	11% (22)	61.8% (201)
Instances where the landsretten cited Højesteret precedent	89% (97)	11% (12)	33,5% (109)
Instances where the landsretten opinion cited Højesteret precedent (but no precedent was cited in the subsequent Højesteret opinion)	90% (72)	10% (8)	24.6% (80)
Summary opinions (no written opinion)	100% (26)	0% (0)	8% (26)
Højesteret cites precedent in begrundelse section	90% (27)	10% (3)	9.2% (30)
Højesteret cites precedent *before* begrundelse section (such as in the sagsfremstilling section)	65% (13)	35% (7)	6.2% (20)

As for all dom tax cases, the Højesteret cites its own precedent in 44 cases (this constitutes about 13.5 percent of all dom cases examined in our study), and the government wins about 82 percent of cases where precedent is cited. Thus, Højesteret citations to past supreme court precedent are significantly related to a *decrease* in government wins (not unlike the pattern seen in cases where ECJ precedent is cited). The trend is particularly evident in the situation where the Højesteret cited its own precedent in an opinion, but the lower court landsretten opinion in the same case did not cite any past precedent of the Højesteret. In contrast, in cases where both the landsretten and the Højesteret cited past precedent, the win rates for the government are not significantly different from the overall average. Even more interesting, when the lower court cites past Højesteret precedent, that situation appears to have no effect on Højesteret behavior. In the 109 cases where the landsretten cited Højesteret precedent, SKAT won 89 percent of those cases. Thus, the greatest number of wins for the taxpayer comes when the

Højesteret cites precedent for the first time (with no mention of past precedent in the landsretten).[42]

Perhaps Højesteret justices feel more inclined to justify in more legal detail decisions where the government loses, particularly when the landsretten did not cite any past precedent in their opinion. This perspective is further corroborated if one examines the number of words in a supreme court opinion (minus any words written by dissenting justices). There is a strong statistical correlation between an increase in words in an opinion and a government loss. When the government loses a case, the supreme court is much more likely to write a *longer* court opinion.[43] A final bit of evidence in this area also comes from summary opinions of not more than a sentence or two that are sometimes issued by the Højesteret. There are 26 of these perfunctory opinions in our data where the Højesteret wrote essentially nothing, other than stating briefly in a sentence or two who the winning or losing party was. In all 26 of these non-opinion cases, the taxpayer lost and the government won.[44]

Certainly, the justices often appear at pains to describe in detail why the government loses a case, whereas the taxpayer receives much less explanation when the taxpayer loses a case. One possible explanation for this behavior in opinion writing stems from the power of the Danish Højesteret in the political system. In Denmark, the supreme court does not wield the same amount of power vis-à-vis the other branches of government as is the case in the United States or Norway. The political system implies that parliament is expected to operate as the primary democratic check on the actions of the Tax Ministry. When the Højesteret does take on SKAT, perhaps it feels more compelled to justify adverse decisions

42. In this analysis, we did not include citations to landsretten precedent. We only considered Højesteret precedent.
43. We excluded the number of words issued by a dissent, because when dissents occur, they are significantly related to government losses and we don't want to conflate the two. A number of justices feel the need to dissent when the government loses a case. On the other hand, even by excluding the words written by dissenters, this maneuver may not fix these concerns, because perhaps justices write longer opinions when there is a dissent in order to respond to their dissenting colleagues. Thus, to confirm this trend of longer opinions with a government loss, we ran another Pearson correlation analysis in which we excluded all cases where justices dissented, and in this secondary analysis we still found a strong correlation (at the .05 level) between a government loss and an increased length in the opinion. In short, longer opinions are not simply a function of the majority opinion writers responding to their dissenting colleagues. That situation may be part of the reason for longer opinions in cases where there is a dissent. However, because longer opinions also exist in government losses where all justices agree to the outcome, it seems that either justices are trying to justify the legitimacy of their decisions more broadly, or they are addressing a complicated legal issue in need of a longer opinion.
44. It should be noted that these 26 opinions are not simply frivolous cases where the taxpayer had no attorney. In only 4 of these 26 non-opinions was it a case where a taxpayer did not have legal representation.

against the Ministry with additional legal authority in order to bolster the legitimacy of its decisions.

This explanation finds further support when examining citation practices in EU cases. When the Højesteret cites ECJ precedent, regardless of whether or not there is a dissent, the statistical relationship between citations to the ECJ and an increase in losses for the government holds. Scholars on the ECJ such as Karen Alter[45] have suggested that national courts might strategically use the ECJ and EU system in their decision making. When Højesteret justices cite ECJ precedent, they are able to check the authority of the other branches of government while making it more difficult for the other branches of Danish government to call into question the legitimacy of their decision, because in theory the Højesteret justices can claim that they are simply following a higher legal authority.

On the other hand, the story of a supreme court attempting to justify its strike-down of SKAT to other institutions in the political system is not fully supported by the data when one examines the location of the Højesteret precedent and the presence or absence of dissents in all tax cases (not just EU cases). For example, when the Højesteret cites precedent in the begrundelse section, SKAT wins 90 percent of the cases. Perhaps these are easy cases for which the Court has an easy answer citing a previous decision. However, when the Court cites precedent in the earlier parts of the opinion (such as the sagsfremstilling section), SKAT only wins 65 percent of these cases. The reasons for this lopsidedness may have to do with the interaction of justices when dissents occur. Most of these wins by the taxpayer when precedent is cited in the earlier sections of the opinion also result in dissents. If one removes cases with dissents from the analysis, the winning rate for the government jumps to over 90 percent in cases where precedent is cited in earlier sections of the opinion (before the begrundelse section). Thus, the use of precedent by the Court may be mostly just an artefact of the internal struggle on legal arguments amongst the justices. In dissensual decisions, the dissenting minority either asks the majority to insert certain citations in the earlier sections of the opinion or the majority themselves insert citations in the earlier sections as a response to the dissent. In short, the evidence from the Højesteret's citation practices and opinion writing offers a few possible explanations for their behavior in tax cases – the relative power of the Court in the political system or the number of easy cases arriving at the Court's doorstep – and neither of these explanations are mutually exclusive.

45. Karen Alter. 1998. »Who are the 'masters of the treaty'? European Governments and the European Court of Justice«. *International Organization*, Vol. 52, No. 1, pp. 121-147.

6. Conclusion

Taxpayers in Denmark have a tough time winning tax cases in their supreme court. On average across our data, the state wins in Denmark in dom cases around 88 percent of the time. A superficial interpretation of this number suggests that the Danish Højesteret appear rather friendly towards the government. Certainly, the differences in resources among litigants appears to play some part in the high win rates for the government. Corporations and associations achieve more wins in the Højesteret compared to individual citizens. These entities are able to hire scores of attorneys who are probably better able to determine whether a case has a chance of winning before the Højesteret and thus should be appealed. As we saw in our data, litigants who have no attorney when taking their tax case to the Højesteret lose every case. Moreover, inertia created by the large amount of government wins in the landsretten also appear to influence the outcomes of tax cases in the Højesteret.

Taxpayers have a slightly better chance of attracting favorable votes from justices in cases involving EU issues. However, the additional judicial votes that taxpayers receive in cases with EU law do not appear to translate into greater amounts of wins in the Højesteret since our EU law variable has no statistical effect in our model examining overall wins and losses in the Højesteret (see appendix).

We failed to find evidence that the 2007 rules changes did much to affect the outcomes of cases reaching the Højesteret, at least in any direct way. On the other hand, we do find that frivolous cases involving litigants with no attorney almost completely stopped appearing before the supreme court under the post-2007 rules changes. Certainly, the Court's lack of docket control, particularly pre-2007, allowed a certain amount of frivolous cases to reach the court.[46] And to that extent, the number of tax cases reaching the court began to decline. However, a decline in the amount of tax cases before the Højesteret after the 2007 rules changes

46. One can easily find examples of some of this frivolousness before the 2007 rules changes in our dataset. Here are three examples: 1.) a 2008 case about a restaurant owner who engaged in strange accounting practices and who also claimed that large sums of kroner were a loan from a family member even though no loan documents were drawn up prior to the disbursement of funds (cited in UfR – U 2008.2177/1 H, decided June 11, 2008); or 2) Another case about a business owner who had two restaurants and a taxi cab company and reported negative income by claiming he had loans that were set up with no interest, yet he had shoddy records of his cash receipts (cited in UfR – U 2009.476/2 H, decided November 27, 2008); or 3) the director of a company who was also the majority shareholder who for years used the company car all year long for free but claimed in tax returns he was only using the car for free during the summer (cited in UfR – U 2008.2162 H). It would be unusual for a supreme court in control of its own docket to take on willingly such cases that appear rather heavily fact-based and of minor legal importance. These cases are easy wins for the Danish tax ministry.

did not change the rate of wins for the government. It is also probably the case that SKAT has been strategic in determining whether to appeal cases that it loses in the lower courts.

Much controversy and interest surround the possibility that justices with different backgrounds and viewpoints might decide cases differently in the Højesteret – the way it often does in the U.S. Supreme Court –, but we found little evidence that justices' social backgrounds had a large effect on their votes in tax cases. There is a weak statistical probability that justices who had experience in the private sector and in academia voted less often for the government. However, even assuming this relationship or pattern between judges' backgrounds and their votes is not due to chance, the substantive effects of these social background factors on a justice's overall voting behavior in tax cases is somewhat small. Justices having private practice experience or a prior career in academia only contributed to a small decrease in judicial voting for SKAT. These social background factors of judges cannot fully account for the overwhelming support that the Court gives the government. Of course, there are a few justices who are more supportive of the government compared to the mean and also a few justices that are less supportive of the government compared to the mean. Nevertheless, social background factors only play a small part in the overall voting patterns of justices in tax cases. On the other hand, it is also possible that our measures of a judge's prior work experience are too blunt, and further refinement in a future study might produce more robust results. Moreover, it is also possible that Danish justices – irrespective of background – are just simply more trusting of the tax authorities or are more concerned about the financial pressures of the welfare state. Such hypotheses, however, are beyond the scope of this study.

In conclusion, we find that institutional factors play an important role in SKAT's ability to win so often in the Højesteret. Denmark's supreme court has no direct control over its own docket. Consequently, the justices cannot choose cases that they think are important (and presumably, where the law is in doubt). In addition, for many years tax cases were operating under legal rules that allowed cases, regardless of their legal difficulty or importance, to reach the Court. Even today, the Court does not have complete control over its docket. A comparative study involving other Scandinavian countries – such as Norway – might offer further clues about how docket type shape judicial behavior on Scandinavian courts. Furthermore, one cannot know exactly how much of a role the Højesteret's overall institutional authority plays in the government winning. It could be that the current institutional docket rules allow easier cases to reach the court, resulting in a higher number of government wins. As additional cases reach the Højesteret under the more recent 2014 rules, future research may be able to further untangle the answer to this question.

7. Appendix: Statistically Modeling Højesteret Behavior in Tax Cases

The crosstabs in Tables 2-3 showing the individual relationships between our variables and judicial votes (or case wins) provide a picture of Højesteret behavior in tax cases that is illuminating but potentially misleading. Consequently, it is important to consider these relationships while accounting for other potential factors. Multivariate statistical models allow one to test these competing influences simultaneously. In this appendix, we employ three logistic regressions: 1) one model at the case level to predict which party wins a tax case (where the dependent variable constitutes a 1 if the government (or SKAT) wins the case in the Højesteret and a 0 if SKAT loses); 2) and two models that focus on predicting the individual votes of justices (where the dependent variable constitutes a 1 if the justice votes in favor of a SKAT win and a 0 if the justice votes in favor of a SKAT loss).[47]

In the statistical models in this appendix, we employ many of the same variables examined in Tables 2-3. For the model predicting whether the state wins or loses a case (the case-level model), we have dropped the individual justice characteristics from the model and focus on the institutional features driving Højesteret behavior. These results appear in our appendix table.

For our two statistical models predicting individual justice votes (Models 1 and 2 in our appendix table), we find some statistical evidence that justices with previous work in academia are more skeptical of the Tax Ministry's claims (see appendix table) in Model 1. However, this variable is only marginally statistically significant.[48] The effects of private background experience do not quite reach traditional levels of statistical significance. In Model 2, there is some statistical evidence for the effects of social background on justices' voting. Thus, the models diverge somewhat in their findings. However, what is clear from both models is that even if a justice's private background experience or academic experience, or birth in Zealand, is related to voting against the Tax Ministry, the *substantive impact* of these variables in the overall model is relatively small. A justice with background experience in private law or academia only decreases the probability of a vote against SKAT by about 5 percent (the impact is even smaller for justices who come from Zealand). In other words, the social background of justices, if they matter at all in tax cases (given the weak statistical relationship), matter only to some degree. The gender of a justice has no impact on their votes in tax cases.

47. In one of the models of individual justice votes, we employ robust standard errors clustered around the judge. In the second model of individual justice votes we employ robust standard errors clustered around each court case.
48. Model 1 attempts to account for the correlation of voting among the same justices in later cases.

On the other hand, many institutional influences are highly statistically significant in our models (i.e. there is high probability that a relationship exists). These institutional variables also have a somewhat stronger substantive impact on the outcome of a justices' vote when compared to the social background variables. For example, in cases where the taxpayer is an individual, justices are less likely to vote in favor of SKAT, ceteris paribus. In other words, the supreme court favors corporations and associations over individuals in their fights against the Tax Ministry. In terms of the substantive impact of this variable, in cases where the litigant is an individual, the probability of SKAT obtaining a favorable vote from a justice *increases* by around 10 percent. Labor cases are also statistically significant predictors of judicial behavior and substantially *decrease* the probability of a justice's vote for SKAT by about 15 percent. Justices are also less likely to vote for SKAT in cases containing any EU law issues, though the impact of this variable is rather moderate (between 7 and 8 percent). When the Tax Ministry wins in the lower court, this occurrence significantly predicts a judicial vote for the tax authorities in the Højesteret, increasing the probability of a justice's vote for SKAT by about 15 percent. Strangely enough, disagreement among lower court judges is significantly related to an increase in judicial voting for SKAT in the Højesteret (with the substantive impact of this variable about 5 percent). This relationship is not something we expected, but the result illustrates the position of strength that SKAT sits in during any appeal. Perhaps SKAT changes its tactics – putting in additional effort in the case – when it encounters a dissent in a lower court opinion that gets appealed. Landsretten disagreement about the outcome of a tax case is not a reason for a taxpayer to be enthusiastic about winning in the Højesteret. Tax issues dealing with real property also are significantly related to an increase in justices voting in favor of SKAT, though the substantive impact of this variable is also relatively small.

Finally, we found no statistical effect on individual judicial votes resulting from the administrative reforms of 2007. Though it is clear that after the 2007 reform the number of tax cases dropped and the number of pro se litigants virtually disappeared (in other words, perhaps the most frivolous of cases stopped appearing in the Højesteret), the reform does not appear to have affected the rate of pro-government judicial votes in tax cases before the Højesteret when we account for other potential factors. Were the reform variable operating as expected, we should have seen the reform causing a decrease in judicial votes for SKAT – as more legally challenging cases reached the Højesteret. Presumably, in cases with no legally clear correct answer, rates of judicial votes should fall closer to 50/50 for the taxpayer and the government. However, the 2007 administrative reform did not either increase or decrease judicial votes for the taxpayer.

Moving to our statistical model 3 on predicting overall case wins for SKAT, we see the story changes. In this third model, we are trying to predict the outcome of a case rather than predicting how an individual judge votes. What variables pre-

dict changes in a justice's votes do not necessarily also create enough change in votes to change the outcome of a case. While a number of factors influence an individual judge's propensity to vote for or against SKAT, they do not necessarily affect the outcome of a case. Since the government wins around 88 percent of all cases, there is actually very little variance in the data to explain. Statistical models cannot offer as much description when there is so little variance to explain. We do find, however, that two variables significantly impact SKAT wins before the Højesteret.[49] Tax Ministry wins in the lower court are statistically related to the Ministry winning again in the Højesteret. In addition, SKAT wins significantly increase in the Højesteret when they are up against individual citizens instead of corporations or associations. Put another way, corporations and associations have a better chance of winning against SKAT when compared to individual citizens. Finally, we note that in this third model, the 2007 reforms failed to affect win rates for taxpayers against the government before the Højesteret.

49. Two of the variables (Tax Ministry wins in the lower court and cases where the litigant is a corporation/association) are statistically significant at the .10 level (the probability we would observe such values by chance), which means we have less certainty that a relationship exists. Theoretically, however, the relationship makes sense.

7.1. Appendix Table

Logit coefficients for Statistical Models of judge voting and government wins in tax cases in the Højesteret

Variables	Model 1 Judge votes clustered by judge	p-Value	Model 2 Judge votes clustered by case	p-Value	Model 3 Win/ loss for SKAT	p-Value
Judge characteristics						
Centre born	-.380 (.241)	.115	-.380 (.141)	.007	--	--
Woman	-.215 (,273)	.412	-.215 (.190)	.258	--	--
Law professor	-.432* (.254)	.089	-.432** (.192)	.025	--	--
Private practice	-.454 (.288)	.115	-.454** (.182)	.013	--	--
Case factors						
2007 admin reform	-.064 (.149)	.667	-.064 (.348)	.854	.352 (.368)	.339
No oral argument	-.129 (.222)	.561	-.129 (.377)	.733	-.145 (.417)	.728
Individual citizen (i.e. not a corporation or association)	1.06*** (.142)	.000	1.06*** (.351)	.002	1.40*** (.474)	.003
Tax ministry win in lower court	1.03*** (.199)	.000	1.03* (.582)	.077	1.00* (.600)	.093
Dissent in lower court	.597** (.275)	.030	.597 (.766)	.435	.360 (.680)	.596
EU law or ECJ legal issue	-.627*** (.140)	.000	-.627* (.334)	.060	-.431 (.410)	.294
Labor issues tax case	-1.06*** (.233)	.000	-1.06** (.518)	.040	-.680 (.648)	.294
Real Property tax case	.394** (.183)	.031	.394 (.465)	.396	.605 (.572)	.290
Intercept	1.34** (.341)	.000	1.34** (.599)	.024	.536 (.608)	.377
N	1677 (30)		1677 (325)		325	

*p<.1, **p<.05, ***p<.01. Note: In Models 1 & 2, the dependent variable is coded as 1 for a judge's vote for the government and 0 for a judge's vote against the government. The dependent variable for Model 3 measures a government win in a case as 1 and a government loss as 0. Standard Errors are in parentheses. Robust standard errors are clustered around the judge in Model 1 and clustered around the court case in Model 2