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Agenda Setting In Supreme Court Tax Cases: Lessons From the Blackmun Papers

NANCY C. STAUDT†

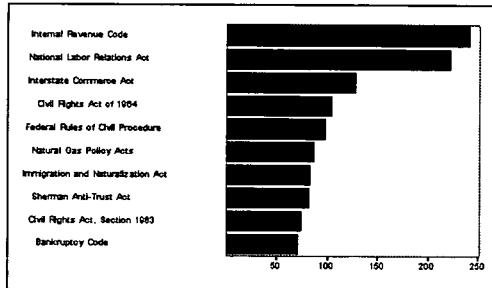
Justices on the Supreme Court have extraordinary control over their agenda—the rules governing the Court’s jurisdiction on writ of certiorari explicitly provide that review is “not a matter of right, but of judicial discretion.”¹ This agenda setting power means the Justices are at liberty to grant as many—or as few—petitions of certiorari as they see fit and are free to hear only the legal disputes they find the most intellectually fascinating. Indeed, the Court theoretically has freedom to hear just a handful cases in a single area of the law each term or it could hear hundreds, perhaps even thousands, across the legal spectrum. Docket control, however, has not led the Justices to seek out the cases they find particularly intriguing while eschewing all others from their courtroom. Actually quite the opposite is true: while the Justices have granted certiorari to more tax controversies than any other area of the law involving a single statute,² they describe these cases as the “crud”³ on the docket—the cases that “put law clerks to sleep.”⁴

† Professor of Law, Washington University School of Law. I owe thanks to Lee Epstein and to the staff at the Library of Congress, all of whom greatly facilitated this research. I also thank the editors of the Buffalo Law Review for inviting me to participate in their inaugural issue of essays addressing topics “in the neighborhood of the law.”

1. SUP. CT. R. 10. The Court did not always have full discretion to set its agenda, this came about just 75 years ago with the adoption of the Judiciary Act of 1925. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. For a terrific historical discussion of the certiorari process, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000).

2. The Court has granted certiorari to nearly 250 tax disputes since 1952 and has heard nearly as many controversies implicating the National Labor Relations Act, but far less in other statutory areas of the law, including controversies involving the Bankruptcy Act, the Civil Rights Act of 1964, the Sherman act, and the Immigration and Naturalization Act. The figure below shows the frequency of cases that reach the Supreme Court in these different contexts.

To add insult to injury, students of taxation routinely deride the high court for “bungling” the tax cases they decide to hear.⁵ So inept at understanding complex taxation issues, scholars claim that the Justices frequently issue opinions that are “needlessly confusing,”⁶ should “be consigned to the judicial scrap heap,”⁷ and have become the “laughingstock” of the tax bar.⁸ These criticisms have been so widespread and enduring that many commentators



Lee Epstein, Nancy Staudt, & Peter Wiedenbeck, *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305, 309 (2003) (noting the large number of tax cases in the Supreme Court warrants scholarly attention).

3. “If one’s in the doghouse with the Chief, he gets the crud. He gets the tax cases and some of the Indian cases, which I like, but I’ve had a lot of them.” BrainyQuote, www.brainyquote.com/quotes/authors/h/harry_a_blackmun.html; see also, Neil M. Richards, *The Supreme Court Justice and “Boring” Cases*, 4 THE GREEN BAG 2d 401 (2001) (commenting on the fact that the Justices find tax cases boring).

4. Container 612, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (Supreme Court clerk comment on preliminary memorandum circulated to Court in *Commissioner v. Soliman*, a case involving an anesthesiologist seeking a home office deduction. The author added the following notation after each party’s name: *Commissioner of Internal Revenue* (“puts law clerks to sleep”) v. *Soliman* (“puts patients to sleep”).

5. Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 173 (2001) (“Tax lawyers have derided the Supreme Court, complaining that the Court ‘hates tax cases’ and generally bungles the cases it does hear.”).

6. Joel Newman, *The Story of Welch: The Use (and Misuse) of the “Ordinary and Necessary” Test for Deducting Business Expenses*, in TAX STORIES 181 (Paul L. Caron, ed., 2003).

7. *Id.*

8. Bernard Wolfman, *The Supreme Court in the Lyon’s Den: A Failure of Judicial Process*, 66 CORNELL L. REV. 1075, 1099-1100 (1981) (“A Supreme Court opinion ought not become the basis for tax lawyers to make a laughingstock of the Court as they now do when quite routinely they add unnecessary third parties to financing transactions in order to qualify for the shelter of *Frank Lyon*.”).

argue it is unrealistic to expect the Justices to develop a sophisticated tax jurisprudence;⁹ rather, Congress should curtail, if not eliminate, the Court's jurisdiction over tax matters—perhaps through the creation of a National Court of Tax Appeals with final resort to the Supreme Court seriously abridged.¹⁰

If the Supreme Court dislikes tax cases so much and at the same time issues decisions that generate more confusion than clarity, why does it continue to grant certiorari to such a relatively large number of taxation disputes? This question invites speculation as to why the Justices make decisions the way they do; it calls for an explanation of the seemingly irrational process that leads Justices—with virtually complete control over their docket—to hear cases they find tedious and boring when they could avoid them altogether. Of course, we cannot get into the Justices' minds to answer this query but we can access motive through a variety of other techniques including conducting interviews of the Justices and their law clerks,¹¹ examining published court opinions that recite reasons for granting certiorari,¹² and using statistical models to identify the variables that correlate with the decision to hear a case.¹³ Scholars have

9. *Id.* at 1100.

10. See, e.g., Oscar Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925) (criticizing the federal tax litigation process as clumsy and time-consuming and arguing for a single court with national jurisdiction over all tax disputes); Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Appeals*, 59 TEMP. L.Q. 879 (1986) (arguing problems unique to taxation should lead Congress to pursue legislation authorizing National Court of Tax Appeals); Charles L.B. Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222, 222 ("The thesis of this paper is simple: It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court."). But see Theodore Tannenwald, Jr. *The Tax Litigation Process: Where It Is and Where It Is Going*, 44 THE RECORD 833-46 (1989) (examining case for and against National Court of Tax Appeals and opposing reform).

11. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991) (interviewing five Justices, sixty four law clerks, and others with regard to the certiorari process).

12. See Harold J. Spaeth, *The Original United States Supreme Court Judicial Database 1953-2002 Terms*, <http://www.polisci.msu.edu/pljp/sctcode.pdf> (last visited Nov. 12, 2004) (offering a wealth of information about Supreme Court decisions, including variables identifying Court's reasons for granting certiorari).

13. See Gregory Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988) (using a statistical model to analyze empirical data).

relied on these techniques in the past and have uncovered a range of intriguing explanations for judicial decisions at the certiorari phase of Supreme Court litigation. The extant literature, however, focuses on the factors that make a petition "cert-worthy" as a general matter and when scholars do concentrate on judicial concerns that relate to a specific issue area, they focus on civil rights and not legal disputes that arise in contexts such as taxation.¹⁴ This is unfortunate because the reasons for granting or denying certiorari in business cases may well differ from those that counsel for and against hearing a civil rights dispute—after all, the legal, economic, and political interests associated with these two areas often diverge and the implications of deciding (or refusing to decide) a civil rights case are different from those in the business context. Moreover, none of the studies help to clarify why the Justices seem to prioritize disputes emanating from the tax code over other laws when, by all accounts, we would expect the Court to shun them.

In this essay, I investigate the factors that explain the Supreme Court's decision to grant certiorari to federal tax controversies and, to this end, I look to Justice Harry A. Blackmun's papers for purposes of understanding the judicial mind.¹⁵ The Library of Congress opened the papers to the public just this year, and as it turns out, Justice Blackmun meticulously and carefully kept files on nearly every aspect of his judicial career.¹⁶ He retained notes, emails,

14. Even authors that investigate the certiorari decision in a single issue-area ignore explanations that may be unique to the particular legal question and focus instead on broad explanatory variables such as decisional conflict or the presence of the Solicitor General as a party in the case. See, e.g., Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101 (1997) (examining certiorari decisions in bankruptcy but failing to control for factors unique to this area, such as the amount of debt at issue or the type of expenditures incurred).

15. Harry Blackmun was born on November 12, 1908. President Nixon nominated Blackmun to the Supreme Court and on June 9, 1970 he was sworn in as the 102nd Justice. After serving 24 years on the Court as an Associate Justice, Blackmun retired on August 3, 1994. He died on March 4, 1999. He replaced Abe Fortas and was replaced by Stephen Breyer. See *Harry A. Blackmun: A Register of His Papers in the Library of Congress*, at <http://www.loc.gov/rr/mss/blackmun/> (Connie L. Cartledge ed., 2003) (last visited Oct. 11, 2004). For a discussion of Justice Blackmun's work in the tax area while on the Supreme Court, see Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109 (1998).

16. Several of the Supreme Court Justices retained papers and files that indicate how each individual Justice voted on the writ of certiorari, but the files

memoranda, conference vote tallies, correspondence, and much more on each and every issue the Court considered between 1970-1993, the years he served as an Associate Justice on the United States Supreme Court.¹⁷ In my review of the papers, I uncovered countless fascinating documents and letters—from commentary about individual litigants' verbal talents (or lack thereof);¹⁸ to intra-Court predictions about tax outcomes during oral argument;¹⁹ to vote changes for purposes of getting "solid court opinions."²⁰

do not contain systematic evidence associated with the arguments for and against the decisions found in documents such as the preliminary memoranda. See, e.g., Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 109 (2001) (indicating that Justice Powell's papers contain preliminary memoranda, but only for cases in which the Court granted plenary review); see also Stark, *supra* note 5, at 245 (discussing the certiorari decision in *Cobb v Comm'r*, 338 U.S. 832 (1949), which suggests Justice Jackson's papers contain information about the certiorari decision).

17. Justice Blackmun's papers are housed in 1,576 boxes in the Library of Congress. *Harry A. Blackmun: A Register of His Papers in the Library of Congress*, Containers 1-1576, (2003) (housed in the Manuscript Division, Library of Congress, Washington, D.C.). The documents were given to the Library of Congress in 1997 and physically transferred between 1999-2000; the Library opened the files for public viewing in March, 2003. See *Harry A. Blackmun: A Register of His Papers in the Library of Congress*, *supra* note 15. For a brief profile of the Blackmun files, see *Blackmun Papers: Humor in the Court* (National Public Radio Broadcast March 7, 2004) available at www.npr.org/features/feature.php?wflid=1751150 (last visited Oct. 11, 2004) ("Blackmun's papers, which include notes he and other justices jotted to each other during oral arguments, show a human, often humorous, side to the court. They also shed light on dramatic legal battles, including Chief Justice William Rehnquist's repeated efforts to weaken *Roe*. . . . Most of the business of the nation's highest court is deadly serious, but members occasionally allow themselves a little levity. As acting Chief Justice, Blackmun once scheduled square dancing at the Supreme Court building and ordered the court cat to chase Boris, 'the rat upstairs.'") *Id.* With regard to the massive amount of documents Justice Blackmun returned, the news reporters noted: "he kept things that none of us would keep. He kept his tennis scores with [Chief Justice] Warren Burger from when they were kids. He kept his dance cards and notebooks from Harvard. He would clip things and put them in the files about all of his colleagues. I wish I had a clipping service like Harry Blackmun. He was compulsive about it." *Id.*

18. Container 578, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (commenting on lawyers' verbal skills during oral argument and noting that the case was "well-argued"); Container 621, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (Justice Blackmun notes during oral argument that he can hardly hear counsel and writes "I may have well stayed in my office").

19. Container 1150, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (Justice Blackmun asked Justice Brennan to

In this essay I focus exclusively on the "preliminary memoranda" to gain purchase on the Court's decision to grant certiorari to the federal tax cases. The preliminary memoranda (usually, called "cert pool memos") address the arguments for and against granting certiorari and are authored by a single Justice's law clerk, but are circulated to nearly the entire Court for review.²¹ Upon receiving these memoranda, Justice Blackmun instructed his law clerks to review the documents, write comments in the margins regarding the arguments set forth, and make a separate recommendation on the question of certiorari for each case. I do not rely on the law clerks' recommendations in the memoranda for understanding judicial votes; rather I focus on the arguments set forth for purposes of understanding possible judicial rationales for granting or denying a full hearing.²²

The preliminary memos suggest three factors play a strong role in the Court's decision to hear a tax case on the merits. First (and somewhat predictably) the Justices look to inter-court conflict when deciding whether or not to grant certiorari on a particular legal issue. Second (and much more surprising) the Justices nearly always consider the impact of the lower court decision on the federal fisc—in other words, what is the cost of *not* hearing the case. As the cost increases, the Justices appear more likely to grant certiorari.²³ Finally, the papers highlight judicial deference to

predict case outcome in *Davis v. United States*—Justice Brennan predicted the IRS would prevail and his prediction was accurate.).

20. Container 565, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (Chief Justice Rehnquist decides to switch his vote to assure strong majority opinion in *Cheek v. U.S.*).

21. For a brief discussion of the origins of the pool memo, see David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J. L. & Pol. 779, 798-806 (1997) (discussing both origins and controversies surrounding the Court's reliance on the cert pool memorandum for purposes of granting or denying petitions); see also Palmer, *supra* note 16, at 105-19 (discussing cert pool memos and their impact on Justices' votes).

22. In fact, the Justices often did ignore the clerk's recommendation and these cases may be particularly informative of the certiorari process. See *infra* text accompanying note 84 (discussing case in which law clerk recommended against a full hearing but Court granted writ of certiorari).

23. See *infra* notes 29-62 and accompanying text (authors ignore role of costs in Supreme Court decision making); but see ROBERT STERN, EUGENE CRESSMAN, STEPHEN M. SHAPIRO, & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 248-49 (2002) (noting the fact that especially large amounts of money

the Solicitor General's office—especially when the government supports a plenary hearing as a *respondent* who won on the merits in the court below. The existing studies on certiorari, in both law and the social science literatures, investigate the role of conflict, but entirely ignore the impact that fiscal costs or litigants' atypical legal positions may have on the Court's decision making process. Accordingly, I briefly explore whether this new information should affect the way scholars understand agenda setting in the Supreme Court, as well as the proposals set forth advocating congressional limits on the Court's jurisdiction over tax disputes.

Justice Blackmun's papers are filled with important and new information that may well impact the way we think about business in the Supreme Court. The goals of this essay, however, are modest and I want to make them clear. I examined only the federal tax cases to which the Court *granted* a plenary review between the years 1986 and 1993.²⁴ This means that my data set is very small (the Court decided forty-one tax cases during that time period) and at the same time I have reviewed only the cases in which the litigants successfully argued for certiorari—not the cases that failed to get a full hearing on the merits. By selecting on the dependent variable (the very thing I hope to explain), I cannot be sure that the newly uncovered data actually impacts the Court's decision making process: to answer this question, further data collection and additional analysis is necessary. Accordingly, this essay is largely limited to profiling the Blackmun papers and offering insight into possible new areas of research, but it does not (and cannot) offer firm conclusions about the judicial motivations underlying the certiorari decision. With these limitations in mind, my investigation of Supreme Court agenda setting unfolds as follows. Section I briefly describes Supreme Court Rule 10, which governs review on a writ of certiorari, and then offers a summary of the law and social science literature that investigates agenda setting in the Supreme Court. Section II outlines the data uncovered in Justice Blackmun's papers indicating how the Court uses Rule 10 in federal taxation controversies. In this section, I note that

involved in litigation over the issue of statutory construction may also be a "persuasive factor" in the Court's certiorari decision).

24. For an explanation of why I chose this time period, see *infra* note 63.

the Blackmun files indicate certain factors play an important role in the Court's decision to grant or deny certiorari, but scholars ignore these factors in their discussion of the Court's certiorari procedures. Accordingly, in Section III, I investigate possible avenues for future research—both normative and descriptive—that account for the archival evidence I uncovered. In conclusion, I offer brief comments on why Supreme Court Justices are inclined to give plenary hearings to tax cases when they find this area of the law so dull.

I. REVIEW ON WRIT CERTIORARI: SUPREME COURT RULE 10

Rule 10 of the Supreme Court of the United States governs the Court's jurisdiction on writs of certiorari. It provides that in exercising discretion, the Court will rarely grant a certiorari petition solely on the grounds that a lower court made erroneous factual findings or misapplied a rule of law.²⁵ Rather than pursuing an error correction strategy that assures the accuracy of all rulings in a given year on a particular issue of federal law, Rule 10 indicates that the Court will grant certiorari only for "compelling reasons."²⁶ While the Court rules do not describe in clear terms exactly which cases the Justices will deem compelling, they do indicate the character of such cases—cases that involve judicial decisions in "conflict" on matters of "importance."²⁷

25. SUP. CT. R. 10.

26. *Id.* While Rule 10 suggests the Court will not pursue an error correction strategy as to factual findings, the justices do, of course, grant certiorari to correct erroneous legal conclusions. Empirical studies suggest the cert decision, however, is tied to politics and probabilities. See, e.g., John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 335-42 (1990) (arguing that evidence suggests Justices who want to reverse the lower court will vote to grant certiorari while a Justice who agrees with the lower court will vote to deny). See also LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 79 (1997) (same). *But see* H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1980) (discussing an interview with Justices and law clerks suggesting certiorari votes are based on the probability of winning on the merits); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824-37 (1995) (arguing that Justices consider probability of winning on the merits and not just their disagreement with lower court outcomes in certiorari decision making).

27. SUP. CT. R. 10.

Specifically, the relevant portion of Rule 10 for certiorari petitions raising federal taxation issues provides that:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

...

(c) . . . A United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.²⁸

Because Rule 10 “neither controls nor fully measures”²⁹ the Court's discretion, it sets no real boundaries, effectively giving the Justices complete freedom to grant or deny a writ of certiorari on any grounds whatsoever. As noted above, however, the language of the rule suggests that the Court will give special attention to cases that involve conflicting judicial decisions on important legal matters.

It is easy to understand why conflict—whether between circuit courts or with Supreme Court precedent—is a factor that should play a role in the decision to grant certiorari, both generally and in the taxation context specifically. Many Court scholars argue that the federal government must treat likes alike—in effect, fair legal results are tied to

28. *Id.*

29. *See id.*

uniformity of treatment irrespective of the individual's place of residence or geographic location. Individuals residing in the United States have the right to equality of treatment and if federal courts treat two similar cases differently, then the judicial system has arguably produced at least one unfair decision.³⁰ Moreover, uniformity is valuable because it contributes to greater predictability and certainty in the law. A predictable set of rules, in turn, structures interactions and encourages reliance among parties. This enables individuals to understand what to expect in social and business interactions and to rely on those expectations rather than litigating every conflict that arises, thereby unnecessarily expending private or judicial resources.³¹ Finally, uniform rules foster respect for the judiciary; they require judges to render consistent outcomes and ensure that judges draw on a body of law that represents the collective experience of the judiciary over time rather than upon their own political or ideological viewpoints. Consequently, the public is more likely to view court decisions as fair and predictable rather than impulsive and fickle.³² Consistency in outcome, therefore, leads to the public perception that the federal courts act responsibly and for the greater good of society, rather than as political bodies intent on imposing their own views on society-at-large. Whether the perception rests on solid ground or not, is not the point—instead the idea is that federal judges tend to seek legitimacy and will be successful only if judicial outcomes appear grounded in fair laws and not individual preferences.³³

In addition to fairness, efficiency, and judicial legitimacy problems associated with erratic decision making, inconsistency in the tax context promotes behavioral changes that have their own costs. First, if tax deductions, exclusions, or exemptions depend not on congressional language found in the tax code but on the jurisdiction in which a taxpayer resides, individuals and corporations are likely to respond by moving and reincorporating to the preferred site. This reaction, in turn, will have an impact not only on

30. Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 836-40 (2003) (discussing uniformity goals and describing existing literature on the topic).

31. *Id.* at 838.

32. *Id.* at 837-39.

33. *Id.* at 838-39.

the federal budget, but also on state and local budgets as the tax base moves from circuit to circuit given the differential effective tax rates, ultimately decreasing federal, state, and local revenues.³⁴ Second, with unique rules in each jurisdiction, parties with national business interests may avoid planning and pursuing business transactions given the unpredictability of tax outcomes in the absence of a nationally binding rule, thereby decreasing overall national productivity.³⁵ Third, even if parties do undertake commercial dealings and endeavors, and litigation ensues from these interactions, the parties are likely to engage in forum shopping as a means to exploit the legal conflicts that exist.³⁶

While variations of the above-described drawbacks of a lack of uniformity exist in many legal contexts, statutory rules unique to taxation lead to fairness problems that do not exist elsewhere in the law. After litigating a case in federal court, the Commissioner of the Internal Revenue Service has the power to publish "nonacquiescence" letters indicating the government will not accept a court decision as precedent—even within the jurisdiction in which it was issued!³⁷ While the IRS is bound by Supreme Court rulings and must respect these outcomes as controlling in future

34. Recognizing the drawbacks associated with decisional conflict, the Supreme Court seems to give priority to cases that involve such tension. Of the forty-one tax cases the Court decided between the years 1986-1994, it explicitly noted the existence of just such a conflict on the face of the published opinion and suggested that the Court's decision to hear the case was grounded, at least in part, on this conflict in seventy-three percent of the cases. Moreover, empirical studies published in the social science literature confirm the role of conflict in the certiorari decision; although various other explanatory variables play an important role, scholars have found that the existence of conflict is highly statistically significant. See, e.g., Sidney S. Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 905 (1984) (examining cases with alleged and genuine inter-court conflict, and finding a correlation with genuine conflict and the Court's decision to hear a case on the merits).

35. See SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 57 (1986); Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1265-74 (1988).

36. See ESTREICHER & SEXTON, *supra* note 35, at 57; Sturley, *supra* note 35 at 1265-74.

37. Congress has never specifically authorized this procedure but the government has long pursued it. See Carter, *supra* note 10, at 879-99 (discussing the Commissioner's authority to refuse to acquiesce to tax decisions unless issued by the Supreme Court).

litigation, this same constraint does not exist when a federal appellate court or the tax court issues the opinion—these lower court rulings govern only with respect to the party involved in a particular lawsuit. Put differently, the IRS is entitled to disregard most judicial opinions when the opinion is not to its liking. This means, absent a Supreme Court ruling, the government can and will treat taxpayers differently in the same jurisdiction and with complete impunity; future taxpayers, of course, are entitled to re-litigate the issue over and over again, but as countless scholars have pointed out, this result imposes a financial burden on tax litigants that does not exist elsewhere in the law.³⁸ This impediment to uniformity, along with the other problems identified, has led a number of commentators to argue that Supreme Court intervention is particularly important for purposes of achieving uniformity and coherence in the interpretation of federal tax rules.³⁹

Scholars have made a strong case for uniformity in general, and specifically in the tax context, but they also discourage the Court from placing too much emphasis on this goal. A lack of uniformity is not always intolerable and in some contexts it may be beneficial at least in the short run. Disagreement among the lower federal courts enables percolation and independent evaluation of legal issues by

38. See Martin D. Ginsburg, *The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U. L. REV. 631, 633 (1990) (stating that anyone who can afford to litigate a tax issue will do so in the forum that is most likely to issue a winning decision).

39. See ESTREICHER & SEXTON, *supra* note 35, at 57 (noting that the tax arena is particularly susceptible to considerations of forum shopping and planning by multi-circuit actors); Carter, *supra* note 10 at 885-93 (achieving uniform treatment of federal taxpayers is the goal of judicial system); Ginsburg, *supra* note 38, at 635 ("It ought to be clear that the present system of tax adjudication does promote uncertainty, incoherence, and, comparing the position of wealthy and less wealthy taxpayers, perceptible unfairness as well."); Hon. Theodore Tannenwald, Jr., *The Tax Litigation Process: Where It Is and Where It is Going*, in 44 THE RECORD 825, 841 (1989) ("the uniformity of treatment of all taxpayers wherever located. . . should be the hallmark of any system of taxation."). Scholars, however, rarely note that Supreme Court decisions can lead to a lack of uniformity due to the interplay of the federal and state rules. This happened when the Supreme Court decided *Poe v. Seaborn*, 282 U.S. 101 (1930), and permitted married couples to split their income. The Court created precedent for treating married taxpayers in common law states differently than couples residing in community property states. For a terrific discussion of the problem, see EDWARD J. McCAFFERY, *TAXING WOMEN* (2000).

different courts. As Professors Samuel Estreicher and John Sexton point out:

“[t]he process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, thus has the benefit of the experience of those lower courts, often yielding concrete information about how a particular rule will “write,” its capacity for dealing with varying fact patterns, and the merits of alternative approaches.”⁴⁰

Moreover, permitting a conflict to percolate for a period of time may eliminate the conflict among federal courts as they might naturally reach accord over the course of time as judges observe various courts outside their jurisdiction issuing different—and possibly better—outcomes than their own courts initially reached.

Conflict alone, therefore, is not, and perhaps should not be, sufficient for purposes of granting certiorari; in fact, the language of Rule 10 indicates as much when it suggests that cert-worthy petitions are those that involve not only divergent decisions but also raise an “important [legal] matter” that “should be” decided by the Court.⁴¹ Thus, Rule 10 implies that conflict is a relevant consideration, but not adequate for getting a hearing on the merits in the Supreme Court. The additional salience requirement found in Rule 10 is sensible given that it promotes the allocation of Supreme Court resources to issues that provoke long-term and irreconcilable conflict among the circuits and at the same time assures that the legal questions are substantial and far-reaching. The “important” cases the Court agrees to take will more likely impact a range of individuals and interests beyond those associated with the litigants themselves. The additional proviso, in effect, guarantees the Court will grant certiorari and decide cases with the most profound implications for law and policy relative to the effort required to hear and decide the case.⁴² The problem, of course, is that without a definition of “important” it is difficult to discern between cases that are cert-worthy and those that are not *ex ante*. We know that once the Court

40. ESTREICHER & SEXTON, *supra* note 35, at 48.

41. SUP. CT. R. 10.

42. See Caldeira & Wright, *supra* note 13, at 1111.

agrees to hear a case, the Justices view the issue as important, but can we differentiate the weighty issues from the petty cases prior to that time, or are they simply those that the Court says are important?

Scholars interested in the certiorari process have investigated this question from both a normative and descriptive perspective. Those with a normative bent have argued that the Court should examine the legal and economic costs of permitting a conflict to exist in lower federal courts for purposes of determining the relative importance of a case and grant certiorari only when the costs—which include exploitation of inconsistent legal rules through forum shopping and interference with domestic and international commercial concerns—exceed the benefits.⁴³ Others argue the Court should not attempt to define “important” cases beyond using a definition that calls for the Justices to adopt a managerial role for the Court, making affirmative use of its decision making powers by prioritizing cases that involve (1) inter-court conflicts that clearly involve a disagreement over a particular legal doctrine that governs recurring and typical fact patterns, (2) conflicts with Supreme Court precedent, or (3) inter-branch disputes.⁴⁴

The problem with these normative prescriptions is that they ignore inevitable resource constraints—thousands of litigants file certiorari petitions each year and many satisfy the criteria set forth in the normative literature.⁴⁵ In fact, this is precisely the tax bar’s criticism of the Supreme Court’s current certiorari process: the Court is not equipped to decide every tax case that involves conflicts among federal decision makers, and this is especially true given the IRS’s ability to issue a nonacquiescence letter with regard to any given court decision. Thus, as the tax scholars note, not only do the federal courts create conflict among themselves, but the IRS routinely generates it through its ability to refuse to adhere to any court opinion as precedent.

The rules grounded in normative concerns not only ignore judicial resource limitations, but they also prioritize

43. See Sturley, *supra* note 35, at 1256-74 (investigating two maritime statutes and arguing the Court should tolerate conflict in one context but not the other).

44. See ESTREICHER & SEXTON, *supra* note 35, at 52-62.

45. See Ulmer, *supra* note 34, at 905-06 tbls.1 & 2 (providing data on the number of genuine and alleged conflicts raised in certiorari petitions during the Vinson, Warren, and Burger Court eras).

conflict and suggest that it should always be a condition for getting certiorari in the high Court. And yet, cases exist that do not involve decisional conflict, but other factors that should counsel the Court to accept the case for a plenary hearing. These additional factors are likely to be unique to individual areas of the law and may involve "intolerable consensus" in the lower courts rather than "intolerable conflicts;"⁴⁶ for example, circuit court rulings that lead to an unjustifiable interpretation of the Constitution—or uniform circuit court rulings that are exceptionally costly to the federal budget.

The normative literature addresses what the Court *should* do, but a second literature investigates what the Justices *actually* do. This second literature finds some truth to the normative views set forth above, but adds additional insights into the agenda setting process—whether the Court should deem these additional case factors salient is not a question the empirical scholars seek to answer. Rather they hope only to describe what the Court does when faced with thousands of petitioners seeking a review of a lower court decision. To that end, the extant empirical literature has identified a number of variables that help to explain how the Court defines "compelling" for purposes of Rule 10, including: (1) the existence of genuine (as opposed to alleged) inter-court conflict,⁴⁶ (2) the Solicitor General as a party,⁴⁷ (3) two or more amicus briefs on file,⁴⁸ (4) the direction of the lower court's decision (Justices are more likely to take a case for purposes of reversal),⁴⁹ and (5) the ideological orientation of the Court (liberal Courts are more likely to grant certiorari to conservative lower court decisions for purposes of reversal).⁵⁰ The first three variables

46. *Id.* at 901-11; see also S. Sidney Ulmer, *Conflict with Supreme Court Precedents and the Granting of Plenary Review*, 45 J. POL. 474, 474-78 (1983).

47. See Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts*, 41 W. POL. Q. 135, 135-44 (1988); see also LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987) (arguing that the Solicitor General's impact on the outcome is so great that he or she might be described as a member of the Court).

48. See Caldeira & Wright, *supra* note 13, at 1115-22

49. See Virginia C. Armstrong & Charles A. Johnson, *Certiorari Decisions by the Warren & Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141, 141-50 (1982) (stating that the Justices were more likely to grant a writ when the lower court favored civil rights than when the decision went against the claim).

50. See GLENDON A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959) (stating that the liberal court in the 1940s chose to hear FELA

highlight the type of the case and the parties involved while the fourth and fifth factors suggest that outcome-oriented concerns motivate the Court. Empirical scholars offer useful explanations for why these factors explain the Court's decision at the certiorari stage (and the most sophisticated study in the literature accounts for all of them in a single statistical model).⁵¹

The role of conflict in the decision to hear a case is not a surprise given that the Supreme Court's formal rules on certiorari suggests it is an important factor and nearly all scholars interested in the certiorari process suggest it should be. Moreover, many scholars have predicted the Justices will defer to the Solicitor General in Supreme Court litigation given the Solicitor General's status as a repeat player and the fact that he is unlikely to expend resources on any but the most important cases—those with national implications.⁵² The Justices rationally assume that when the Solicitor General chooses to petition the Court for review, the case satisfies the underlying goals of Rule 10.⁵³ With regard to amicus briefs filed in support or in opposition to certiorari, Professors Caldeira and Wright suggest this participation also signals the Justices that the case is important not only to the named parties but to a broader constituency. As Caldeira and Wright note, "the potential significance of a case is proportional to the demand for adjudication among affected parties and that the amount of

cases that were decided against workers in circuit courts and in which the workers had the best chance of winning on the merits in the Supreme Court).

51. See Caldeira & Wright, *supra* note 13, at 1115-22.

52. See *id.* (noting that the Solicitor General's office has a unique role in Supreme Court litigation and has remarkable success in convincing Justices to grant certiorari); see also Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. Rev. 611, 623 (1984) (same); Lawless & Murray, *supra* note 14, at 112-13 (same).

53. Evidence in Justice Blackmun's files support this contention. See Container 518, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Stuart* indicating the case "presents a square conflict . . . and the SG strongly argues the case is of great importance. Combined with the usual deference given to the SG, these factors indicate plenary review is warranted."); but see, Stark, *supra* note 5, at 213 (arguing Justice Jackson's experience in the IRS and the Solicitor General's office fostered distrust in the government's litigation positions).

amicus curiae participation reflects the demand for adjudication.⁵⁴

Finally, the fact that a statistically significant correlation exists between the Justices' decision to grant certiorari and their decision to reverse on the merits, suggests the Court is far more result oriented than many scholars seem to believe.⁵⁵ Given resource constraints, this reversal strategy is sensible: if the Justices agree with the lower court decision there is little incentive to change the status quo because the costs of reviewing may be considerable but the overall result does not change. Justices, then, are efficient in their decision to grant review to the cases they wish to reverse.⁵⁶ Most agree this cost/benefit calculation alone is not sufficient to explain certiorari decisions but the additional underlying reasons for the strategy are unclear—some argue the Court grants plenary review to cases it intends to reverse as a means to correct legal errors, and others argue the technique is useful for a Court that is driven to reverse outcomes that are inconsistent with its ideological agenda.⁵⁷ The existing studies on the question do not offer a conclusive explanation for the Justices' motivations when voting to grant or deny a hearing.⁵⁸

54. Caldeira & Wright, *supra* note 13, at 1112; *see also id.* (stating that the logic of the repeat player applies to the participation of organized interests: the groups and interests generally possess more information about a case than the Court, and the Justices (and clerks) are generally not in a position to discern the reliability of information in the short term, but as the organized groups repeatedly participate in the process they build a reputation for trustworthiness and can be counted on to identify "compelling" cases in the long term); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 719 (1993) (theorizing various litigants' roles in Supreme Court certiorari process); *see generally* Gregory A. Caldeira & John R. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782 (1990) (describing and comparing the variety and types of individuals and organizations that file briefs supporting or opposing writs of certiorari).

55. Neither the normative nor the descriptive legal scholarship on certiorari addresses this factor. *See, e.g.*, ESTREICHER & SEXTON, *supra* note 35, at 52-62 (stating that a normative discussion of certiorari focused on conflict and intra-branch disputes, but not on outcomes or results of litigation on the merits); Lawless & Murray, *supra* note 14 at 118-22 (containing a statistical model that does not include reversal as an explanatory variable).

56. *See, e.g.*, Caldeira & Wright, *supra* note 13, at 1111-12.

57. *See* Boucher & Segal, *supra* note 26 (summarizing competing claims and finding data inconclusive for resolving debate).

58. *See id.*

Professors Caldeira and Wright are the only scholars who control for all the possible explanatory variables listed above. They found that the presence of the Solicitor General as a petitioner had the greatest impact on the certiorari decision, followed by the existence of amicus briefs and actual conflict. The inclination to reverse had the least impact on the Justice's vote to grant or deny certiorari. Focusing on the interaction of these three variables,⁵⁹ Caldeira and Wright estimate that the probability of getting a plenary hearing on the merits with two of the three important factors present in the litigation is between eighty-eight and ninety-six percent; with just one of the three variables present, the estimated probability of getting a hearing decreases to between thirty-three and thirty-seven percent; and without the presence of the Solicitor General, a conflict, or amicus briefs, the likelihood of getting a writ of certiorari falls to just one percent.⁶⁰

Caldeira and Wright's model for predicting certiorari decisions had great success in predicting outcomes: they accurately predicted eighty percent of all the certiorari decisions during the 1982 term when the Court considered 1,771 petitions and granted review in just 141 cases. The model has also had success in specific issue areas involving civil rights claims,⁶¹ but no scholar has used it for purposes of understanding the Court's decision to grant certiorari in business cases or in taxation cases specifically. I do not undertake this type of empirical study here; rather I argue the model *may* be underspecified (notwithstanding the numerous explanatory variables included) for purposes of identifying all the relevant explanations for granting certiorari in taxation disputes. After reviewing Justice Blackmun's case files I have reason to believe that we could improve upon the model by taking into consideration factors associated with the federal fisc and the Solicitor General's position when expressing a view on certiorari as a respon-

59. The authors controlled for ideology when generating the probabilities. Caldeira & Wright, *supra* note 13, at 1120-21.

60. *Id.* at 1121-22.

61. See McGuire & Caldeira, *supra* note 54, at 722-25 (using the model to understand certiorari decisions in the context of obscenity cases); see also Lawless & Murray, *supra* note 14, at 118-32 (adopting a statistical approach investigating cert decisions in the bankruptcy context but ignoring amicus curiae).

dent (not petitioner)⁶² in the case. Because I examined only the tax cases that received a plenary hearing—and not the cases the Court refused to hear—I cannot discern whether these factors have a strong role to play in the decision making process. This essay, therefore, serves to highlight possible avenues for useful research in the future.⁶³

II. JUSTICE BLACKMUN'S PAPERS: INSIGHT INTO THE CERTIORARI PROCESS

For purposes of this study, I focused on the forty-one tax cases that the Supreme Court decided between the 1986 and 1993 terms.⁶⁴ Each case file contained a range of materials including some or all of the following: (1) a preliminary memorandum written by a law clerk and circulated to members of the cert pool outlining the parties' arguments for and against a writ of certiorari and including the law clerk's assessment of the case; (2) a bench memorandum outlining the parties' arguments on the merits and including the law clerk's viewpoints; (3) Justice Blackmun's personal notes regarding the case and the issues that arose during oral argument; (4) Justice Blackmun's personal notes taken while the Justices discussed the case after oral argument with a conference tally indicating how each Justice intended to vote on the merits; (5) drafts of the majority, concurring, and dissenting opinions with changes highlighted or identified in the margin; (6) correspondence among the Justices regarding the draft opinions; (7) letters from members of the tax bar offering insight into cases or commenting on case outcomes; (8) news articles describing the case and the implications of the decision; (9) portions of

62. The literature accounts for the Solicitor General's participation as a petitioner but not as a respondent. As I note below, the Solicitor General argues *for* certiorari even when the case was won below, and this fact may be highly correlated with the Court's decisions to grant a full hearing. See *infra* notes 71-73 and accompanying text.

63. In the forty-one cases I investigate, seventy-three percent involved a conflict in the lower courts or with Supreme Court precedent; the Solicitor General's office was the petitioner in fifty-six percent of the cases granted certiorari; and in seventeen percent of the cases, one or more *amicus curiae* filed a brief in support or in opposition to the certiorari.

64. I chose this time period for two reasons (1) Chief Justice Rehnquist was the Chief Justice for this entire time period, offering some uniformity to the decision making process, and (2) I worked under time constraints. The cases are listed in the index attached to this article.

the congressional record indicating the legislators' intent when adopting the tax provision at issue or their subsequent response to a decided case; and (10) random documents ranging from intra-court emails to notes passed between the Justices during oral argument.

Because my focus in this essay is the certiorari decision, I discuss only the preliminary memoranda—law clerk authored documents evaluating petitions for certiorari—and set aside the documents in the file that do not bear on this topic.⁶⁵ These memoranda include a description of the legal controversy, the lower court decisions, the petitioners' arguments for certiorari, the respondent's arguments opposing (or supporting) certiorari, amicus' arguments on the issue, and finally Justice Blackmun's law clerk mark-up, indicating whether or not the Court should grant certiorari.

Rule 10 indicates the Court will bear in mind inter-court conflict when determining whether or not to grant plenary review on a case and the preliminary memoranda offer evidence that the Justices do just that: all the files include a memorandum discussing the existence of, and the potential problems associated with, inter-court conflict. The authors of the preliminary memos generally first identified whether the parties alleged decisional conflict and then offered his or her own assessment of the matter. For the most part, the parties and the law clerk agreed on the question but at times disagreement existed and the law clerk addressed the matter in some detail in an effort to determine which party had the better argument. For example, in *U.S. v. Burke*, the Solicitor General maintained that his office identified a problematic circuit split among the Fourth, Fifth, and Sixth circuits on the tax treatment of back pay

65. Justice Lewis Powell first suggested that the Court create a certiorari pool in 1972 for purposes of evaluating the thousands of petitions filed with the Court each year. According to various former Supreme Court law clerks and authors, all the Justices on the Court, with the exception of Justice Stevens, belongs to the certiorari pool. The Justices assign certain chambers to write a single memo on each petition for Court-wide circulations. See Palmer, *supra* note 16, at 105-08. My own review of the documents indicated that the law clerk responsible for writing the memo generally summarizes the facts, the legal issues, the lower court outcomes (including dissents and concurrences), the parties' arguments (including those found in amicus briefs) supporting or opposing certiorari, and their own view of the case. Justice Blackmun's own clerk then examined the memorandum, identified the author, and evaluated the arguments for and against a writ of certiorari—all in handwritten mark-ups.

awards while Burke's lawyers argued that the split was irrelevant given that the case at hand involved the taxation of damages, and not back pay awards.⁶⁶ The law clerk sided with the Solicitor General's office, noting that the taxpayers' "new-found belief that their suit was for damages and not back pay flies in the face of their own complaint and the district court's undisturbed finding to the contrary."⁶⁷ The author of the preliminary memorandum then gave her own viewpoint on the cert decision, "[t]he case is probably not that important (I doubt there is much money at stake). Nonetheless, because of the fairly deep split, I recommend that the Court grant the petition."⁶⁸ Justice Blackmun's own law clerk, who did not write the preliminary memorandum but reviewed it for Blackmun, added a handwritten note confirming the view of the original author, "[t]here is a clear split . . . therefore, I recommend a grant."⁶⁹ If the law clerks' memoranda and commentary indeed offer any insight into the Court's understanding of a case, it appears the clerk's assessment of the split is a key factor for the Court when deciding whether or not to hear a case on the merits: seventy-eight percent of the cases that I reviewed involved a so-called square conflict.⁷⁰

Burke was a case that involved the Solicitor General as the petitioner, as well as a deep split in the circuit courts on the issue presented. The descriptive literature suggests these two factors together lead the Court to hear the case eighty-eight to ninety-six percent of the time—and in fact the Court did give *Burke* a full hearing. The claim that the Solicitor General's decision to seek Supreme Court review signals the importance of the case is generally confirmed in the preliminary memos found in the taxation context. Often the deference is implicit—discernable only by the fact that the law clerks frequently adopt the Solicitor General's view presented in a brief supporting or opposing a full hearing. At times, however, the deference is explicit; for example,

66. See Container 597, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., (containing the preliminary memorandum in *U.S. v. Burke*, at 5-6).

67. *Id.* at 5-6.

68. *Id.* at 6.

69. *Id.* at 7.

70. ESTREICHER & SEXTON, *supra* note 35, at 54 (describing a "square conflict" as a conflict when two or more courts—federal courts of appeals or state courts of last resort—take contrary positions on the same legal issue).

one law clerk advocated certiorari, in part, based on the "usual deference given the Solicitor General's office."⁷¹ In the forty-one tax cases that reached the Supreme Court for a full hearing, the Solicitor General supported this decision in eighty-three percent of the cases; in twenty-three of the cases, the Solicitor General petitioned the Court for review and in another eleven cases, his office supported a plenary hearing as the respondent in the case.

The existing literature on certiorari seems to assume the Solicitor General will support plenary review when the government loses in the circuit court but will oppose a hearing on the merits when the government won below.⁷² One might ask why the government, as a respondent, would ever support Supreme Court review in a case in which it won in the lower court—why not protect the win by avoiding review altogether? The explanation may have to do with the fact that the government prevails in the vast majority of cases that go to the Supreme Court—on average seventy percent of the time. Accordingly, if the Solicitor General is faced with a situation in which the IRS won in the specific dispute at hand but faces a conflict on the issue in the circuit courts generally—then the government would strongly favor a decision by the Supreme Court that establishes a uniform rule giving the IRS the winning outcome in every circuit across the country. Indeed, even if the lower courts have not generated a conflict, the Solicitor General's support for a writ of certiorari would be a rational choice—an aggressive means to achieve a national rule on an important and new issue. In fact, note that the Solicitor General supports certiorari in eighty-three percent of the cases, and has a similar win rate in the Supreme Court—if he accurately predicts outcomes (which cases he will win and which he will lose) then he is undertaking exactly the right strategy to the certiorari process.⁷³

71. See Container 518, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Stuart* recommending certiorari based on the "usual deference to Solicitor General").

72. See, e.g., Lawless & Murray, *supra* note 14, at 113 (noting the Court is more likely to grant certiorari even when the Solicitor General is a respondent and arguing this is because the government's participation in any case suggests issues of "of public importance" are at hand, ignoring the possibility that the government may support a writ of certiorari even as a respondent).

73. The literature on certiorari is filled with discussion about the Justices' strategies to achieve preferred outcomes—the use of defensive denials and

The preliminary memoranda in the Blackmun files also suggest a third mechanism the Court uses for identifying compelling cases in the certiorari process. Recall the law clerk's comment in the *Burke* case suggesting the dispute was unimportant given the amount of "money at stake" in the case. Virtually every preliminary memorandum filed in the forty-one cases I examined included some discussion of tax costs, and most implied that an "important tax case" was one that had considerable financial implications for the U.S. Treasury. In many cases, the memorandum identified the actual numbers involved. For example, in *U.S. v. Hill*, a case that involved the alternative minimum tax for oil and gas revenue, the law clerk wrote:

The fiscal consequences of the case are enormous. From 1985 to 1989 alone, the IRS reports that more than \$5 billion of revenue from the minimum tax on tax preference income is affected by this decision. Since that decision below, the IRS has already received refund claims aggregating over \$400 million . . . the revenue losses to the government as a result of this ruling therefore will be at least one billion dollars a year and could be much more.⁷⁴

Many other memoranda contain similar language. In *U.S. v. Centennial Savings Bank*, the law clerk wrote that if the Supreme Court permitted the lower court opinion to stand, it would impact at least 108 cases with more than \$128 million at stake in taxes;⁷⁵ in *U.S. v. Goodyear*, the law clerk indicated that "a grant would help with the deficit" because this issue involved "more than \$900 million in tax credits" over the course of time;⁷⁶ in *Commissioner v.*

aggressive grants—but no scholar addresses this same concern when it comes to repeat players. See, e.g., Boucher & Segal, *supra* note 26, at 829-36 (discussing the possibility that Justices may vote to deny certiorari as a means to avoid a particular outcome, but may vote to grant certiorari in cases in which they have a high probability of winning a majority and an outcome they prefer); see also Krol & Brenner, *supra* note 26, at 335-37 (same).

74. See Container 615, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum, *U.S. v. Hill*, at 9-10).

75. See Container 573, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Centennial Savings Bank*).

76. See Container 548, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Goodyear Tire and Rubber*, at 18-19).

Indianapolis Power, the author wrote that "more than 150 cases involving more than \$300 million in potential tax liabilities" were implicated by the lower court decision;⁷⁷ in *Colonial American Life Insurance v. Commissioner*, the memo indicated that the dispute was significant given that it involved tax consequences of more than \$1.78 trillion in reinsured life insurance funds.⁷⁸ These claims are but a few examples found in the Blackmun papers highlighting the parties' continual focus on potential revenue costs to the Treasury. These examples—along with the law clerk's use of the numbers in advising the Court to grant or deny certiorari—suggest that a lower court's impact on the federal fisc is an important factor in the decision making process.⁷⁹

Of course, government allegations about the fiscal costs of a lower court decision do not make them a reality. Law clerks, in fact, did not always accept government claims about the financial implications of denying certiorari and often independently considered the problem. In *U.S. v. Dalm*, a case involving the doctrine of equitable recoupment and time-barred claims, the Solicitor General argued that the issue was recurring and for that reason could have a large impact on the fisc. The author of the memorandum questioned this claim on the grounds that the "doctrine of equitable recoupment arises only on rare occasions—when one party is able to use the statute of limitations to have it both ways—the government to collect two inconsistent taxes on the same money . . . or the taxpayer to pay no tax."⁸⁰ And as the law clerk noted it was not at all "clear how often this happens,"⁸¹ suggesting the fiscal costs of refusing to hear the case were not an independent reason for granting certiorari.

77. See Container 547, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (preliminary memorandum in *Commissioner v. Indianapolis Power*, at 9).

78. See Container 534, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (preliminary memorandum in *Colonial American Life Insurance v. Commissioner*, at 7).

79. See Stark, *supra* note 5, at 205-06 (quoting a brief by Solicitor General, and later Justice, Robert Jackson, implying the predictability of the effect on federal revenues is a proper consideration in the certiorari process).

80. See Container 551, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (preliminary memorandum in *U.S. v. Dalm*, at 9).

81. *Id.*

The monetary costs presented and analyzed in cases such as *Hill*, *Centennial Savings Bank*, *Goodyear Tire & Rubber*, *Indianapolis Power*, *Colonial American Life*, and *Dalm* raise the question of whether costs actually serve as a useful variable for understanding certiorari decisions. In both *Burke* and *Dalm*, the law clerks considered the fiscal costs to be minimal and yet they still suggested the Court hear the case based on the existence of a deep conflict—and in fact the Court did give the issues presented in the brief a full hearing on the merits.⁸² In other cases, the interaction between inter-court conflict and revenue costs worked in just the opposite way. In *Goodyear Tire & Rubber Co.*, the parties agreed no conflict existed—indeed, the author of the preliminary memorandum noted that a circuit court conflict would probably never emerge. The law clerk grounded this prediction on the grounds that the Court of Appeals for the Federal Circuit was the only court to consider the issue and it decided for the taxpayer. This fact combined with the fact that taxpayers all over the country have the right to file in the Court of Federal Claims (cases appealed to the Federal Circuit) meant that taxpayers with savvy counsel would never challenge an IRS deficiency notice in any trial court but the Court of Federal Claims. Notwithstanding the lack of conflict, the law clerk noted that the fiscal consequences of the Federal Circuit Court decisions were “enormous.”⁸³ This insight led the law clerk to recommend that the Justices “deny [certiorari] unless Treasury costs are an independent reason to grant.”⁸⁴ In fact, the Justices did undertake a plenary review in *Hill* notwithstanding the lack of conflict—suggesting that harmony and error on costly matters may be intolerable and thus sufficient for the Court to deem a case cert-worthy. Indeed, if the preliminary

82. See Container 597, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Burke* recommending the Court grant certiorari even though the case “is not too important” at least based on fiscal considerations); Container 551, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Dalm* indicating the law clerk had “reservations about the ‘importance’ of the issue,” but nevertheless recommended the Court grant the petition given the conflict among the appellate courts).

83. See Container 548, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing a preliminary memorandum in *U.S. v. Goodyear Tire & Rubber Co.*, at 18).

84. *Id.*

memoranda are a good indication of why the Justices grant certiorari in tax cases generally—then the files indicate that sixty-one percent of the cases decided between 1986 and 1993 involved potential massive revenue losses for the government.

The Blackmun papers highlight the law clerks' focus on inter-court conflict, the Solicitor General's arguments (in both the role of petitioner and respondent), and the fiscal costs involved in the case for purposes of recommending the Court grant or deny certiorari. The preliminary memoranda, however, gave little attention to the role of amicus curiae briefs but this may be due to the fact that few friends of the court actually filed briefs in the taxation cases I reviewed—only seven of the forty-one cases I examined included amicus briefs at the certiorari stage. Moreover, the law clerks gave scant attention to the question of whether or not the lower court decision was "right or wrong" and thus offered little insight into the ongoing debate concerning the role of outcomes and results in the Justices' decision to grant or deny certiorari in taxation cases. This reversal rate factor, however, may have a lesser role in tax cases than in other areas of the law. The percentage of cases in which the Court reverses a lower court on the merits overall is sixty-six percent,⁸⁵ but in the tax context this rate falls to forty-eight percent⁸⁶—suggesting the Court has a different cost/benefit analysis and a different motivation for grants of certiorari in unique areas of the law such as taxation. These possibilities—the fact that few amicus filed briefs in support or in opposition to certiorari and the fact that the Court does not reverse the majority of cases it hears in the tax context—as well as the new evidence uncovered in Justice Blackmun's files described above, all suggest exciting new avenues for scholarly research on agenda setting in the Supreme Court.

85. Computed from Harold Spaeth's Original United States Supreme Court Judicial Database, at <http://www.polisci.msu.edu/pljp/sctdata1.html> (last updated Dec. 11, 2003; last visited Oct. 11, 2004). The variable under analysis is "decision type."

86. This number is calculated from tax cases generally—the Supreme Court has decided 1007 tax cases since 1909 when it adopted the first modern income tax laws. See Nancy Staudt, Lee Epstein, & Peter Wiedenbeck, *Competing Models of Statutory Interpretation* (May 25, 2004) (unpublished manuscript on file with author).

III. FUTURE RESEARCH ON AGENDA SETTING IN THE SUPREME COURT

As noted above, my conclusions about cert-worthy cases must be qualified by the fact that my data set is small and because I reviewed only cases that the Court agreed to hear on the merits. To determine the full impact of the evidence uncovered in the Blackmun papers, I plan to review the full file—all the cases considered between 1970 and 1993 and examine every preliminary memorandum addressing the arguments for and against certiorari in tax cases. This more complete study will enable me to discern whether the factors I discussed above are important for understanding judicial decisions or whether no correlation exists between these variables and the cases the Court decides to hear on the merits. Beyond this more comprehensive study of certiorari, the Blackmun papers highlight a number of important new avenues for scholarly research.

A. *Normative Considerations for Granting or Denying Certiorari*

The normative scholarship on certiorari prioritizes conflict and to a lesser extent the commercial costs of not hearing a case. The preliminary memoranda in the Blackmun files suggest the Justices have directed their law clerks to investigate this matter and the law clerks, in turn, appear to work diligently to understand the true nature and the potential problems of any alleged inter-court decisional conflicts. In short, Justices appear to take conflict seriously in taxation controversies—as well as in virtually all other contexts.⁸⁷

The focus on commercial costs in the extant literature, however, is too narrow to encompass the range of concerns the Supreme Court appears to have when considering the disadvantages of not hearing a case in the tax context. The type of costs enumerated in the normative literature—the costs to both the litigants and the judicial system associated with uncertain legal rules—are associated with inter-court conflict. These are certainly relevant, but the Court also appears to be concerned with costs outside this limited definition of costs—fiscal costs to the U.S. government. The

87. See, e.g., Caldeira & Wright, *supra* note 13, at 1111-12.

preliminary memoranda suggest the Court believes it should grant a plenary review when fiscal costs are "enormous" even when a consensus on a legal issue exists in the lower courts and no conflict exists with Supreme Court precedent. This is a factor that scholars interested in certiorari have completely ignored but should theorize before reaching conclusions about the decision making process. For example, some scholars argue Supreme Court jurisdiction in tax controversies should be limited, in part due to the Justices' lack of expertise, and in part due to the fact that the Justices often fail to identify true conflicts in lower federal courts.⁸⁸ But if closing loopholes and protecting the fisc from extraordinary revenue losses is a useful judicial endeavor, then the legal errors and the lack of conflict may be negative aspects that are far outweighed by the fiscal benefits of a decision.⁸⁹

Of course, an unambiguous focus on revenue loss raises a host of additional questions for scholars with a normative bent. For example, should the judicial focus on tax costs be heightened in eras with massive deficits? Similarly, should the Court pay particular attention to this factor when economists predict economic downturns—times when the federal government is more likely to incur greater costs associated with unemployment, health, and welfare? At first glance, it may seem that the Court is not equipped to undertake these types of considerations and yet macroeconomic concerns are not new to the Court.⁹⁰ Many tax scholars argue that the outcome in *Cottage Savings v. Commissioner*, a 1991 case in which the Court considered loss deductions in the savings and loan context, makes sense only if we take into account judicial concerns for the possibility that the government was facing massive costs associated with the S&L crisis in the late 1980s. Congress appeared incapable of addressing the problem so the Court stepped in and allowed unprecedented loss deductions as a

88. See Wolfman, *supra* note 8, at 1093-94.

89. See Sturley, *supra* note 35, at 1275 ("concluding that sometimes resolving a conflict incorrectly may be better than permitting the conflict to stand.").

90. I investigate the questions above and other ideas in: Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *Competing Models of Statutory Interpretation* (May 25, 2004) (unpublished manuscript, on file with author).

means to offset an impending financial disaster.⁹¹ While *Cottage Savings* is an example of the Court expressing willingness to incur revenue costs through the allowance of loss deductions, presumably, the Justices reached the conclusion that these short-term costs were lower than the long-term costs the government would suffer with the vast number of S&L bankruptcies that seemed to be on the horizon.

Finally, the normative literature ignores a facet of litigation that both the published empirical studies, as well as the Blackmun files, suggest is important: the Solicitor General's important role in the Justices' decision to grant certiorari. On the one hand, the Solicitor General's repeat player status and his office's limited resources suggest he is in a good position to identify important cases and to pursue them into the Supreme Court—as both petitioner and respondent. On the other hand, scholars should question the propriety of giving deference to one party in the litigation; in giving deference, the Court begins to look biased against the taxpayer—never able to give a fair hearing to individuals (or entities) the government argues should contribute to the public fisc. In fact, this deference leads to an unusually high win rate for the federal government in the Supreme Court in all legal contexts, and this finding holds true for tax controversies as well, suggesting that the issue is ripe for theorizing from a normative perspective.

B. *Descriptive Considerations for Understanding the Decision to Grant or Deny Certiorari*

The empirical literature on certiorari provides useful insights into the decision making process, but the literature has several limitations that the Blackmun files highlight. First, empirical scholars tend to seek an understanding of judicial decision making generally and not in areas of unique issues. Second, even when authors do investigate

91. See WILLIAM A. KLEIN, ET AL., *FEDERAL INCOME TAXATION* 221 (13th ed. 2003) (implying that politics explains both the agency, FHLBB, and Court decision to allow the loss deduction). Interestingly, the file on *Cottage Savings v. Commissioner* in the Blackmun papers did not indicate the Court had this concern in mind either at the certiorari stage or when the Court issued the opinion on the merits. See Container 573, Justice Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (containing no explicit discussion of macroeconomic concerns when deciding the merits of the case).

specific issues areas, they focus on civil rights and ignore areas of the law that involve complicated business transactions. Business areas of the law, such as taxation, may involve distinctive facts and circumstances. Because of this, the existing statistical models devised for understanding certiorari may be incorrect. For example, one manifest omission in the extant literature is the failure to account for fiscal costs. The preliminary memoranda in the Blackmun files suggest that revenue losses are positively correlated with the Court's decision to grant a plenary hearing on the merits. Whether this factor indeed has independent significance—or is simply correlated with the Solicitor General's participation in the litigation—should be explored before we can fully understand certiorari decisions in tax cases. Moreover, as noted above, the Court may well consider fiscal costs as an important variable in determining which cases are cert-worthy, but only in particular eras (for example, when the deficit is high).

With regard to the parties involved in the litigation, the existing models assume the Solicitor General will advocate certiorari only as a petitioner but the preliminary memoranda make clear the government frequently supports a plenary hearing even when appearing as a respondent in the case. This suggests the Solicitor General's office engages in a strategy of seeking defensive denials (opposing certiorari when there is a high probability of losing on the merits) and aggressive grants (supporting certiorari when there is high probability of winning on the merits).⁹² While empiricists have investigated this possibility in the context of the Justices and their votes to grant or deny a full hearing, no one has considered this same strategy on the part of repeat players.⁹³ Not only would an investigation of this question expand our understanding of the certiorari process as well our ability to predict decision making on the part of all parties involved—but if the Solicitor General is in fact successful in predicting when the Court will support its legal position (whether as a petitioner or respondent), then we should also be able to successfully make this prediction

92. See Boucher & Segal, *supra* note 26, at 824-28 (describing strategies in the judicial context).

93. See *id.*

at the merits stage in tax cases—something few have tried to do.⁹⁴

Finally, the empirical scholars are very good at predicting outcomes based on ideology in the civil rights contexts but no one has attempted this same study in the taxation context. Indeed, for the most part, empiricists have eschewed business cases as fruitful arenas for understanding the role of politics and, equally problematic, legal scholars have failed to study systematically the role of judicial politics in the adjudication of business disputes. Nowhere is this failure more evident than in the taxation context and yet social scientists routinely point to the tax laws as the paradigmatic case of politics at work.⁹⁵ Given that politics are key for understanding House and Senate votes on tax legislation, it is highly unlikely that politics and ideology do not play a role in the judicial context as well—understanding that role is far overdue. Although students of political science often assume that Justices with a conservative bent will vote for the taxpayer and those with a liberal mindset will vote for the government, no serious studies have tested this proposition. Moreover, given the range of areas that individuals litigate, this assumption most likely does not hold true in all tax contexts—if it holds true at all. For example, a low-income individual seeking to take advantage of the earned income tax credit is probably a more sympathetic litigant to liberal Justices than to those with conservative politics. But these are the very questions that empiricists should seek to answer with court-generated data.

CONCLUSION

The Library of Congress recently opened Justice Blackmun's personal papers for public viewing. The papers

94. *But see* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. (2004) (using both a statistical model and experts to predict Supreme Court outcomes and finding that the model outperformed the experts).

95. *See generally*, RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973) (examining legislative activities and describing politics and strategies in six committees including the House Ways and Means Committee); *see also* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993) (investigating legislative tax politics).

are unique in that Justice Blackmun retained a number of documents pertaining to the certiorari decision that most other Justices discard. This data may offer exciting new insights into the Court's decision making procedures. For purposes of this essay, I reviewed forty-one case files on taxation disputes decided between 1986 and 1993. I found data suggesting that the Justices (and their law clerks) privilege inter-court conflict, the Solicitor General's support for certiorari, and the fiscal costs of *not* hearing a case when considering the arguments for and against plenary review. These findings are preliminary, given that I looked only to the cases the Court decided on the merits; further research is necessary for understanding fully how these factors impact judicial decisions. At this early stage of my research, however, the Blackmun files suggest that while the Justices detest tax cases, they are willing to put them on their discretionary docket in an effort to protect the federal budget. Moreover, this fact may undermine the calls for curtailing Supreme Court jurisdiction—it may take judicial intervention to save the budget from irresponsible public spending in the legislative context.

INDEX OF FEDERAL TAX CASES, 1986-1993 TERMS

1. *United States v. Carlton*, 512 U.S. 26 (1994).
2. *United States v. Irvine*, 511 U.S. 224 (1994).
3. *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152 (1993).
4. *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993).
5. *United States v. McDermott*, 507 U.S. 447 (1993).
6. *Bufferd v. Comm'r*, 506 U.S. 523 (1993).
7. *United States v. Hill*, 506 U.S. 546 (1993).
8. *Comm'r v. Soliman*, 506 U.S. 168 (1993).
9. *United States v. Thompson Ctr. Arms Co*, 504 U.S. 505 (1992).
10. *United States v. Burke*, 504 U.S. 229 (1992).
11. *INDOPCO v. Comm'r*, 503 U.S. 79 (1992).
12. *United States v. Smith*, 503 U.S. 47 (1992).
13. *Freytag v. Comm'r*, 501 U.S. 868 (1991).
14. *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554 (1991).
15. *United States v. Centennial Sav. Bank*, 499 U.S. 573 (1991).
16. *Cheek v. United States*, 498 U.S. 192 (1991).
17. *Portland Golf Club v. Comm'r*, 497 U.S. 154 (1990).
18. *Beiger v. IRS*, 496 U.S. 53 (1990).
19. *United States v. Energy Res. Co.*, 495 U.S. 545 (1990).
20. *Davis v. United States*, 495 U.S. 472 (1990).
21. *United States v. Dalm*, 494 U.S. 596 (1990).
22. *Comm'r v. Indianapolis Power & Light Co*, 493 U.S. 203 (1990).
23. *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989).
24. *United States v. Zolin*, 491 U.S. 554 (1989).
25. *Colonial Amer. Life Ins. Co. v. Comm'r*, 491 U.S. 244 (1989).
26. *Hernandez v. Comm'r*, 490 U.S. 680 (1989).
27. *Graham v. Comm'r*, 490 U.S. 680 (1989).
28. *Comm'r v. Clark*, 489 U.S. 726 (1989).
29. *United States v. Stuart*, 489 U.S. 353 (1989).

30. *South Carolina v. Baker*, 485 U.S. 505 (1988).*
31. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).
32. *Comm'r v. Bollinger*, 485 U.S. 340 (1988).
33. *Arkansas Best Corp. v. Comm'r*, 485 U.S. 212 (1988).
34. *Church of Scientology v. IRS*, 484 U.S. 9 (1987).
35. *Comm'r v. McCoy*, 484 U.S. 3 (1987).
36. *Comm'r v. Fink*, 483 U.S. 89 (1987).
37. *Comm'r v. Asphalt*, 482 U.S. 117 (1987).
38. *United States v. Gen. Dynamics Corp.*, 481 U.S. 239 (1987).
39. *Comm'r v. Groetzinger*, 480 U.S. 23 (1987).
40. *Wimberly v. Missouri*, 479 U.S. 511 (1987).**
41. *Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987).

* This case was in the Court's original jurisdiction and thus governed by Supreme Court Rule 17. Rule 17, however, does not mandate the Justices grant every motion for leave to file in the Court's original jurisdiction; the Justices in fact have denied many parties a plenary hearing seeking review under this rule. See Patrick T. Mottola, Note, *New Jersey v. New York*, 1185 S.Ct. 1726 (1998), 9 SETON HALL CONST. L.J. 1113, 1119-20 (1999) (noting the Court rarely hears cases in its original jurisdiction and summarizing the Justices' reasons for limiting the docket in this context). For this reason, I include *South Carolina v. Baker*, 485 U.S. 505 (1988), in this study.

** Although the United States is not a participant in this litigation, the case involves a judicial interpretation of federal unemployment taxes and for this reason I include it in my discussion here.