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# SURVEY

## The Elephant and the Four Blind Men: The Burger Court and Its Federal Tax Decisions\*

BEVERLY I. MORAN†  
AND DANIEL M. SCHNEIDER‡

*Four blind men went to see the elephant. The first felt the elephant's trunk and said: "The elephant is a snake." The second felt the elephant's body and said: "The elephant is a wall." The third felt the elephant's tail and said: "The elephant is a rope." The fourth felt the elephant's leg and said: "The elephant is a tree."*

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† Professor of Law, University of Wisconsin Law School.

‡ Professor of Law, Northern Illinois University College of Law.

The authors' names are listed in alphabetical order to confirm that this was a truly collaborative effort.

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## I. INTRODUCTION

### A. Overview

This Article examines the Burger Court and its federal tax decisions. We became interested in this project for three reasons. First, we were struck by the small body of literature on the Supreme Court and federal taxation. Second, as we reviewed the literature, we noted that most articles tended either to criticize the Court or to prescribe ways for the Court to apply various interpretive methods. Third, we discovered that the literature focused either on only a few select federal tax cases, a single Supreme Court term, or a single Supreme Court Justice. These three factors precipitated our interest to examine a significant number of Supreme Court federal tax opinions issued over an extensive period of time.

### B. What We Found

As shown below, much of our findings confirmed the conclusions and findings of other articles analyzing Supreme Court decision making. We observed four points, however, that either contradicted the findings of prior literature or added significantly to them. First, despite prior literature to the contrary, we found that federal tax issues were much more mainstream than previously claimed. Although other authors—including Supreme Court justices themselves—often assert that the Court generally dislikes tax-related cases, we demonstrate, in Part II of this article, the *Certiorari* section, that the Burger

Court in fact granted a fair number of tax petitions and that the Court's method for selecting tax-related cases was no different than its general case selection method.

Second, the *Certiorari* section also demonstrates that the Burger Court was quite sophisticated in granting petitions using the Court's power to select cases that played to one of its institutional strengths: the power of narrative. The use of narrative is one of the Court's strengths that is not shared by other institutions. One of the greatest challenges that lawmakers face—be they legislators, judges, or agency administrators—is how to convey complex information. Sometimes that information is best imparted through statutes and sometimes through administrative forms such as regulations and revenue rulings. In a complex statutory scheme like federal taxation, however, certain fundamental principles develop that are not easily conveyed through more stylized forms. Instead, just as cultures pass down their most important tenets through parables and myths, fundamental legal principles are similarly conveyed through judicial decisions—or a series of narratives. Our system of *stare decisis* leaves the bulk of this precedential process to courts as the institutions best suited to create narratives set around single themes. We found that the Burger Court maximized its expertise in this area by choosing a series of petitions on single themes such as insurance, accounting, and the tax benefit rule; this article emphasizes how the Burger Court's decisions in these areas help formulate the tax culture that drives the federal tax system.

We were pleased to find that our choice of method—reviewing a significant number of cases over an extensive period of time—painted a different, and we think more accurate, portrait of the Court's use of doctrine. For example, contrary to the findings of previous and less comprehensive studies, we found that the Burger Court employed the “plain language” doctrine much more than we expected and, conversely, employed the “nonliteral interpretations” much less than we expected. In addition, our method unlocks a central mystery about the Court's use of doctrine: we discovered that the Burger Court generally favored the Internal Revenue Service (“IRS” or “Agency”) in its actions while consistently claiming to favor Congress in its rhetoric. We consider this contradiction, between what the Court said and what the Court did, as an attempt to reconcile two competing interests. On the one hand, we believe that the Burger Court favored the IRS because it is less subject to political malfunction than Congress. On the other hand, the Burger Court's rhetorical deference to Congress at-

tempts to comply with our shared notions of taxation as a vehicle of democracy.

## C. Methodology & Structure

### 1. Methodology

#### a. Why the Burger Court

We selected the decisions of the Burger Court as the data set for our study for three reasons. First, the Burger Court covered seventeen years,<sup>1</sup> which was about as long a period of time as we wanted to survey. Second, the Burger Court is the most recently closed Court, which provides us the benefit of fairly recent opinions and a finite number of cases. Third, the Burger Court is the subject of several insider reports by journalists and social scientists, which have helped in shaping our ideas.

#### b. Which decisions

We limited the scope of our study to cases and opinions concerning income taxation, deductions, gift and estate taxation, business tax related issues, including corporate and partnership taxation, as well as cases concerning tax exempt organizations. We did not review cases concerning tax procedure, tax crimes, tax related constitutional issues (for example, standing), Indian tax cases, or state and local taxation. We emphasize that we had no ulterior motive in choosing the former topics. Indeed, we had no idea what we would find when our search was completed. We selected the former set of cases to match the literature's tendency to criticize the Court for lack of expertise or interest.<sup>2</sup> To test these criticisms, then, we concentrated on matters of concern to those with such interests and expertise: tax lawyers. We sought subjects and opinions that tax lawyers would likely read.

### 2. Structure

This article is divided into two major sections: petitions for writs of certiorari to the Burger Court and the Burger Court's federal tax opinions. We were interested in the certiorari-selection process for three reasons. First, some commentators have suggested that because of the small number of tax cases reviewed and decided by the

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1. Warren Burger was Chief Justice from 1969-1986.

2. See *infra* Part II.C.1.



Supreme Court each year, the Court is unable to make a meaningful contribution to the field of federal taxation.<sup>3</sup> As a result, we sought to compare the certiorari-selection process in tax-related issues to the certiorari process in general. Second, we were aware of the Court's limited resources and questioned whether the Court utilized them effectively in the tax area by granting certiorari judiciously. Third, certiorari is the front line of the Supreme Court process, and we wanted to examine that process closely.

We were interested in the Burger Court's federal tax opinions for two reasons. First, most of the works we reviewed took very definite positions about specific Supreme Court decisions, doctrines, or interpretive methods.<sup>4</sup> Second, we were interested to learn whether the Burger Court justices lacked federal tax expertise and, more important, whether the justices were attempting to accomplish a particular purpose, or were merely haphazardly and begrudgingly deciding cases they could not avoid.

a. The *Certiorari* Section

In the *Certiorari* section, we first review the general literature on the certiorari process, placing particular emphasis on insider studies of the Burger Court. Second, we compare the findings of these general studies to the area of federal taxation. In making our comparison, we espouse an approach never adopted before: we review all the certiorari petitions concerning tax-related issues filed during the Burger Court years—1217 petitions in total.<sup>5</sup> Thus, our comparison is based on the actual petitions that the Burger Court reviewed over a seventeen-year period.

Comparing the certiorari-acceptance record of the Burger Court concerning tax-related issues to the general certiorari process, we draw some fresh conclusions. We demonstrate, for example, that the Burger Court handled tax-related petitions for certiorari much like any other in the certiorari process. More important, we discovered that the Burger Court manipulated the certiorari process to return to certain tax-related issues over and over again, and we emphasize how

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3. See James B. Lewis, *Introduction to Note, Supreme Court Decisions in Taxation: 1979 Term*, 34 *TAX LAW.* 423 (1981).

4. See, e.g., Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 *N.C. L. REV.* 623 (1986) (suggesting methods for the Supreme Court to resolve questions of nonliteral interpretation); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 *U. CHI. L. REV.* 859 (1982) (book review).

5. See Appendices A, B.

this behavior actually plays to one of the Court's strengths: the Court's use of narrative to explain certain fundamental tax principles.

b. Opinions

The Opinions section has four parts: 1) Plain Language; 2) Legislative History; 3) Regulations; and 4) Deep Structure. This order travels from those opinions giving maximum deference to Congress, through those giving deference to the IRS, and finally to opinions resulting from an activist Court.

We focus on these areas for a number of reasons. First, the literature on taxation and the Supreme Court underscores these areas.<sup>6</sup> Second, these methods are a tax lawyer's major tools. Third, because each method assumes a certain type of deference to one or more institutions, reviewing these methods permits us to study the Burger Court's pattern of deferring to other institutions within the tax system.

We also focus on what the Court voices in its opinions and what the court is doing to determine whether the two correspond. Accordingly, each section contains a discussion of what the Burger Court said about particular methods—an analysis of what the court actually did over a number of criteria—and a contrast between what the interpretive method is meant to do and what it achieves. An essential part of this analysis requires a comparison between the roles of each of the government institutions involved in the development of federal tax law. For example, what role did the Court assign to Congress, the Treasury, and itself? Did the Court assume the preeminent role in making tax law, or did it defer to Congress or the Treasury? These questions and answers refine our analysis of the Burger Court and federal taxation.

c. Statistics

One of this Article's distinctions is that we examined a large number of cases decided over an extended period of time, covering the foundation of federal tax law. Consequently, each section offers statistics on, for example, the number of opinions reflecting each method, dissents, and government-taxpayer win-loss records.

With this introduction in mind, we turn to the *Certiorari* section of the Article.

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6. See, e.g., sources cited *infra* note 96.

## II. PETITIONS FOR WRIT OF CERTIORARI

### A. Introduction

Gate keeping is an important function of any institution's operation. Central to a discussion of the Burger Court's federal tax decisions is the Burger Court's process for selecting cases for review. Thus, we learn as much by examining cases that the Burger Court declined to review as by cases the Court accepted for review. Indeed, the Court's selection process is a manifestation of what cases the Court deems important and worthy of review, as well as what the Court views as its own strengths and weaknesses.

Because more information is available about certiorari in general than about its application in federal tax matters, we devote Part II.B. to a general discussion of the certiorari process. In Part II.C., we first survey what little information is available about the Burger Court and petitions to that Court for certiorari in federal tax matters. Next, we provide new information about the Burger Court, federal tax cases and certiorari from our review of all the federal tax petitions for certiorari presented to the Burger Court between the Terms running from 1969 through 1985. Finally, we compare our own findings to the speculations of others who have reviewed the Court and the certiorari process.

### B. The Certiorari Process in General

Clearly, the Court is faced with more petitions for writ of certiorari than it can possibly review.<sup>7</sup> As Professors Estreicher and Sexton have observed:

[M]any constituencies compete for the Court's limited appellate resources. Civil liberties advocates stress the importance of reviewing

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7. Chief Justice Burger's tenure ran from 1969 to 1986. During that time, the number of petitions presented each year grew from 4187 in the 1969 Term, 39 U.S.L.W. 3037 (July 14, 1970) (1969 statistics), to 5082 in the 1985 Term, 55 U.S.L.W. 3038 (July 29, 1986) (1985 statistics). Statistics available during the 1985 term indicate that 4410 of these 5082 cases were docketed during the 1985 term.

Other statistics tend to suggest growth as well. For example, statistics compiled by the *Harvard Law Review* indicate that in 1969, 2880 petitions for certiorari were denied or dismissed. Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 248 Table I (1970). Of these dispositions, 1121 were on the appellate docket and 1759 were on the miscellaneous docket. While 4202 applications for review were filed during that term, *id.* at 254 n.9, no comparable statistics exist for the 1985 Term. In the 1985 Term, the number denied had risen to 3999. Note, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 308 Table II (1986). Of these dispositions, 1863 were on the appellate docket and 2136 were on the miscellaneous docket. In these same years, opinions issued grew from 112 to 172. *See id.*

decisions rejecting claims of individual liberty. Government lawyers emphasize the need for Supreme Court review of rulings interfering with the workings of the modern regulatory state. Corporate counsel contend that all decisions imposing substantial regulatory costs on the private sector or thwarting significant commercial enterprise merit the Court's attention. Others bemoan the Court's reluctance to seize a particular vehicle for doctrinal clarification or expansion. From each quarter, for different reasons, we hear that the Court is not taking cases that it should be hearing—or that it is deciding cases, drawn from other sectors, that it need not have heard.<sup>8</sup>

Given the many demands on the Court's limited resources, how does the Court choose more than a hundred cases from the thousands of petitions it receives each year? There is both an official and an unofficial answer to this question.

### 1. Selecting cases for decision—the official story

Since the enactment of the Judiciary Act of 1925, the Supreme Court has relied on the certiorari process to manage its docket.<sup>9</sup> During this period, the Court has developed official rules concerning the certiorari process.<sup>10</sup> For example, Rule 10 of the Supreme Court Rules, which sets forth what the Court will consider in granting certiorari, provides:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The

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8. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* 41 (1986) (footnotes omitted).

9. Judiciary Act of 1925, ch. 229, 43 Stat. 936, 937 (1925). Since 1988, appeals have ceased being an avenue to the Court. Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified as amended at 28 U.S.C. § 1257 (1988)).

The Court actually has enjoyed five types of jurisdiction: original, appellate, certiorari, certification, and extraordinary writs. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT*, at ch. 2 (1991). Perry devotes much of his book to the October 1976 through October 1980 Terms, *id.* at 9, during which time approximately 20% to 25% of the cases reached the Supreme Court by appeal as of right. *Id.* at 25. A majority of the remainder of the cases reached the Supreme Court by petitions for writ of certiorari. *Id.* at 27.

For analyses of recent changes, see Robert L. Stern, *Remedies for Appellate Overloads: The Ultimate Solution*, 72 *JUDICATURE* 103 (1988); Robert L. Stern et al., *Epitaph for Mandatory Jurisdiction*, A.B.A. J., Dec. 1, 1988, at 66. The Supreme Court's jurisdiction over appeals as of right is set forth at 28 U.S.C. §§ 1253, 1257 (1988 & Supp. IV 1992).

10. For example, Supreme Court rules require a petition for a writ of certiorari to be filed within 90 days of the final judgment below. See SUP. CT. R. 13.1. The petition may not exceed 30 pages, and the first page of the petition must state the questions presented. See SUP. CT. R. 14.4.

following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same 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 power of supervision.<sup>11</sup>

Thus, in the official story, conflicts between the circuits take on primary importance. Beyond this explicit rule, however, lies the unofficial story of the best route to the Supreme Court.

## 2. Selecting cases for decision—beyond the Supreme Court's official rules

While the official certiorari process focuses on splits in the circuits, the unofficial story reveals that the Court considers other factors as well. As Chief Justice Vinson noted in 1949:

The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgmts [sic]." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. . . . To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. *Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are*

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11. See generally PERRY, *supra* note 9, at ch. 2 (discussing explicit jurisdiction of and procedure for petitioning the Supreme Court for writ of certiorari); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, at ch. 6 (7th ed. 1993) (same).

based the plans, hopes, and aspirations of a great many people throughout the country.<sup>12</sup>

Thus, the unofficial certiorari story is far more complex, richer and more difficult to detail than a focus on splits among the circuits alone would reveal. In fact, we selected the Burger Court as the data set for our study because of, among other things, the various studies that had compiled information about the Burger Court's unofficial certiorari process. Much of this information derives from a study conducted by Professor Perry, who had access to sixty-one Supreme Court law clerks and five justices during the Burger Court years, and whose work—along with Stern, Gressman, Shapiro, and Geller<sup>13</sup>—provides much of the material for subsection II.B. of this Article.<sup>14</sup> While Professor Perry's study disclosed a great deal of information about the Supreme Court's certiorari process<sup>15</sup> and use of the "cert pool"<sup>16</sup> in

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12. The Hon. Fred M. Vinson, *Work of the Federal Courts*, Address Before the American Bar Association (September 7, 1949), in 69 S. Ct. vi (1949) (emphasis added).

13. See STERN ET AL., *supra* note 11.

14. See PERRY, *supra* note 9, at 17-20 (discussing methodology of book). One of the especial benefits of Perry's book is his extensive reliance on interviews he held with justices and law clerks. Although these informants are largely anonymous, Perry still provides a wealth of information. See *id.* His study also is focused on the Burger Court, specifically the October 1976 through the October 1980 Terms. See *id.* at 9. For other sources and studies examining the Supreme Court's case selection process, see *id.* at 7 n.10.

15. For example, while every petition for a writ of certiorari must be reviewed, justices have suggested that well over half of the cases are not meritorious. PERRY, *supra* note 9, at 34-36. Perry relates, for example, that "Justice Harlan . . . argued . . . 'that more than one-half [of the certiorari petitions to the Supreme Court] were so untenable that they never should have been filed,'" *id.* at 35 (citation omitted); that Chief Justice Vinson contended that "[w]hile a great many of the 85% [of the certiorari petitions] that were denied were far from frivolous, far too many reveal a serious misconception on the part of counsel concerning the role of the Supreme Court in our federal system," *id.* at 36 (citation omitted); and that in 1937 Chief Justice Hughes suggested that 60 percent of the certiorari petitions are meritless, while approximately 20 percent "have a fair degree of plausibility, but which fail to survive a critical examination," and another 20 percent merit review. *Id.* at 34-35 (citation omitted).

Of these meritorious cases, only four percent of the petitions for certiorari are accepted. See STERN ET AL., *supra* note 11, at 164.

A justice may examine a pool memorandum, rely on his or her clerks, or make the decision himself or herself, as did Justice Brennan (based solely on his reading of the questions presented). See William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973). Regardless of the method chosen, however, each justice must vote to decide whether a certiorari petition should be granted. Any justice could, although only the Chief Justice usually would, place a seemingly worthy case on the "discuss list." The case would be discussed at the justices' next conference, and, if at least four justices voted to grant certiorari, certiorari would be granted. See generally PERRY, *supra* note 9, at 43-50 (describing the "discuss list," conference and petition review processes).

16. Until recently, each justice reviewed each petition for writ of certiorari either directly, or at least initially, perhaps, through a clerk. Chief Justice Burger became concerned about the Court's excessive amount of work and created the "cert pool." BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 323 (1979). By the time of Justice Kennedy's appointment during the stewardship of Chief Justice Rehnquist, six justices—Chief Justice Rehnquist, and Justices

general, more interesting is the unofficial standards the Court applied in granting petitions. Professor Perry identifies these as:

- Timing
- Best vehicle
- Social importance
- Split between the circuits
- Ability to win on the merits
- Solicitor General's petitions

a. Timing

Because the Supreme Court is the final arbiter of issues before it, Perry asserts that a single conflict between two circuits is often not enough to warrant review by the Supreme Court. The Burger Court generally bears out this assertion, as the justices sought to ensure that an appropriate number of lower and circuit courts had addressed an issue so that the Supreme Court would have the benefit of a full and fair presentation of every facet of a dispute. Thus, the justices sometimes declined consideration of important questions until a later date when a similar, but more seasoned, issue emerged.<sup>17</sup>

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White, Blackmun, O'Connor, Scalia and Kennedy—used the pool. See PERRY, *supra* note 9, at 42. Of those other justices who sat on the Burger Court, Chief Justice Burger, of course, used the pool, as did Powell; Justices Douglas, Stewart, Stevens, and Marshall did not. As noted, Brennan, *supra* note 15, at 477, Justice Brennan not only refused to use the pool; he did not use his clerks to review petitions. *Id.*; WOODWARD & ARMSTRONG, *supra*, at 323-24.

The theoretical efficiency of having one justice, or one justice's clerk, review each petition for certiorari may not have translated into any actual efficiency. See PERRY, *supra* note 9, at 51-60.

17. Part of this question is whether the case has "percolated" long enough so that a decision carrying the Court's finality should now be reached. See PERRY, *supra* note 9, at 230-34; see also STERN ET AL., *supra* note 11, at 170-71 ("The Court has implied as much by referring repeatedly in its opinions to the fact that certiorari was 'granted to resolve the conflict on this important question,' or 'because of the importance of the question presented and the conflict of opinion on the constitutional issue involved,' . . . because of a conflict 'and the need for a uniform rule on the point.'").

According to Perry, the frequency with which circuit courts have addressed an issue—for example, five circuits as opposed to two or three circuits, suggests the timeliness of a case. See PERRY, *supra* note 9, at 230-34. Similarly, a case might not have yet ripened or may be moot. Even though the case is important, it may not have reached a final enough stage to merit consideration. See STERN ET AL., *supra* note 9, at 173; see also PERRY, *supra* note 9, at 106-12 (asserting that a case may be "digged"—i.e., dismissed after the Court has accepted it for review—because of problems, unidentified at the certiorari stage, that emerge later, such as when it appears that the constitutional issue for which certiorari was granted cannot in fact be reached). Similarly, even if a "sufficient" number of circuits have examined the issue at hand, if the issue has been settled, the Court has less reason to review the case. See *id.* at 249-50; STERN ET AL., *supra* note 11, at 172.

## b. Best vehicle

The “best vehicle” method focuses on how well a particular case presents the underlying issue. For example, the method focuses on whether the facts of a particular case are “messy,” complicated, or so specific that they will draw the Court into deciding an individual case rather than providing an opportunity for the Court to make a broader statement.<sup>18</sup> A successful argument against granting a petition is that another petition in the “pipeline” will provide the Court a better opportunity to address a broader issue.<sup>19</sup>

## c. Social importance

Whether a matter is important to the Court as an institution is another reason for granting a petition for a writ of certiorari. Such “institutionally” important cases present major questions of the day of broad social significance. For example, the Court presumably was compelled to take cases on desegregating public schools in *Brown v. Board of Education*,<sup>20</sup> on abortion in *Roe v. Wade*,<sup>21</sup> and on reverse discrimination in *Regents of the University of California v. Bakke*.<sup>22</sup> These cases presented issues that were socially important and, therefore, were institutionally important.

## d. Split among the circuits

While a split among the circuits is one of the criteria expressly listed in Supreme Court Rule 10,<sup>23</sup> a mere split, without more, may be insufficient to justify review.<sup>24</sup> Rather, a conflict between circuits suggests the presence of additional criteria, such as the importance of the question raised.<sup>25</sup> In addition, at least according to Professor Perry, the Court’s desire for timeliness suggests that a conflict among a greater number of circuits (for example, four circuits) is more “timely” than a conflict among fewer circuits (for example, two circuits) and thus more likely to be granted and, furthermore, that a peti-

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18. PERRY, *supra* note 9, at 234-35.

19. *Id.* at 238-39.

20. *Brown v. Board of Educ.*, 349 U.S. 294 (1954).

21. *Roe v. Wade*, 410 U.S. 113 (1973).

22. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

23. *See supra* Section II.B.1.

24. Compare PERRY, *supra* note 9, at 127 (“[O]ne of the most important things to all the justices [in granting certiorari] is when there is a split in the circuits.”) and *id.* at 246-52 (conflict among the circuits is “the single most important generalizable factor”) with STERN ET AL., *supra* note 11, at 168-73 (asserting that conflict among the circuits is not determinative).

25. *See* PERRY, *supra* note 9, at 246-52; STERN ET AL., *supra* note 11, at 168-73.



tion involving an important question as well as a split among circuits is more likely to be granted.<sup>26</sup>

e. The merits of the decision below

In some ways, a justice's vote to grant a petition represents his opinion on the merits of the lower court's decision. As one Justice stated, " 'Generally, when people vote to grant, they feel that it is because [the decision below] is wrongly decided.' "<sup>27</sup> Thus, the Court is more likely to spend its time " 'correcting' rather than affirming,"<sup>28</sup> because " 'no [justice] feels the obligation to correct something that has been correctly decided.' "<sup>29</sup>

f. Solicitor General's petitions

As noted by Perry and others, the Solicitor General<sup>30</sup> is much more successful than private litigants in having his petitions granted.<sup>31</sup>

C. The *Certiorari* Process and Federal Tax Cases

In this section we first review what commentators and Supreme Court justices have expressed about the Court's general attitude towards federal tax cases. Essentially what emerges is a view of Court antipathy to tax-related matters. This antipathy, some commentators assert, has resulted in the Court's failure to accept an optimal number of federal tax petitions for review.<sup>32</sup> Next, we offer insights culled

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26. See PERRY, *supra* note 9, at 246-48.

27. *Id.* at 270 (quoting interview statement of unidentified justice); see *id.* at 269 (recording the opinion of one justice that while it is " 'not uncommon' " for the merits of a case to go unconsidered in granting certiorari, " 'you will hear [another justice] say that "the Ninth Circuit is dead wrong in this case; I'll vote to grant.' " (quoting interview statement of unidentified justice)).

28. *Id.*

29. *Id.* at 269 (quoting interview statement of unidentified justice). See generally *id.* at 268-70 (illustrating votes on petitions for certiorari as votes on merits).

30. The Solicitor General is, as has sometimes been said, the "tenth justice." Each private litigant has only her own grievance; the Solicitor General must satisfy the government. Most petitioners are unlikely to return to the Court; the government will always be back. Thus, the Solicitor General has a vested interest in putting forth the cases he thinks are most noteworthy, as well as those that assure him the greatest likelihood of winning. See LINCOLN CHAPLAIN, THE TENTH JUSTICE 3 (1987) ("The Solicitor General's principal task is to represent the Executive Branch of the government in the Supreme Court.")

31. See PERRY, *supra* note 9, at 93 (examining what petitions are put onto the Court's conference discussion list and noting that "[c]ases petitioned by the solicitor general are effectively assured a place on the list"); Lewis, *supra* note 3, at 427.

32. See Lewis, *supra* note 3, at 426-31 (noting that the Solicitor General was less successful in petitioning federal tax cases than in other areas and attributing lack of success to Supreme Court's declining interest in federal tax cases).

from our review of every tax-related petition for certiorari presented to the Burger Court. Finally, we compare our own observations to those of other authors and conclude that, in general, the Court did not create a higher standard for tax cases. Rather, we found that the Court selected and rejected tax-related cases in much the same way it accepted and rejected non tax-related cases.

## 1. Impressions

A review of the small pool of literature available leaves the distinct impression that the Court loathes tax cases and, indeed, avoids them whenever possible. Even Justice Douglas observed that:

This Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are (1) that the field has become increasingly technical and complicated due to the expansions of the Code and the proliferation of decisions, and (2) that we seldom see enough of them to develop any expertise in the area. Indeed, we are called upon mostly to resolve conflicts between the circuits which more providently should go to the standing committee of the Congress for resolution.<sup>33</sup>

Woodward and Armstrong supported Justice Douglas's observations when they maintained that Justice Burger assigned tax-related cases to Associate justices as a form of punishment, noting that Justice Blackmun "felt that he had suffered under . . . Chief [Justice Burger, including] receiving . . . more than his share of tax . . . cases"<sup>34</sup> and that Justice Rehnquist was assigned a tax case as punishment for a Christmas skit.<sup>35</sup>

In a more academic vein, Professor Perry also notes the Court's distaste for tax matters when he asserts that:

There are special tax courts in the United States, and tax cases are usually extraordinarily complex. Several justices have come to believe that tax cases generally are not worth the Court's time or effort, and that it is better to leave the questions to the specialized tax courts. All justices do not agree, but an overwhelming number of

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33. *Commissioner v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J., dissenting).

34. WOODWARD & ARMSTRONG, *supra* note 16, at 224. This book documents the first seven terms of the Burger Court.

35. *Id.* at 489-90; see also Erik M. Jensen, *Of Crud and Dogs: An Updated Collection of Quotations in Support of the Proposition that the Supreme Court Does Not Devote the Greatest Care and Attention to Our Exciting Area of the Law; or Something the Tax Notes Editors Might Use to Fill Up a Little Space in That Odd Week When Calvin Johnson Has Nothing to Print*, 58 TAX NOTES 1257 (1993) (another sample of Supreme Court's perceived distaste for tax matters).

the clerks I interviewed did. They hated tax cases, even those who worked for justices who liked tax cases. . . . One justice, assessed it this way: . . . “I don’t mind working on tax cases, but I certainly don’t go out and look for them. We have enough to do, although I am impressed with their importance in the federal area.” This justice, however, was out of sync with most of his brethren who felt that tax issues were generally unimportant.<sup>36</sup>

These negative perceptions and his own observations led another Court observer to assert that: “The conclusion that the court has become more reluctant to accept substantive federal tax cases is inescapable.”<sup>37</sup>

## 2. Empirical evidence

Based on the statements chronicled above, one might expect that, generally, the Burger Court would deny *certiorari* to tax-related cases. Yet the Court decides federal tax cases each year. This, therefore, leads to the question of whether—assuming that the Court was not evading tax-related issues—the Court was giving the area less than its fair return? To answer this question we reviewed all the petitions for *certiorari* concerning federal tax issues from 1969 to 1985, the span of the Burger Court.<sup>38</sup> Comparing what we found when we examined only tax cases to what others discovered in their general reviews of the Court’s *certiorari* process, we observe that, in some ways, the Burger Court treated tax cases much like any other case; but in other ways, there are some significant differences.

### a. Similarities between tax and other areas

#### (1) Gate keeping

As noted by Justice Vinson, Professor Perry, and Stern, Gressman, Shapiro, and Geller, the justices view the *certiorari* process as a

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36. PERRY, *supra* note 9, at 229-30.

37. Lewis, *supra* note 3, at 430.

38. We counted 1217 petitions in federal tax cases that were filed during this time. To expedite our research, we divided the petitions into eight categories of our own choosing: business tax, constitutional law, deductions, estate planning, exempt organizations, income, procedure, and tax crimes. The petitions are summarized by numbers, category, and term in Appendix A. We were more selective in choosing opinions to review in greater detail, guided by what we believed would be the areas of greatest significance to general tax practitioners and, as it turned out, areas of law least driven by cases tied to specific facts. Thus, we eliminated decisions pertaining to taxes and constitutional law, procedure, and crimes. The remaining five areas produced 46 decisions. These decisions, including who petitioned, who won, and whether the case involved a split among the circuits, are listed in Appendix C.

way of uncovering questions of broad significance beyond each matter's relevance to the parties involved.<sup>39</sup> Given this standard, at least one-half of the tax petitions we reviewed were inconsequential either because the facts were too specific or the question raised was too narrow.<sup>40</sup> As expected from the general literature, our review of all the Burger Court's tax petitions demonstrates that these "inconsequential" petitions were never accepted.<sup>41</sup>

## (2) Ability to win on the merits

In the general literature we find the assertion that the justices are more inclined to overturn than affirm;<sup>42</sup> consequently, petitioning parties should win more often than lose. This was at least marginally true in the Burger Court's tax decisions. In accord with a predilection to overturn, the party challenging the decision below won the Burger Court's approval in sixty-one percent of all accepted tax matter petitions.<sup>43</sup> When it was the government that challenged the decision below, its success rate increased to seventy-three percent.<sup>44</sup> Even taxpayers (generally notable losers before the Court, as we shall see below) won almost as much as they lost when they were the petitioners. The petitioning parties' success rate shows that winning on the merits was as important in the tax area as it was overall.<sup>45</sup>

## (3) Best vehicle and timing

Whether a petition presents the "best vehicle" at the "proper time" is the most subjective part of the certiorari process and, thus, the hardest to quantify. Nevertheless, we were determined to evaluate the Burger Court's use of these criteria, if at all, in selecting its tax docket. To uncover this information, we reviewed all the tax petitions for certiorari during the Burger years. Using a subset of these peti-

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39. See *supra* notes 12, 17-19 and accompanying text.

40. For example, many of the petitions from criminal convictions are so entwined with specific facts as to be meaningless for Supreme Court review. The Court may fashion justice in a particular case, but it cannot easily establish a broad principle of general import. The same is true of the many petitions questioning the constitutionality of the federal income tax or petitions involving procedure cases concerned with whether procedural safeguards were afforded the taxpayer at trial or whether the appellate court exceeded the proper scope of its review. See *supra* notes 15, 38.

41. See *infra* notes 47-62 and accompanying text.

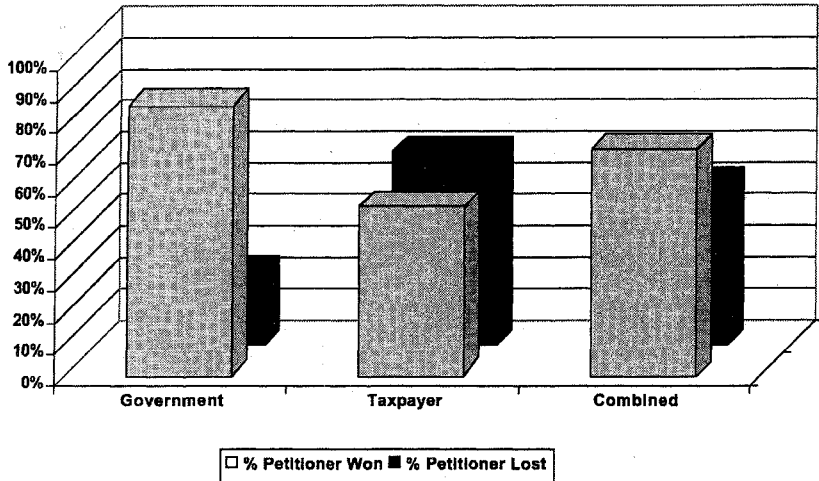
42. See *supra* notes 27-29 and accompanying text.

43. See Appendix B.

44. *Id.*

45. Taxpayers won 41% of the cases they petitioned. See Appendix B. For discussion of taxpayers' losses, see *infra* notes 63-67 and accompanying text.

### Petitioner's Success on Merits By Percentage



tions, we demonstrate that the Burger Court did seek, and find, “best vehicles” in the tax area, as much as it did in non-tax areas.

#### a) Selecting a substantive area

As discussed above, finding the “best vehicle” is essentially reduced to determining whether a specific petition is supported by either a “clean” record or “clean” facts that highlight and refine the underlying question presented. In contrast, “timing” tends to focus on whether the question presented in the petition for certiorari has percolated enough in the lower courts to ensure vigorous advocacy on all sides of the issue. Accordingly, our first step in evaluating “best vehicle” and “timing” in the tax area was to select a group of petitions that involved similar issues and to analyze why the Court selected one petition over another. We did this by applying the criteria discussed in Part II.B. To illustrate our approach, we now focus on two sub-categories within the business tax area: (1) organizations/reorganizations/separations; and (2) redemptions.<sup>46</sup>

46. We grouped the 79 business tax petitions into 15 areas suggested to us by the material. Those groups, and the number of petitions in each, are: corporate organizations/reorganizations and separations (12), dividends or capital gain (12), liquidations (10), related corporations (8), partnership formations or distributions (7), redemptions (7), assignment of income (4), S corporations (4), penalty taxes (4), capital expenditures (3), foreign tax (2), tax benefit rule (2), what is a corporation (2), cooperatives (1), and debt-equity (1). To see whether we were able to elimi-

## b) Organizations/reorganizations/separations

Of twelve petitions concerning corporate organizations, reorganizations and separations, the Burger Court selected only one petition for review: *Paulsen v. Commissioner*.<sup>47</sup> *Paulsen* was an attractive case for a number of reasons. First, it enabled the Court to return to a topic it had examined before.<sup>48</sup> Second, given the complexity of the issues, *Paulsen's* facts were fairly clear and straightforward; therefore, the Court could use its decision to develop broad principles. Finally, *Paulsen* concerned mergers within the savings and loan industry at a time when such transactions were occurring at an increasing rate. The *Paulsen* petition thus provided the Burger Court an opportunity to establish legal guidelines for both taxpayers and the government in a particularly active and significant economic sector. For all these reasons, *Paulsen* was a clear candidate for the "best vehicle" within the reorganization sub-group.

Of the remaining eleven petitions, two were discarded from the cert pool when the petitioners withdrew their petitions.<sup>49</sup> Two other petitions raised important issues but may have failed the "timing" test—the Court eventually did address the questions raised in later, and presumably more seasoned, disputes.<sup>50</sup> Five more petitions concerned matters that were either inherently factual or were no longer important by the time they reached the Supreme Court.<sup>51</sup> The re-

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nate cases for obvious reasons, we examined the organizations/reorganizations/separations and redemptions areas in greater detail, as both areas contained a case that had been decided by the Burger Court.

47. *Paulsen v. Commissioner*, 469 U.S. 131 (1985).

48. The issue concerned corporate reorganization rules and whether a shareholder in a merged corporation maintained enough of his investment in the new corporation to avoid a tax on his exchange of the old shares for stock in the new corporation. The Supreme Court had addressed questions concerning continued investment in corporate reorganizations in such prior decisions as *LeTulle v. Scofield*, 308 U.S. 415 (1940); *Helvering v. Minnesota Tea Co.*, 296 U.S. 378 (1935); and *John A. Nelson Co. v. Helvering*, 296 U.S. 374 (1935).

49. *Heverly v. Commissioner*, 451 U.S. 1012 (1981); *Chapman v. Commissioner*, 451 U.S. 1012 (1981). Settlement of the cases is noted in Margaret C. Henry, *The Impact of Reeves v. Comm'r on the Creeping Control "B" Reorganization: The Need for Legislative Reexamination of Section 368(a)(1)(B)*, 10 J. CORP. TAX'N 195, 199 (1983).

50. One case, *Home Sav. & Loan v. Commissioner*, 423 U.S. 1015 (1975), involved an issue similar to *Paulsen* but was petitioned several years before *Paulsen*. Another addressed whether cash received in a reorganization should be taxed as a dividend or as capital gain. *Shimberg v. United States*, 439 U.S. 1115 (1979). That issue was subsequently reviewed by the Rehnquist Court. *Commissioner v. Clark*, 489 U.S. 726 (1989). Arguably, neither *Home Savings* nor *Shimberg* had ripened, and thus the petitions were denied.

51. Two petitions concerned liquidation-reincorporations: *Schaffan v. Commissioner*, 449 U.S. 836 (1980) and *Cresta Corp. v. Commissioner*, 400 U.S. 1008 (1971). Different tax consequences flow from whether a corporation liquidates and reincorporates, as shareholders would often argue, or has engaged in a reorganization, as the Internal Revenue Service would often

maining three petitions concerned corporate separations, and each was an important case in the field.<sup>52</sup> The justices might have passed on these three petitions, however, for any number of reasons.

First, any one of the three petitions afforded the Court the opportunity to weigh in on substantive changes made to Section 355 in 1954, thereby allowing the justices to exert their influence over the taxation of corporate separations.<sup>53</sup> Yet each of the petitions raised extremely technical questions that the justices may have felt were beyond their expertise.<sup>54</sup> Furthermore, the nature of Section 355 and questions surrounding corporate separations are not easily answered by deciding any individual controversy; to make its mark, the Court might have had to grant a number of petitions over several years. Finally the Warren Court had reviewed a Section 355 case at the end of Chief Justice Warren's tenure.<sup>55</sup> Thus, because the Warren Court only recently had decided a case in this area, and because the Court may have needed several decisions to effectively interpret the scope and meaning of Section 355, timing considerations may have argued for waiting until other—perhaps more seasoned—petitions emerged. Unfortunately, however, no such cases were petitioned during the Burger Court years.

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suggest. See BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶12.64 (6th ed. 1994); DANIEL M. SCHNEIDER & PAUL E. HOELSCHEN, JR., *FEDERAL TAX ASPECTS OF CORPORATE REORGANIZATIONS* §§ 17.02-.05 (1988). The tension about the character of the event predates enactment of the 1954 Internal Revenue Code. See BITTKER & EUSTICE, *supra*, ¶12.64[2][a]-[b]. Therefore, little would be gained if the Burger Court had reviewed this conflict.

Two petitions dealt with shareholders' loss of control over a corporation, *Stephens v. United States*, 409 U.S. 1118 (1973) and *Stanley v. Schuster*, 400 U.S. 822 (1970). Control, a term defined by I.R.C. § 368(c), dates back to 1924 and is used in a variety of corporate tax statutes. See SCHNEIDER & HOELSCHEN, *supra*, § 4.06. Thus, little purpose would be served if the Burger Court had looked at this topic either.

In the fifth case, *Lorch v. Commissioner*, 444 U.S. 1076 (1980), the question was whether expenses were deductible or had occurred pursuant to a reorganization, a characterization of the event which would have precluded the taxpayers' deducting the expenses. Again, the factual nature of the issue minimized the case's benefit to the Burger Court.

52. See *Redding v. Commissioner*, 450 U.S. 913 (1981) (presenting question of whether transfer of warrants qualify as stock for purposes of § 355); *Rafferty v. Commissioner*, 408 U.S. 922 (1972) (presenting question of whether transaction failed to qualify under § 355 because it was a "device"); and *Gordon v. Commissioner*, 400 U.S. 848 (1970) (presenting question of the primacy of § 355 in regulating corporate separations).

53. See *supra* notes 47-48.

54. See *supra* note 33 and accompanying text.

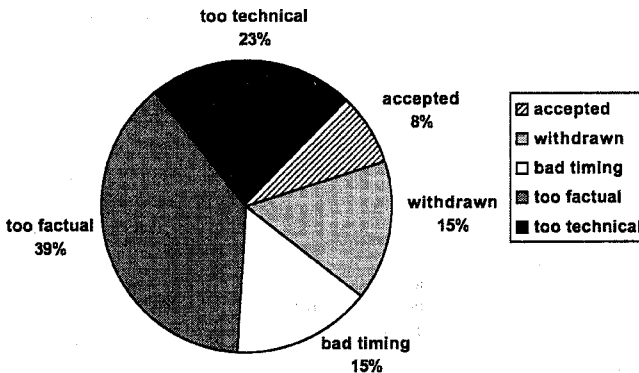
55. *Commissioner v. Gordon*, 391 U.S. 83 (1968). The later *Gordon* case, 400 U.S. 848 (1970), in which the petition for certiorari was denied, was actually a further proceeding in the 1968 Supreme Court case.

We cannot fully explain why the Court rejected the three corporate separation petitions, especially given that each raised important questions about Section 355. We contend, however, that a combination of timing and a sense that the Court was not institutionally equipped to handle the extremely technical tax matters involved swayed the justices more than any desire to influence the area.

Regardless of the Court's rationale for refusing to grant these three petitions, we have arrived at the Court's choice of one of four viable petitions rather than the original twelve. This winnowing down from the inconsequential cases (petitioned issues that have no potential for making broad statements on the issue) to the questionable cases (petitions that have some merit but may not be the "best vehicle" to address the issue) and finally the selected cases (in this data set *Paulsen*) mirrors what others observe in the general certiorari process. That is, that in the federal tax area, as in other substantive areas, the Burger Court looked for a "best vehicle" in selecting its docket.

**Corporate Organizations, etc.-**

Reasons for Certiorari Decision



c) Redemptions

We repeated our winnowing away experiment with redemptions. Here the question ordinarily is whether a taxpayer receives income from her corporation as a shareholder and thus must pay the higher ordinary income tax on dividends, or whether she is "cashing out" her investment by selling shares back to the corporation, an act that mer-



its the lower capital gains tax rates.<sup>56</sup> Over the course of the Burger Court years, the Court had seven opportunities to address this question but accepted only one redemption petition: *United States v. Davis*.<sup>57</sup>

The *Davis* petition was a “best vehicle” because it raised several important issues never before addressed by the Supreme Court and was supported by very clean facts.<sup>58</sup> In other words, the important and significant issues presented in the petition allowed the Burger Court to step in once, make a substantial impact, and establish broad rules to be (and that were) applied to a variety of other fact situations.<sup>59</sup>

Because *Davis* allowed the Court to reach so many important attribution issues in one decision, it had no reason to consider the next petition that raised these issues.<sup>60</sup> Rejecting that petition consequently reduced the Court’s possible choices from a total of seven petitions to five petitions with one granted and the remaining petition raising too many of the same issues as the granted petition to be a “best vehicle.”

Four other petitions concerned the interpretation of “meaningful reduction” in a shareholder’s stock, an issue whose broad dimensions had already been sketched by *Davis*.<sup>61</sup> Thus, these petitions were now too specific to merit additional attention. The final petition addressed too narrow a question, examining the overlap of Section 302 (gov-

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56. Compare I.R.C. § 1 (1988 & Supp. IV 1992) (tax rates on ordinary income) with I.R.C. § 1202 (1986) (before repeal in 1986) (deduction for capital gain, which led to lower tax rate).

57. *United States v. Davis*, 397 U.S. 301 (1970).

58. For example, one especially important issue in *Davis* was a new rule concerning attribution of stock ownership between related parties that was intended to make it more difficult for taxpayers to gain benefits by distributing their stock ownership over a larger range of people, all of whom were related to the taxpayer and presumably under the taxpayer’s influence or control. See I.R.C. § 318 (1988 & Supp. IV 1992).

Both §§ 318 and 302(b)(1) had been enacted in 1954. Although § 302(b)(1) incorporated language used before 1954, the same language had different meanings in § 302(b)(1) and in its predecessor. See *Davis*, 397 U.S. at 304-13.

*Davis* also enabled the Burger Court to send a message that the recently enacted law, which attributes to the person whose stock is redeemed that stock owned by his relatives, should be interpreted broadly. Further, *Davis* gave the Court the opportunity to characterize a redemption, also under recently enacted law, in which the shareholder did not suffer a “meaningful reduction” in his stockholding, to warrant receipt of a dividend, not a capital gain. I.R.C. § 302 (1988 & Supp. IV 1992).

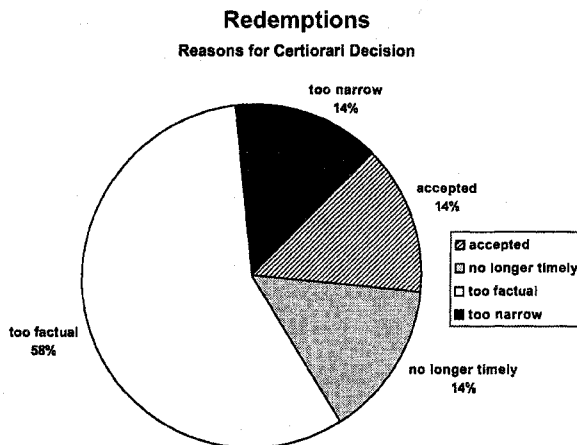
59. See BITTKER & EUSTICE, *supra* note 51, ¶ 9.05.

60. *Metzger v. Commissioner*, 463 U.S. 1207 (1983).

61. *Russo v. Commissioner*, 454 U.S. 966 (1981); *Fehrs Fin. Co. v. Commissioner*, 416 U.S. 938 (1974); *Brown v. United States*, 414 U.S. 1011 (1973); *Miele v. Commissioner*, 414 U.S. 1104 (1973).

erning redemptions of stock) with another Code section, Section 351 (governing incorporations).<sup>62</sup>

Once again, in the tax area, as elsewhere, the Burger Court followed Justice Vinson's admonishment to accept only those petitions that raise issues beyond their limited facts and adopted the "best vehicle" analysis Professor Perry describes by choosing the most significant redemption case it was offered and rejecting all others.



#### (4) The importance of the Solicitor General

As in non-tax cases, the Solicitor General was more successful than taxpayers in his certiorari petitions to the Burger Court.<sup>63</sup> the Solicitor General's applications were accepted more often,<sup>64</sup> he won

62. *Coates Trust v. Commissioner*, 414 U.S. 1045 (1973).

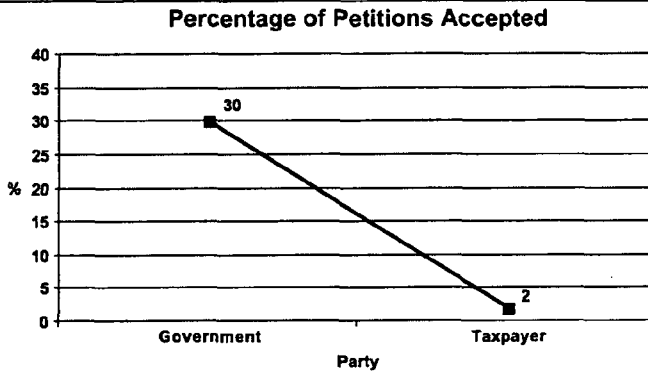
63. See PERRY, *supra* note 9, at 128 (75%-90% success rate).

64. Twenty-six of the Solicitor General's 86 petitions were accepted for a success rate of 30%. Only 22 of the taxpayers' 1131 petitions were accepted for a success rate of 2%. See Appendices B, C.

more cases than did taxpayers,<sup>65</sup> and in granting his petitions, the Court was less likely to require a split among the circuits.<sup>66</sup> Moreover, the Solicitor General was better equipped to exploit splits among the circuits than were taxpayers.<sup>67</sup>

(5) Federal tax compared to other areas of law—number of petitions accepted

Given the literature on the Court's distaste for federal tax cases discussed above,<sup>68</sup> one would expect to find that the Burger Court granted fewer tax petitions than those based on other federal statutes. On the contrary, we found that the number of accepted tax petitions compared favorably to other areas involving highly technical federal statutes.<sup>69</sup> What these numbers suggest is that tax was not the Burger



65. The Solicitor General won 19 of 26 cases he successfully petitioned (73%). The taxpayers won only 9 of 22 cases they successfully petitioned (41%). See Appendix C.

66. See *infra* note 77.

67. For example, the Solicitor General filed a petition in *Hilton Hotels* less than a month after the taxpayer filed a petition in *Woodward*. See Appendix A, Deductions; 38 U.S.L.W. 3098-99, 3144. These cases then became companions when subsequently decided by the Burger Court. *United States v. Hilton Hotels Corp.*, 397 U.S. 580 (1970), and *Woodward v. Commissioner*, 397 U.S. 572 (1970).

The Solicitor General's ability to petition a case which he knew would provoke a conflict among the circuits is dependent, of course, on presence and timing. He cannot petition a case which is not in a position to be petitioned, but his omnipresence is clearly an influential factor.

68. See *supra* Section II.C.1.

69. The annual *Harvard Law Review* surveys of the Supreme Court's activity for the immediately preceding term suggest that tax was not slighted, or at least was not slighted more than other, comparable statutory areas. Taxation appears in this survey as one of four categories of "federal government litigation." The other three areas are administrative, including cases involving administrative procedure, the Internal Revenue Service, the Interstate Commerce Commission, or the National Labor Relations Board; cases involving enforcement of federal statutes, for example, antitrust or unemployment compensation cases; and other actions involving the federal government, for example, bankruptcy, Indian affairs, or Federal Tort Claim Act actions. See, e.g., *The Supreme Court 1994 Term*, 109 HARV. L. REV. 1, 339 (1995) (Table III).

Court's orphan stepchild. As with tax, labor law—another area governed by a complex federal statutory scheme—was often addressed by the Court several times each term while banking and bankruptcy generally received somewhat less attention.<sup>70</sup>

In this light, tax fares favorably, or at least no less favorably, than Supreme Court review of cases in other areas. For example, in the 1970 Term, there were four tax cases: three tax cases plus one Internal Revenue Service case. In that same Term, there were two antitrust cases, four labor cases (three N.L.R.B. cases plus one Labor-Management Reporting and Disclosure Act case), two banking, and one bankruptcy case. See *The Supreme Court 1970 Term*, 85 HARV. L. REV. 1, 347 (1971) (Table II). In the 1973 Term, there were six tax cases, seven labor cases (six N.L.R.B. cases plus one Fair Labor Standards Act case), one banking (Bank Secrecy Act) and no bankruptcy cases. See *The Supreme Court 1973 Term*, 88 HARV. L. REV. 1, 278 (1974) (Table III). In the 1977 Term, there were six tax cases, one patent case, one securities case, two antitrust cases, and one bankruptcy case. See *The Supreme Court 1977 Term*, 92 HARV. L. REV. 1, 333 (1978) (Table III).

Specific information about tax decisions during the Burger Court years is provided in the following table:

Term	Tax Cases Decided	All Cases Decided	% of Tax Cases to All Cases
1969	4 [3G, 1T]	94	4
1970	3 [3G, 0T]	122	2
1971	4 [2G, 2T]	151	3
1972	7 [6G, 1T]	164	4
1973	6 [4G, 2T]	157	4
1974	2 [2G, 0T]	137	1
1975	1 [0G, 1T]	159	1
1976	3 [2G, 1T]	142	2
1977	6 [3G, 3T]	135	4
1978	3 [2G, 1T]	138	2
1979	1 [1G, 0T]	149	1
1980	5 [3G, 2T]	138	4
1981	4 [3G, 1T]	167	3
1982	6 [6G, 0T]	162	4
1983	3 [2G, 1T]	163	2
1984	4 [4G, 0T]	151	3
1985	5 [4G, 1T]	159	3

G = a decision in favor of the government

T = a decision in favor of the taxpayer.

These statistics are drawn from annual *Harvard Law Review* surveys of the Supreme Court's immediately preceding term, published in the first issue of each new volume of the *Review*. See *The Supreme Court 1969 Term*, 84 HARV. L. REV. 1 (1970); *The Supreme Court 1970 Term*, 85 HARV. L. REV. 1 (1971); *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 297 (1972); *The Supreme Court 1972 Term*, 87 HARV. L. REV. 1, 303 (1973); *The Supreme Court 1973 Term*, 88 HARV. L. REV. 1, 274 (1974); *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1 (1975); *The Supreme Court 1975 Term*, 90 HARV. L. REV. 1 (1976); *The Supreme Court 1976 Term*, 91 HARV. L. REV. 1 (1977); *The Supreme Court 1977 Term*, 92 HARV. L. REV. 1, 327 (1978); *The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 275 (1979); *The Supreme Court 1979 Term*, 94 HARV. L. REV. 1, 289 (1980); *The Supreme Court 1980 Term*, 95 HARV. L. REV. 1, 339 (1981); *The Supreme Court 1981 Term*, 96 HARV. L. REV. 1, 304 (1982); *The Supreme Court 1982 Term*, 97 HARV. L. REV. 1, 295 (1984); *The Supreme Court 1983 Term*, 98 HARV. L. REV. 1, 307 (1984); *The Supreme Court 1984 Term*, 99 HARV. L. REV. 1, 322 (1985); *The Supreme Court 1985 Term*, 100 HARV. L. REV. 1, 312 (1986).

70. See *supra* note 69.

b. Differences between selection of tax and other petitions

(1) Social importance

Outside the tax area, Supreme Court observers note that the Court looks for matters of social significance in choosing its docket.<sup>71</sup> Although this remains the case when the Court confronts tax matters, the social importance criteria gives the Court very little to choose from. With the exception of *Bob Jones University v. United States*,<sup>72</sup> an action dealing with tax exemptions for racially discriminatory schools, and *Regan v. Taxation with Representation*,<sup>73</sup> an action concerning freedom of speech and exempt organizations, no other certiorari petitions to the Burger Court raised issues of social significance in the tax area. Both *Bob Jones* and *Regan* were granted and decided. Thus, the justices gave as much attention to socially significant tax matters as they possibly could, making tax matters similar to other areas. Yet, given the infrequency with which social issues entwine with tax issues, the Court must place less emphasis on social importance, lest it severely limit its tax docket.

(2) Number of requests for review

Unlike the general trend, in which petitions for review increased each year, the number of requests for review of tax matters remained constant during the Burger years.<sup>74</sup> A review of these petitions demonstrates consistency from Term to Term. As we saw above, consistency in the certiorari context means that most petitions will be

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71. See, e.g., PERRY, *supra* note 9, at 253-60.

72. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

73. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

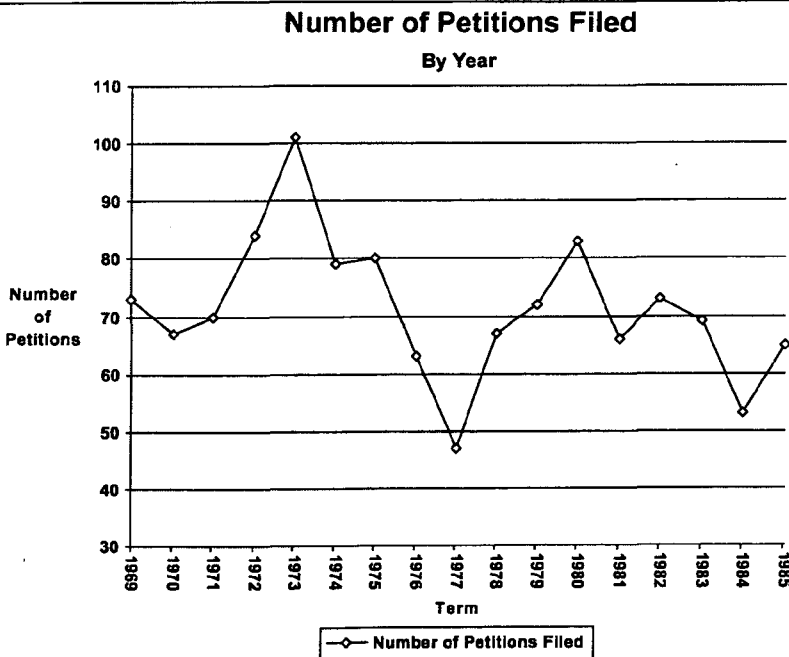
74. The number of petitions filed in each of the terms of the Burger Court are as follows.

Term	Number of Petitions Filed
1969	73
1970	67
1971	70
1972	84
1973	101
1974	79
1975	80
1976	63
1977	47
1978	67
1979	72
1980	83
1981	66
1982	73
1983	69
1984	53
1985	65

denied, primarily because they repeatedly fail to present issues broad enough to apply beyond their particular facts. Thus, although we cannot maintain that the Court's alleged hostility towards tax matters resulted in a decrease in tax-related certiorari petitions to the Burger Court, we maintain that the Court's inhospitable reputation towards tax-related issues encouraged certiorari applicants to use more care than others in selecting issues for review.

(3) Split among the circuits

A split among the circuits was an important factor in having a tax-related certiorari petition granted: thirty-three of the forty-six cases (seventy-two percent) in our data set involved some sort of split between circuits.<sup>75</sup> The number of circuits involved in these splits,



For more information on the number of petitions filed and the terms in which they were filed, see Appendix B.

We cannot conclude whether this steady level of applications means that applicants with tax questions were dissuaded from applying because we only examined actually filed petitions.

75. See Appendix B.

however, was not as great as one would expect—especially in light of Professor Perry’s conclusions.<sup>76</sup>

Furthermore, compared to the number of taxpayer certiorari petitions accepted by the Burger Court, circuit splits were not as significant in the Court’s acceptance of the Solicitor General’s certiorari petitions.<sup>77</sup> In addition, the Court often articulated other reasons for accepting certiorari petitions: these included, for example, the amount of money at stake in a particular case or the importance of an issue or question to a particular industry.<sup>78</sup>

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76. See *supra* Part II.B.2.d. Twenty of the 33 accepted petitions involved splits between only two circuits and the Court of Claims as opposed to the three-, four-, and five-circuit splits postulated by Professor Perry. See Appendix C.

Nine circuits split in one case: *United States v. Davis*, 397 U.S. 301, 303-04 (1970) (eight circuits and Court of Claims).

Five circuits split in four cases: *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 164 (1981); *Commissioner v. Kowalski*, 434 U.S. 77, 82 (1977); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 (1977); *United States v. Foster Lumber Co.*, 429 U.S. 32, 36 (1976).

Four circuits split in four cases: *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 22 (1982) (two lower courts also in conflict); *HCSC-Laundry v. United States*, 450 U.S. 1, 5 (1981) (three other lower courts also had decided case); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569, 573-74 (1977); *United States v. Chandler*, 410 U.S. 257, 258 (1973).

Three circuits split in four cases: *Paulsen v. Commissioner*, 469 U.S. 131, 132-33 (1985) (one lower court also in conflict); *Diedrich v. Commissioner*, 457 U.S. 191, 192, 194 (1982); *Fausner v. Commissioner*, 413 U.S. 838 (1973); *United States v. Genesee*, 405 U.S. 93, 96 (1972).

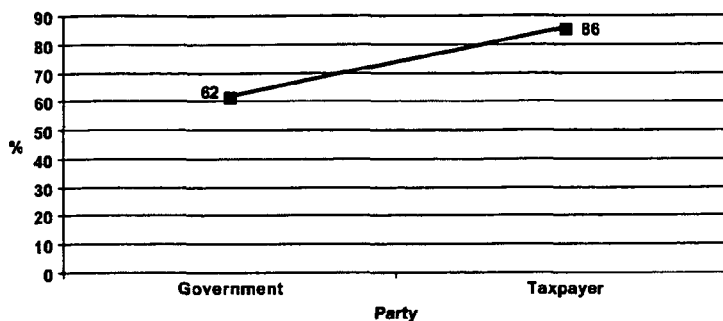
Only two circuits split in 20 cases: *Dickman v. Commissioner*, 465 U.S. 330, 333 (1984); *Commissioner v. Engle*, 464 U.S. 206, 207 (1984) (conflict between a circuit court and Court of Claims); *Commissioner v. Tufts*, 461 U.S. 300, 303 (1983); *Jewett v. Commissioner*, 455 U.S. 305, 308-09 (1982); *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472, 476 (1979); *United Cal. Bank v. United States*, 439 U.S. 180, 185 (1978) (implicitly, two circuits); *Frank Lyon Co. v. United States*, 435 U.S. 561, 572 (1978); *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21, 24 (1978); *Fulman v. United States*, 434 U.S. 528, 529-30 (1978); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 727 (1977); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *Commissioner v. Idaho Power Co.*, 418 U.S. 1, 4 (1974) (conflict between a circuit court and Court of Claims); *Central Tablet Mfg. Co. v. United States*, 417 U.S. 673, 677 (1974); *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 141-42 (1974); *Snow v. Commissioner*, 416 U.S. 500, 501 (1974); *United States v. Cartwright*, 411 U.S. 546, 550 (1973) (two other circuits also indirectly in conflict); *Commissioner v. First Sec. Bank*, 405 U.S. 394, 395 (1972); *Nash v. United States*, 398 U.S. 1, 3 (1970); *United States v. Hilton Hotels Corp.*, 397 U.S. 580, 581 (1970) (companion case to *Woodward*); *Woodward v. Commissioner*, 397 U.S. 572, 574 (1970) (indicating other federal circuits in conflict).

Conflicts were noted in one other case without enumeration of the number of courts involved: *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772, 780 & n.10 (1981) (noting, however, a “growing number of conflicting federal and state decisions on this issue”).

77. Of the 46 cases in our data set, 26 resulted from certiorari applications by the Solicitor General. Of these 26 cases, 16 involved splits in the circuits. Thus, only 62% of the Solicitor General’s successful certiorari applications involved splits. On the other hand, of the 46 cases in our data set, 22 resulted from certiorari applications by taxpayers. Of these 22 cases, 19 involved splits in the circuits. Thus, 86% of all successful taxpayer certiorari applications involved circuit splits.

78. In one case, the Burger Court granted a petition simply because the taxpayer’s position was “in conflict with precedents of [the Supreme] Court.” See *United States v. Basye*, 410 U.S.

## Percentage of Petitions Involving Splits



Some of the Burger Court's most important tax-related decisions, however, were not accepted solely because of a split in the circuits. A prime example of an important case that presented no conflicts at the circuit level was *Bob Jones University v. United States*;<sup>79</sup> another example was *Commissioner v. Tufts*,<sup>80</sup> a case which, although a split existed, was arguably waiting to be heard since its theoretical ancestor, *Crane v. Commissioner*,<sup>81</sup> was decided in 1947.

### c. Developing themes

Our study of the Burger Court's certiorari-selection process uncovered something never before addressed by other analyses of the Burger Court and federal taxation. We discovered that the Burger Court returned to certain tax-related themes again and again. Concededly, in some tax-related areas, the Burger Court would select a single case, make its mark, and move on.<sup>82</sup> In other tax-related areas, however, the Burger Court returned to certain issues several times.<sup>83</sup>

441, 442 (1973). Importance of the issue was noted in other cases as well. *See, e.g.*, *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 525 (1979) ("important and recurring income tax accounting issues"); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 138, 151 (1977) ("question is important to the revenue"); *Ivan Allen Co. v. United States*, 422 U.S. 617, 624 (1975) ("because of the importance of the issue in the administration of the accumulated earnings tax"); *United States v. Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401, 404 (1973) ("precedent for the tax treatment of substantial sums"), *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 346-47 (1971) ("importance of the issue for the savings and loan industry and for the Government").

79. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (involving propriety of tax-exempt status for University that barred admission to students who encouraged or were engaged in interracial marriage).

80. *Commissioner v. Tufts*, 461 U.S. 300 (1983). For more on *Tufts*, see *infra* Part III.E.4.c.

81. *Crane v. Commissioner*, 331 U.S. 1 (1947).

82. *See supra* notes 47-62.

83. *See infra* notes 84.



Further, we discovered that the Court did not choose its topics randomly. On the contrary, our study revealed a pattern in the Burger Court's certiorari-selection process that focused on issues relating to proper accounting methods,<sup>84</sup> capitalization,<sup>85</sup> ownership of property,<sup>86</sup> assignment of income,<sup>87</sup> depletion,<sup>88</sup> interest,<sup>89</sup> and the tax benefit rule,<sup>90</sup> all of which disclose that the Court thought it important, as it decided tax cases, to develop themes or trains of thought instead of, for example, deciding factually specific cases of limited applicability.

From a legislator's standpoint, some of the subjects listed above present drafting problems, because they are extremely fact sensitive. For example, proper accounting methods are relatively scientific and

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84. See, e.g., *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979) (accounting for inventory); *Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977) (insurer's accounting for premiums); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725 (1977) (insurer's accounting for reserves); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977) (accrual method taxpayer's accounting for deduction).

85. *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974) (capitalizing costs associated with construction); *United States v. Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401 (1973) (capitalizing nonshareholder contributions to capital); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971) (capitalizing additional premiums paid to federal insuring corporation); *United States v. Hilton Hotels Corp.*, 397 U.S. 580 (1970) (capitalizing costs surrounding appraisal of stock acquired from minority shareholders in merger); *Woodward v. Commissioner*, 397 U.S. 572 (1970) (capitalizing costs surrounding appraisal of stock acquired from minority shareholder).

86. *Jewett v. Commissioner*, 455 U.S. 305 (1982) (timing of interest that was disclaimed); *United States v. Swank*, 451 U.S. 571 (1981) (economic interest in coal sufficient to support depletion deduction); *United States v. Chandler*, 410 U.S. 257 (1973) (ownership of savings bond); *United States v. Byrum*, 408 U.S. 125 (1972) (retained interest in property transferred into trust).

87. *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) (sale and leaseback of real estate); *United States v. Basye*, 410 U.S. 441 (1973) (partner's assignment of income to retirement plan); *United States v. Chandler*, 410 U.S. 257 (1973) (inclusion in decedent's gross estate of co-owned savings bond); *United States v. Byrum*, 408 U.S. 125 (1972) (inclusion in decedent's gross estate of retained life estate); *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972) (allocation of income between related parties under § 482).

88. *Commissioner v. Engle*, 464 U.S. 206 (1984) ("average daily production of domestic crude oil" for purposes of percentage depletion); *United States v. Swank*, 451 U.S. 571 (1981) (determining economic interest upon which to base percentage depletion); *Commissioner v. Portland Cement Co.* 450 U.S. 156 (1981) (determining gross income upon which to base percentage depletion).

89. *Dickman v. Commissioner*, 465 U.S. 330 (1984) (interest-free loans were taxable gifts to the extent of fair market value of use of money lent); *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134 (1974) (payment was not deductible debt discount); *United States v. Mississippi Chem. Corp.*, 405 U.S. 298 (1972) (payment attributable to purchase of stock, not interest payments).

90. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983) (tax benefit rule not applicable to bank's payment of taxes in behalf of shareholders, which was subsequently refunded to shareholders; tax benefit rule applied to corporation that deducted cattle feed but then distributed feed to its shareholders in liquidation); *Nash v. United States*, 398 U.S. 1 (1970) (tax benefit rule not applicable to partners whose partnership contributed assets, including bad debt reserve, to corporation).

thus amenable to standardized statutes. While this is true in most cases, many situations lie on the margin where the proper accounting method is dependent on the taxpayer's individual business and practices. To some extent, Congress confronts this challenge by requiring that a taxpayer's accounting method clearly reflect income, and then granting the Treasury Department broad discretion to define and shape that concept.<sup>91</sup> Yet, taxpayers and the IRS often disagree, and it is difficult, if not impossible, for Congress to intervene and mediate such disputes. Accordingly, it is understandable why the Burger Court invoked its "power of supervision"<sup>92</sup> to provide guidance on proper accounting methods.

From the Court's point of view, some of the listed subjects—for example, the tax benefit rule and assignment of income—are judicial creations.<sup>93</sup> Thus, it is not surprising that the Supreme Court returns to these issues rather than shift the responsibility of clarifying and interpreting the meaning of certain regulations and statutes to the Congress or the IRS.

Other congressionally created tax-related concepts, however, are difficult to define and explain in a neat set of statutes. Prior to the enactment of Section 263A, for instance, the only statutory guidance provided to taxpayers regarding the difference between capital expenditures and expenses was that amounts "paid out for new buildings or permanent improvements" were not deductible.<sup>94</sup> The lack of any meaningful statutory guidance regarding the difference between capital expenditure and expenses, in turn, compelled taxpayers to rely on their interpretations of court decisions addressing a wide array of fact patterns. It is therefore understandable why the Burger Court felt compelled to make a worthwhile contribution to the area (the Burger Court addressed this issue five times).

We note that certain industries, such as oil and gas, appeared to fascinate the Burger Court; and interest deductions and ownership of property—topics with their own tax common law—attracted that

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91. See I.R.C. § 446(b) (1988 & Supp. IV 1992) (providing that if the taxpayer's accounting method "does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary does clearly reflect income").

92. SUP. CT. R. 10; see *supra* note 11 and accompanying text.

93. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983) (tax benefit rule); *United States v. Basye*, 410 U.S. 441 (1973) (assignment of income); *Nash v. United States*, 398 U.S. 1 (1970) (tax benefit rule).

94. See I.R.C. § 263(a)(1) (1988). I.R.C. § 263A (1988) was enacted in 1986, just as the Burger Court years ended, and provides specific rules for a wide array of expenditures including trees, inventory, animals, and plants.

Court's interest, we believe, because the Court felt it had particular expertise in those areas.<sup>95</sup> Whatever the reason for its incursions, these areas demonstrate that the Burger Court was quite active in some tax areas despite any antipathy to the Internal Revenue Code as a whole.

#### D. Conclusions

While it may be true that the Burger Court justices disliked tax-related cases, a review of the Burger Court's certiorari-selection process leaves little reason for dismay. Our findings revealed that, generally, the Burger Court's certiorari-selection process followed the same patterns established in the Court's certiorari-selection process in other substantive areas. Further, our findings revealed that any differences in the certiorari-selection process between tax-related cases and other substantive areas had more to do with the subject matter than with any distaste for tax-related matters. For example, one can hardly blame the Burger Court justices for deciding so few matters of social importance. When the opportunity arose, the petitions were granted; but tax does not often present such challenges. Moreover, the Burger Court was willing to grant petitions with no splits in the circuits or with fewer splits than some scholars would predict. In addition, although the Court's tendency to favor the government (a matter we discuss in detail below) may have dissuaded some petitioners, it did not encourage higher quality requests. Thus, if the number of petitions remained stable, taxpayers and the Treasury Department are as much to blame as the Burger Court.

Finally, by returning to some tax-related issues several times, the Burger Court demonstrated its willingness to take on aspects of the Code and make them its own. This is particularly interesting because it demonstrates that the Burger Court carved out a role for itself in a highly technical and ever changing field. As noted above (and as we will see below), the Court helped develop the law of federal taxation often by deferring to Congressional mandates, seldom by deferring to the Treasury Department, and frequently by placing the Court's own mark in the area.

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95. See BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS*, at ch. 31 (2d ed. 1990) (interest); *id.* ¶ 4.42 (sale and leaseback); *id.* ¶ 6.2 (nominal versus beneficial ownership).

## III. THE BURGER COURT'S FEDERAL TAX OPINIONS

## A. Introduction

We now move from the first major section of this paper—the certiorari-selection process—to the second major section: The Burger Court's Federal Tax Opinions.

In this section we first look at how the Burger Court justices reached their decisions by examining the interpretive methods utilized by the justices in deciding tax-law questions. Accordingly, we divide the Opinions section into four subsections: 1) Plain Language; 2) Legislative History; 3) Regulations; and 4) Deep Structure. This order travels from those opinions giving maximum deference to Congress (Plain Language and Legislative History), through those giving deference to the Executive branch and the IRS (Regulations), and finally tax-related opinions rendered by an activist Supreme Court (Deep Structure). These topics are suggested by prior literature on the Supreme Court and federal tax cases, particularly those articles that are prescriptive; that is, those articles that advocate particular interpretive methods.<sup>96</sup>

Our survey of the various interpretive methods available to Supreme Court justices in deciding tax-related issues revealed that the Court was inclined to articulate a preference for legislative supremacy in all of its opinions regardless of which interpretive method it used. Further, this preference for legislative supremacy was expressed even when the Court used methods that seemed to oppose Congress in favor of other institutions.

For example, the Supreme Court's reliance on tax regulations in its decision-making process indicates the Court's preference for Executive branch mandates rather than Congressional ones. Our study revealed, however, that when the Burger Court relied on regulations in its decision-making process, the justices almost always based their reli-

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96. See, e.g., Michael Asimow, *Public Participation in the Adoption of Temporary Regulations*, 44 TAX LAW. 343 (1991) (regulations); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (regulations); Michael A. Livingston, *Congress, the Courts and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 833-37 (1991) (legislative history); Karla W. Simon, *Congress and Taxes: A Separation of Powers Analysis*, 45 U. MIAMI L. REV. 1005 (1990) (regulations); see also Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992) (revenue rulings); Isenbergh, *supra* note 4 (plain language). We have broadened Professor Zelenak's nonliteral interpretation of Code language to "deep structure." See Zelenak, *supra* note 4, at 639 (nonliteral interpretations).

ance on deference to Congress.<sup>97</sup> Further, as we will see, our definition of Deep Structure essentially requires no congressional mandate. Our study revealed, however, that even in Deep Structure cases, the Burger Court made efforts to show that it was deferring to Congressional intent.<sup>98</sup>

Next, because we believe that this deference to Congress was more apparent than real, we examined what the Court actually did in its decisions by analyzing dissenting opinions, government/taxpayer win/loss ratios, as well as other statistics. Most important, however, we emphasize which institution the Burger Court deferred to in its opinions. This approach led to our conclusion that, regardless of the rhetoric, the Burger Court often looked beyond Congress to favor the Executive or the judiciary in its federal tax decisions.

Finally, we ask why a particular institution may be best suited to address particular tax-related questions. For example, in the Regulations section, we discuss why the IRS is less subject to political malfunction than Congress and thus better suited to make certain tax-related decisions. In the Deep Structure and Legislative History sections, on the other hand, we explore how the Burger Court's ability to use narrative affected institutional choice.

## B. The Plain Language of the Statute

In Part II.C.1, we pointed out that many commentators have expressed dissatisfaction with how the Court handles tax matters. These authors' disappointment comes, at least in part, from a perception that the Court is not achieving internal consistency, nor developing broad principles, within the Internal Revenue Code. As a result, these writers have offered a variety of interpretive devices to the Court. One of these mechanisms—respect for the plain language of the Code—is offered by Professor Joseph Isenbergh.<sup>99</sup> Professor Isenbergh is troubled by a series of court-created doctrines that discredit transactions that otherwise meet the Internal Revenue Code's plain language. We illustrate this concept by reviewing *Helvering v. Gregory*.<sup>100</sup>

In *Gregory*, a corporation owned an appreciated asset, which its sole shareholder wanted to sell for her own account. Under the general rules concerning corporate dividends, a simple distribution of the

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97. See *infra* notes 242-52 and accompanying text.

98. See *infra* Part III.E.

99. Isenbergh, *supra* note 4.

100. *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

asset to the shareholder would create an immediate shareholder-level tax at “ordinary income” rates on the asset’s fair market value—a higher tax rate than would be the capital gains tax rate.<sup>101</sup> To avoid this result, the corporation employed the tax law’s reorganization and liquidation rules so that: (1) the shareholder’s tax liability would be delayed until she sold the property; and (2) the delayed tax would be calculated at the lower “capital gains” rate.<sup>102</sup> Despite that the transaction met the Code’s literal requirements, the Court refused to allow the more favorable tax treatment. Instead, the Court treated the corporate transaction as no different in substance from a corporate dividend.<sup>103</sup>

Professor Isenbergh has criticized *Gregory*’s “substance over form” doctrine as fatally flawed because: (1) statutes employ two types of terms: (a) those that come from “life,” and (b) those that come from “art”; (2) a “life” term is one that describes an event that exists independent of the statute while an “art” term is a creature of statute;<sup>104</sup> (3) if a statute uses a term of “art,” then judicial glosses (such as substance over form) are inappropriate because the statute itself requires the use of form over substance by limiting its benefits to transactions that comply with its form; (4) thus, when terms of art are employed, a taxpayer who complies with the statutory form should escape any additional requirements derived from the Court’s independent understanding of economic reality.<sup>105</sup>

For example, if the Internal Revenue Code provides a benefit for “oil wells,” a court has every right to use the substance-over-form doctrine to deny benefits to a gas well even if there are many similarities

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101. Revenue Act of 1928, ch. 277, § 112(i)(1)(B), 45 Stat. 791, 818.

102. *Id.* § 112(g), (i)(1)(B).

The transactions used, and the tax consequences the shareholder would attribute to the steps, were:

1. The shareholder’s corporation created a subsidiary and funded that subsidiary with the appreciated assets. This transaction was not taxed under the reorganization provisions available at the time. *Id.* § 112(i)(1)(B).
2. Next, the primary corporation distributed the subsidiary’s stock to its shareholder pursuant to a plan of reorganization. The shareholder was not taxed on this distribution. *Id.* § 112(g).
3. The subsidiary liquidated, and distributed its asset that the shareholder wanted to possess to her. The distribution was taxed, but at capital gains rates. *Id.* §§ 101, 115(c).
4. Finally, the shareholder’s sale of the asset resulted in limited gain, because her basis in the asset was approximately equal to the money she would receive from selling the asset.

103. *Id.* § 115(a).

104. Points 1 and 2 are gleaned from Isenbergh, *supra* note 4, at 865-66.

105. Points 3 and 4 are found in *id.* at 866-83.

between oil and gas wells because a difference between the two types of wells exists whether or not there is a statute that uses those terms. If, however, the Code's definition of reorganizations is limited to only five of the hundreds of types of reorganizations that exist in the business world, "reorganization" becomes a term of "art" because it creates a category of transactions that we would not acknowledge as separate from other transactions absent the statutory definition.

Professor Isenbergh bases his argument on several principles. His first principle is equality—that both taxpayers and the government should be held to the same standard because, as is often noted, doctrines that defeat the plain language standard are not effective legal weapons for taxpayers.<sup>106</sup> A retreat from plain language also frustrates the taxpayer's ability to predict results based on statutory language, a consequence which is as great a benefit to tax lawyers as it is a detriment to taxpayers.<sup>107</sup> Further, these court-created doctrines are inefficient because the judicially-created rules are often overturned or modified by Congress.<sup>108</sup>

Professor Isenbergh's analysis raises an interesting point relevant to this article: that a respect for the plain language doctrine necessarily involves institutional choice. By articulating a decision in terms of plain language, the Court asserts that Congress's words are more important than the Supreme Court's search for a deeper meaning of those words. Conversely, by using doctrines that Professor Isenbergh abhors—such as "business purpose," "substance over form," and "step transactions"—the Court holds itself out as the ultimate interpreter of congressional meaning. Because we were concerned with how the Burger Court determined which institution was best suited for making specific tax-related decisions, we were interested in pursuing the question of how and when the Burger Court used plain language rhetoric in its decisions.

The remainder of this section contains four parts. In Part III.B.1, we examine the Burger Court's plain language decisions. In Part

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106. See, e.g., *United States v. Davis*, 397 U.S. 301 (1970) (rejecting taxpayer's use of "business purpose" available under prior law and of "substance over form" doctrines, and instead relying on the plain language of the statute to impose a tax on dividend income); see also *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (The Court went beyond literal terms of statute.). For an example of how doctrinal glosses more often injure taxpayers than the government, see BITTKER & LOKKEN, *supra* note 95, ¶4.3.6.

107. "Indeed, it would not take too many cases [of this type] to justify the injunction not to take a deep breath without calling a tax lawyer." Isenbergh, *supra* note 4, at 883.

108. See *id.* at 881.

III.B.2 we make observations based on the total number of plain language opinions we found. Part III.B.3 then attempts to put our observations into a broader context while Part III.B.4 points out some problems with the Court's use of plain language.

## 1. The decisions

### a. Introduction

Before we begin our analysis of the Burger Court's plain language decisions, we want to emphasize what you will not see below. First, you will find no analysis on whether any of the Court's decisions were correct. Many of these decisions have been discussed elsewhere, and readers interested in the consequences of these cases should refer to those publications.<sup>109</sup> We also do not discuss meaning; whether we control words or words control us is not our primary concern. We do, however, underscore the fact that Burger Court justices strongly disagreed about the significance of the plain language doctrine as an in-

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109. See, e.g., Kenneth Blumstein, *When Is a Redemption "Not Essentially Equivalent to a Dividend"?*, 7 J. CORP. TAX'N 99 (1980); Louis A. Del Cotto & Kenneth F. Joyce, *Interest Free Loans and Dickman v. Commissioner: A Letter to the Supreme Court*, 32 BUFF. L. REV. 589 (1983); Raymond E. Dunn, Jr., *Pension and Profit-Sharing Plans*, 14 WAKE FOREST L. REV. 882 (1978); Mark B. Edwards, *Interest-Free Loans Are Held to Be Gifts in Supreme Court's Recent Dickman Decision*, 60 J. TAX'N 266 (1984); Craig W. Friedrich, *Recent Developments*, 12 J. CORP. TAX'N 218 (1985); John D. Gronda, Note, *Taxation—Cash Meal Payments Under the 1954 Internal Revenue Code*, 26 WAYNE L. REV. 215 (1979); Amy R. Hinderer, *Research and Experimental Expenditures—Section 174 Distinguished From Section 162*, 40 MO. L. REV. 685 (1975); Richard M. Horwood & Ronald Hindin, *Supreme Court Adopts Liberal Definition of R & D Deductibility Under Section 174*, 41 J. TAX'N 2 (1974); Jonathan K. Layne, *Cash Meal Allowance Payments*, 27 EMORY L.J. 791 (1978); John W. Lee, *Pre-Operating Expenses and Section 174: Will Snow Fall?*, 27 TAX LAW. 381 (1974); William A. Loutos, *Interest-Free Loans: An Endangered Species*, 62 TAXES 445 (1984); Nicholas G. Moore et al., *How Limited Partnerships Tax-Shelter the R&D of New Products or Technology*, 49 J. TAX'N 138 (1978); Ellis B. Murov, *Meal Allowance for State Troopers Not Excludable From Gross Income*, 52 TUL. L. REV. 650 (1978); Philip F. Postlewaite & Susan R. Finneran, *Section 302(b)(1): The Expanding Minnow*, 64 VA. L. REV. 561 (1978); Gregory J. Soukup, *The Continuity-Of-Proprietary-Interest Doctrine and Thrift Institution Mergers*, 12 J. CORP. TAX'N 141 (1985); *Steps to Take in Planning Intrafamily Transfers After Adverse Interest-Free Loan Decision*, 32 TAX'N FOR ACCT. 276 (1984); Larry R. Thompson, *Research and Experimental Expenditures in Anticipation of Entering a Trade or Business Held to Be Deductible Under § 174—Snow v. Commissioner*, 416 U.S. 500 (1974), 36 OHIO ST. L.J. 175 (1975); Eric S. Ziegler, *The Taxability of Cash Meal Allowances: Form Prevails Over Substance*, 38 LA. L. REV. 907 (1978); Matthew J. Zinn & Mark J. Silverman, *Redemptions of Stock Under Section 302(b)(1)*, 32 TAX LAW. 91 (1978); J. Michael Bernard, Comment, *Classification of Shareholder Interest in Mutual Savings and Loans for Purposes of Nontaxable Reorganizations Under I.R.C. §§ 354 and 361*, 53 U. CIN. L. REV. 177 (1984); Sharp Sorensen, Note, *Paulsen v. Commissioner: The Continuity of Interest Doctrine and Tax-Free Mergers Involving Mutual Savings and Loan Associations*, 79 NW. U. L. REV. 623 (1984); Note, *Dickman v. Commissioner: The Supreme Court Applies the Gift Tax to Interest-Free Loans*, 35 ALA. L. REV. 553 (1984).



terpretive tool.<sup>110</sup> Thus, we do not offer a philosophic definition of plain language. Instead, we accept each justice's assertion that his decision is based on plain language as he understand the term. To illustrate this point, we refer to two decisions that relied on the plain language doctrine, *Paulsen v. Commissioner*<sup>111</sup> and *United States v. Davis*.<sup>112</sup> In *Paulsen*, the Court referred to the plain language doctrine in a dissenting opinion while in *Davis*, the Court referred to the doctrine in a majority opinion.

b. Illustrative plain language decisions

Returning to the reorganization rules which fascinated Professor Isenbergh in his analysis of *Gregory*, we shift our focus to *Paulsen v. Commissioner*.<sup>113</sup> In *Paulsen*, the plaintiff-taxpayers owned "guaranty stock" in a state-regulated savings and loan association that had merged with a federal savings and loan association. As part of the merger, the taxpayers exchanged their guaranty stock for passbook savings accounts and certificates of deposit in the federal savings and loan. Generally, such exchanges result in taxable gain or loss. Shareholders, however, are immune from taxation, if the stock exchange is part of a reorganization, under Section 354 of the Internal Revenue Code.<sup>114</sup> Relying on the Section 354 exception, the *Paulsen* taxpayers reported no income from the exchange of their guaranty stock to passbook saving accounts and certificate of deposits. The government, however, disagreed and challenged the act.

Writing for the dissent, Justice O'Connor used the statute's plain words to conclude that the taxpayers were entitled to nonrecognition. In fact, according to O'Connor, any other holding would introduce "an unfortunate and unnecessary element of uncertainty into an area of our income tax laws where clear and consistent precedent is particularly helpful to both taxpayers and tax collectors."<sup>115</sup>

Justice Rehnquist, however, did not agree with Justice O'Connor's methodology. Writing for the *Paulsen* majority, Justice Rehnquist declared:

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110. See *infra* notes 131-33 and accompanying text.

111. *Paulsen v. Commissioner*, 469 U.S. 131 (1985).

112. *United States v. Davis*, 397 U.S. 301 (1970).

113. For additional discussion of *Paulsen*, see *supra* notes 47-48 and accompanying text.

114. See I.R.C. § 354 (1988) (shareholder gain or loss not recognized). Because shareholder gain or loss is not recognized, it is not taxed.

115. *Paulsen*, 469 U.S. at 144 (O'Connor, J., dissenting).

under the literal terms of the Code the transaction would qualify as a tax-free "reorganization" exchange rather than a sale or exchange on which gain must be recognized and taxes paid.

Satisfying the literal terms of the reorganization provisions, however, is not sufficient to qualify for nonrecognition of gain or loss. The purpose of these provisions is "to free from the imposition of an income tax purely "paper profits or losses" wherein there is no realization of gain or loss in the business sense but merely the recasting of the same interests in a different form.'" . . . In order to exclude sales structured to satisfy the literal terms of the reorganization provisions but not their purpose, this Court has construed the statute to also require that the taxpayer's ownership interest in the prior organization must continue in a meaningful fashion in the reorganized enterprise.<sup>116</sup>

This tension between the plain meaning of the words of the statute and the search for a deeper meaning of the words is echoed in *United States v. Davis*.<sup>117</sup> In *Davis*, however, the majority adopted the plain language doctrine as a basis for its opinion, while the dissent urged the Court to make a more textured reading of the statute.

In *Davis*, the taxpayer, his wife, and children owned all the shares in a corporation. In an effort to make the corporation a better credit risk and obtain financing, Davis purchased \$25,000 of the corporation's preferred shares. When the loan was repaid, and the additional funds were no longer needed, Davis sold the shares back to the corporation for \$25,000. He then reported the transaction as a tax-free redemption of his stock, because he received no more for the shares than he originally paid.<sup>118</sup>

Internal Revenue Code sections 301 and 316 impose a tax on the fair market value of distributed corporate profits as dividends. In contrast, gain from the sale of investment property, such as stock, is accorded preferential capital gains treatment.<sup>119</sup> By enacting Section 302, Congress recognized that some redemptions bear a greater resemblance to sales while others bear a greater resemblance to dividends. Accordingly, under Section 302, Congress treats some redemptions as gains or losses from the sale of a capital asset, while others are taxed as ordinary income dividends.

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116. *Id.* at 135-36 (citations omitted).

117. *United States v. Davis*, 397 U.S. 301 (1970).

118. *Id.* at 303.

119. I.R.C. § 1221 (1988) (capital asset defined); *id.* § 1222 (capital gain defined); I.R.C. § 1202 (1988 & Supp. IV 1992) (deduction for capital gain) (repealed 1986).

Davis could only rely on one of the four ways of ensuring capital gains treatment of redemption funds under Section 302: that the payment was “not essentially equivalent to a dividend.”<sup>120</sup> Based on this exception, Davis reported the redemption as a sale that produced no gain. The government, relying on Section 318 of the Code, denied Davis the favorable tax treatment.<sup>121</sup>

Under Section 302(b)(1), pro rata distributions are ineligible for treatment as “not essentially equivalent to a dividend.” This “no pro rata distribution rule” appeared harmless to Davis, however, because he was the only shareholder who exchanged his stock for cash. Thus, because the redemption appeared to be non-pro rata, it was reasonable for Davis to believe that he could benefit from the capital gains treatment under Section 302.<sup>122</sup> Nevertheless, under Section 318, Davis was treated as owning both his wife’s and children’s shares. Because of Section 318’s ownership attribution rules, the Burger Court declared that the redemption was pro rata, because the 100% shareholder received 100% of the redemption proceeds, making the distribution identical to a dividend.<sup>123</sup>

Some might contend that such convoluted machinations cannot be expressed in plain language. The majority, however, held that “the plain language of [Section 302] compels rejection of [the taxpayer’s]

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120. I.R.C. § 302(b)(1) (1988).

121. *Davis*, 397 U.S. at 303.

122. For example, assume that A owns 50% of Corporation, that B owns 30% and that C owns 20%. Assume further that each has paid \$100 for each share of stock that she owns. If A redeems five shares for \$500, B redeems three shares for \$300, and C redeems two shares for \$200, then these redemptions are pro rata and will be taxed as dividends. In other words, A will be taxed on \$500, B will be taxed on \$300, and C will be taxed on \$200. On the other hand, if A redeems five shares for \$500, while B and C redeem no shares, then the redemption is not essentially equivalent to a dividend—and A can treat the redemption as a sale. Because A has paid \$500 for the five redeemed shares, she has no taxable income as a result of the sale.

The reason for the difference in treatment is explained by Justice Marshall:

the provision had the obvious purpose of preventing a corporation from avoiding dividend tax treatment by distributing earnings to its shareholders in two transactions—a pro rata stock dividend followed by a pro rata redemption—that would have the same economic consequences as a simple dividend. Congress, however, soon recognized that even without a prior stock dividend essentially the same result could be effected whereby any corporation, “especially one which has only a few stockholders, might be able to make a distribution to its stockholders which would have the same effect as a taxable dividend.” In order to cover this situation, the law was amended to apply “(whether or not such stock was issued as a stock dividend)” whenever a distribution in redemption of stock was made “at such time and in such manner” that it was essentially equivalent to a taxable dividend.

*Davis*, 397 U.S. at 308-09 (1970) (citations omitted); see also *id.* at 313 (pro rata redemption cannot qualify under § 302(b)(1)).

123. *Id.* at 307.

argument,"<sup>124</sup> because it requires application of Section 318's attribution rules.<sup>125</sup> It was now left to the dissent to argue, unsuccessfully, of course, that the taxpayer's business purpose made the transaction " 'not essentially equivalent to a dividend.' "<sup>126</sup>

## 2. Observations

Our review of the Burger Court's plain language federal tax decisions convinced us that, although the justices utilized the plain language doctrine frequently, they did not find it easy to apply. Further, when the Court did use the plain language doctrine, it was most often directed against the taxpayer, undermining the notion that an application of the plain language doctrine is a neutral approach to statutory interpretation.

### a. Frequency of use

Over twenty-five percent of the Burger Court's decisions adopted a plain language rationale.<sup>127</sup> Moreover, the justices adopted the plain language doctrine in all types of federal tax matters, demonstrating their general approval of applying the doctrine to a variety of tax-related questions.<sup>128</sup>

### b. Number of dissents

One of the most striking aspects of the Burger Court's use of plain language is the controversy that it ignited. This is best illustrated by contrasting the number of dissents that accompany plain language opinions, and the dissents generated by the twelve non-plain language opinions. For example, of the forty-six cases in our data set, thirty-four cases made no reference to plain language. These thirty-four decisions generated twenty-one dissents; thus, sixty-two percent of decisions involving no use of plain language doctrine carried no dissents.<sup>129</sup> On the other hand, of the twelve cases in which at least

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124. *Id.* at 306.

125. *Id.* at 306-07.

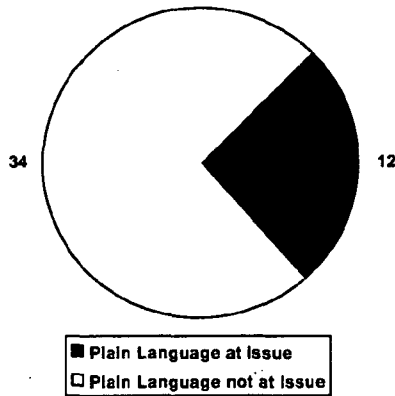
126. *Id.* at 314 (Douglas, J., dissenting).

127. See cases cited *infra* note 130.

128. Using the categories outlined in the appendices, we see that plain language was used in the business area (*Paulsen* and *Davis*), in the estate planning area (*Dickman*), in the tax exempt area (*American Bar Endowment*, *Bob Jones*, *St. Martin* and *HCSC-Laundry*), in the income area (*United California Bank*, *Kowalski*, *Standard Life* and *Consumer Life*), and in the deduction area (*Don E. Williams*).

129. See *Commissioner v. Engle*, 464 U.S. 206 (1984); *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983); *Diedrich v. Commissioner*, 457 U.S. 191 (1982); *Jewett v. Commissioner*,

Number of Cases Involving Plain Language



one justice employed the plain language doctrine, ten cases carry dissenting opinions. Thus, eighty-three percent of cases involving plain language doctrine engendered controversy.<sup>130</sup>

c. Difficulty in applying standard

The higher percentage of dissents in plain language decisions make clear that interpreting plain language is not nearly as simple as the term implies. On the contrary, the large number of dissents suggests that the plain language standard is a particularly difficult doctrine to apply.

455 U.S. 305 (1982); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *United States v. Swank*, 451 U.S. 571 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979); *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978); *Fulman v. United States*, 434 U.S. 528 (1978); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976); *Ivan Allen Co. v. United States*, 422 U.S. 617 (1975); *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974); *Central Tablet Mfg. Co. v. United States*, 417 U.S. 673 (1974); *United States v. Chicago, Burlington & Quincy R.R.*, 412 U.S. 401 (1973); *United States v. Cartwright*, 411 U.S. 546 (1973); *United States v. Basye*, 410 U.S. 441 (1973); *United States v. Byrum*, 408 U.S. 125 (1972); *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972); *United States v. Generes*, 405 U.S. 93 (1972); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971); *Nash v. United States*, 398 U.S. 1 (1970).

130. See *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *Paulsen v. Commissioner*, 469 U.S. 131 (1985); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *United States v. Davis*, 397 U.S. 301 (1970).

Of these 12 cases, the only two that did not prompt dissents were *St. Martin* and *Standard Life*.

An amusing illustration of this incongruity is found in *HCSC-Laundry v. United States*,<sup>131</sup> where both the majority and dissent rely on the plain language doctrine. Another illustration of how difficult it can be to apply the plain language doctrine is by examining how often plain language decisions were supported by additional references to legislative history.<sup>132</sup> In our view, if the language is clear, and the result is dictated by that language, there is no need to look at legislative history for further illumination. Yet, over eighty percent of the decisions relying on plain language also relied on legislative history for further support.<sup>133</sup>

d. Plain language as an anti-taxpayer weapon

Confronted with the wide use of the plain language standard by the Burger Court, we searched for any discernable patterns in its application. We found that what distinguished the plain language standard from other interpretive methods was that: (1) plain language was almost always used in favor of the government and against the taxpayer; and (2) plain language was more often used by the majority than the dissent. Again, among the Burger Court tax-related opinions that relied on plain language,<sup>134</sup> only three favored the taxpayer (and one of these was a dissenting opinion).<sup>135</sup> Of the fifteen opinions generated by the twelve cases using plain language, nine were majority opinions, while only six were dissenting opinions.<sup>136</sup>

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131. *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); see also *St. Martin*, 451 U.S. at 772 (plain language argument used in majority and in concurrence); *Standard Life*, 433 U.S. at 148 (same).

132. See *American Bar Endowment*, 477 U.S. at 105; *Dickman*, 465 U.S. at 330; *Bob Jones*, 461 U.S. at 574; *St. Martin*, 451 U.S. at 772; *HCSC-Laundry*, 450 U.S. at 1; *Kowalski*, 434 U.S. at 77; *Standard Life*, 433 U.S. at 148; *Consumer Life*, 430 U.S. at 725; *Don E. Williams*, 429 U.S. at 569; *Davis*, 397 U.S. at 301.

133. See cases cited *supra* note 132.

134. See cases cited *supra* note 130.

135. See *St. Martin*, 451 U.S. at 772; *United Cal. Bank*, 439 U.S. at 180; *Consumer Life*, 430 U.S. at 725. The dissent was in *United California Bank*.

136. The uneven number comes from the fact that both the majority and the dissent in *St. Martin*, *HCSC-Laundry*, and *Standard Life* used plain language to justify their positions. The nine majority opinions were: *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *United States v. Davis*, 397 U.S. 301 (1970). The six non-majority opinions (dissents and concurrences) were: *Paulsen v. Commissioner*, 469 U.S. 131 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *St. Martin*, 451 U.S. 1 (1981); *HCSC-Laundry*, 450 U.S. at 1; *United California Bank*, 439 U.S. at 180; *Standard Life*, 433 U.S. at 148.

Based on these statistics, we cannot agree that the plain language approach aids taxpayers and the government equally. On the contrary, our review of the Burger Court's federal tax decisions demonstrates that plain language is almost always used against taxpayers and in favor of the government. Thus, although proponents of plain language may be correct when they resound Justice O'Connor's concern for "clear and consistent precedent,"<sup>137</sup> taxpayers should use caution before advocating reliance on the plain language doctrine. If the Burger Court is any model, the precedent will almost certainly be used against them.

3. Speculations—what does the Court hope to achieve with plain language?

a. Introduction

The speculations we offer below are informed by our belief that plain language is not a mandate; rather, it is a choice. The number of dissenting opinions in the Burger Court's plain language decisions chronicled above demonstrate how infrequently the justices found clear congressional intent and how the justices' use of plain language represents a preference rather than a yoke.<sup>138</sup> For us, the dissenting opinions in the Burger Court's plain language opinions are proof that plain language exists more in the reader's mind than on the printed page.

b. Possible benefits of plain language

The Burger Court justices' frequent application of the plain language doctrine in tax-related cases suggests that they recognized some benefits to the approach. Unfortunately, the only benefit that the justices consistently cited was predictability—a benefit that is clearly undercut by our observation that plain language can be used for many purposes, as well as that its tendency is to produce sometimes contradictory results. If consistency, however, is not the primary reason for adopting a plain language approach, what other benefits might the Court gain from plain language rhetoric? We speculate that the Burger Court used plain language signal to both lower courts and taxpay-

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137. See *Paulsen v. Commissioner*, 469 U.S. 131, 144 (1985) (O'Connor, J., dissenting).

138. Of the cases we looked at, there were no unanimous decisions. Each of the nine dissents and the four concurrences show that the Court could have gone another way.

ers the Court's goal of protecting the federal tax system in general, and the Burger Court's docket in particular.

(1) Signal to lower courts

As Justice Vinson's address noted,<sup>139</sup> a Supreme Court decision does much more than settle a particular matter. It also acts as a guide to lower courts, agencies, and potential litigants. In terms of plain language and the Internal Revenue Code, this dual role places the Supreme Court in a strange position.

On the one hand, most questions involving federal taxation are answered by the Code's plain language. Otherwise, our federal tax system would be far more chaotic than it sometimes is, or at least appears. Thus, one way to ensure that the federal tax system runs smoothly is to encourage lower courts to seek out and apply the plain language approach as often as possible. Thus, we suspect that the Burger Court's frequent application of the plain language doctrine was part of an effort to encourage lower courts and agencies to apply the doctrine regularly.

While we know that most tax questions are easily resolved, we also know that, by the time an issue reaches the Supreme Court, the issue requires an analysis that goes beyond an application of the Code's plain language. This tension between what the plain language doctrine can achieve for the tax system as a whole and what it cannot achieve at the Supreme Court level may explain the Burger Court's contradictory use of plain language, as well as the Court's need to rely on other interpretive devices (such as legislative history) in its plain language decisions.

(2) Signal to taxpayers

That plain language decisions are so frequently used against taxpayers raises an interesting question: do taxpayers deserve this treatment? In other words, are plain language decisions the Court's response to truly simple questions that taxpayers make complex by attempting to avoid liability? If so, we can view the Court's frequent use of plain language as a signal directed to a broad class of potential litigants that such behavior is not rewarded.

This signal may help the entire tax system by reducing the number of disputes at all points in the process. Taxpayers, the IRS,

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139. See Vinson, *supra* note 12.



and the lower courts are on notice that the Supreme Court will support the government when a government position is based on plain language. Given the limited chance of success, a taxpayer must be extremely committed to fight a plain language rationale up the line through the administrative process and the lower courts. As a result, the number of disputes may be reduced throughout the system.

The deference to plain language signal more than likely helps the Court trim its own docket as well. Any taxpayer confronted with the government's use of plain language must consider that his chances of success are remarkably low. This, perhaps, is why the number of petitions for certiorari in the tax area remained steady during the Burger Court years, while the number of other petitions increased.<sup>140</sup>

#### 4. Problems with Plain Language

##### a. Muddled signals—inappropriate use of plain language

In Part III.B.3 we speculated that the Burger Court used plain language as a way of encouraging taxpayers, lower courts, and the IRS to find the most straightforward solutions to tax problems. On the one hand, such encouragement is appropriate because the plain language analysis should be applied by the IRS and lower courts, where there are more questions with simple answers awaiting resolution. On the other hand, plain language analysis is not as appropriate for the Supreme Court because a higher percentage of the Court's questions are complex.<sup>141</sup> Because the Supreme Court entertains questions that are more complex than those addressed by subordinate bodies, it actually relies on other factors in addition to the plain language analysis when making its decisions. But, rather than admit the complexity, the Court often cloaks decisions in plain language. Thus, the signal to lower courts and the Agency becomes muddled because the Court purports to use one type of analysis while actually engaging in an-

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140. See Table A, *supra* note 74.

141. This is not to say that lower level reviewing bodies do not deal with complex questions. Clearly they do. It is only to say that the lower the level of review, the higher the percentage of simple questions. Thus, on the lower levels, plain language resolutions are more appropriate than on the Supreme Court level, where the percentage of complex matters is far greater. The complexity of an issue can have far-reaching political implications as well. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 82-84 (1994) (recognizing that the complexity of an issue can have great effect on the issue of *minoritarian bias*); *id.* at 83 ("Majorities faced with complex issues . . . may be manipulated or misled into supporting positions that are detrimental to them.").

other. As a result of this contradiction, the Burger Court's plain language decisions send a confused signal.

b. Muddied signals—dissents

Another problem with the Burger Court's plain language cases is the number of dissenting opinions that these decisions generated. To the extent that the number of dissents in plain language decisions remains fifty percent higher than in other areas, the dissenting opinions send a counter signal to taxpayers: that they may have an opportunity to prevail. Further, dissenting opinions undercut the legitimacy of the plain language standard by demonstrating that, in each case, justices disagree with the notion that the issue before the Supreme Court can be—as the majority opinion asserts—easily resolved. It seems to us that the plain language standard's legitimacy rests on the assertion that texts have determined meanings. This legitimacy, however, is undermined whenever the rationale or methodology of a majority opinion is countered by a dissenting opinion.

c. Plain language and institutional resources

Plain language raises at least two institutional questions: first, whether the plain language doctrine helps preserve the Internal Revenue Code's internal consistency (or help create broad principles within the Internal Revenue Code)? And second, whether the application of the plain language doctrine promotes efficiency by preserving institutional resources?

Plain language is not an efficient way either to improve the Code's internal consistency or to develop broad principles. As a practical matter, the plain language standard requires that the Supreme Court forgo any interest in either goal in favor of a rigid adherence to a mechanical application of statutory language. In essence, courts are directed to apply strict language and to disregard results. If the consequences of a plain language application are contrary to what Congress intended, it is presumed that Congress will itself act to remedy the situation. It may be argued, however, that this approach—standing alone—is inefficient, because it forces an institution confronted with a problem to stand by passively while implementing and applying defective rules or policies. Given that Congress is the constitutionally designated institution for creating tax law, this potential inefficiency may be acceptable if the deference ultimately pleases Congress. The central question thus is whether Congress prefers a deferential Court in

the area of federal taxation or whether Congress also is sending signals that indicate otherwise. In this regard we note that the federal tax law is filled with court-made rules that Congress seems satisfied with—at least as demonstrated by its failure to overturn them.<sup>142</sup> Indeed, Congress, by remaining passive in response to Supreme Court tax rulings, has “repealed” very few Supreme Court federal tax decisions.

Thus, Congress’s failure to disembowel most Supreme Court federal tax decisions in general—and Burger Court tax decisions specifically—begs the following questions: is it more efficient for the Court to invite congressional response by merely exposing absurdities? Or is it more efficient for the Court to correct internal flaws? The latter question is based on an expectation that Congress would act to override the Court’s holdings if congressional intent had been contravened.

To some extent, the Court’s strict use of plain meaning to expose a statute’s faults hoards institutional resources. The Court interprets a statute, reveals its flaws, and leaves Congress to remedy any remaining flaws. As a result, the Court’s resources are saved, because it does not have to fashion a solution that may be overturned. To some extent, however, the plain language approach squanders institutional resources as well, particularly if plain language reveals a serious statutory flaw.<sup>143</sup> The Court has a limited ability to review questions in general and an even more limited tax docket. So long as a question has made its way to the Court, why not remedy the problem?

Congress’s general reluctance to rewrite federal tax decisions by subsequently enacting laws to contradict the Court’s decisions underscores the argument that Congress finds efficiency in a more, rather than less, aggressive Court. Accordingly, if we accept the premise that Congress should be the institution responsible for creating tax law, we must also consider that, as a “leading” institution, it is signalling the Court towards a more activist position.

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142. For example, *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184 (Ct. Cl. 1954), offers an explanation of basis that cannot be supported by plain language. Likewise, *Crane* offers an interpretation of amount realized that is equally absent from the statute. See *infra* notes 332-33. See also *Tufis*, discussed *infra* at notes 329-35; Galler, *supra* note 96, *passim* (recognizing that courts’ deference to IRS revenue rulings in the face of congressional silence gives interpretive rulings legislative effect).

143. We would use the plain language result in *Paulsen v. Commissioner*, 469 U.S. 131 (1985), as one example of such a revealed statutory flaw. See *supra* notes 113-16 and accompanying text.

## C. Legislative History

### 1. Introduction

#### a. The attraction of legislative history

In Part III of this Article we examine different interpretative methods used by the Burger Court in deciding federal tax questions. Discussion of the various interpretive techniques begins with an analysis of methods that confer high deference to Congress—for example, plain language—and moves through each method towards the Deep Structure section, and a more activist Court. Because courts and commentators have vacillated over the proper role of legislative history in statutory interpretation, not every court's sequence of topics would naturally flow from Plain Language to Legislative History.<sup>144</sup> Courts' regard for legislative history has spanned the spectrum from no regard to high regard and back again. Yet that sequence is natural for the Burger Court's federal tax decisions, because the Burger Court seemed to find deference to Congress in the form of legislative history a necessary side dish to the majority of its tax decisions.<sup>145</sup>

Often combining legislative history with other interpretive methods (such as plain language or regulations), the Burger Court used legislative history a great deal when deciding federal tax matters. Of the forty-six cases we surveyed, the majority, the concurrence, or the dissent used legislative history fifty-four percent of the time.<sup>146</sup> Our finding that the Burger Court respected and, indeed, was fond of legislative history was not unusual. In fact, it confirms Professor Carro's

144. Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 283-84 (1982).

145. Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160-75.

146. Cases using legislative history are: *Davis v. United States*, 495 U.S. 472 (1990); *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *United States v. American College of Physicians*, 475 U.S. 834 (1986); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *Commissioner v. Engle*, 464 U.S. 206 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Vogel Fertilizer*, 455 U.S. 16 (1982); *Jewett v. Commissioner*, 455 U.S. 305 (1982); *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 482 (1979); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21 (1978); *Fulman v. United States*, 434 U.S. 528 (1978); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976); *Central Tablet Mfg. Co. v. United States*, 417 U.S. 673 (1974); *Snow v. Commissioner*, 416 U.S. 500 (1974); *United States v. Byrum*, 408 U.S. 125 (1972); *United States v. Mississippi Chem.*, 405 U.S. 298 (1972); *United States v. Generes*, 405 U.S. 93 (1972); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971).

earlier study that showed the Supreme Court used legislative histories in tax matters more than in any other area.<sup>147</sup> The nature of tax legislation makes legislative history attractive for a number of reasons. First, although tax law derives from many sources, including judicial decisions and regulations, one cannot escape the essentially statutory nature of the area. In response to this, one trend we found throughout the Burger Court's federal tax decisions was its constant reference to Congress and congressional intent. Often the Burger Court found that intent in legislative history.

Second, federal tax statutes, generally, are accompanied by unusually rich legislative histories. Internal Revenue Code changes often come complete with extensive reports from the House Ways and Means Committee, the Senate Finance Committee and the Joint Committee on Taxation, as well as with statements from the Treasury, House, and Senate hearings and floor debates. Furthermore, members of Congress often base their votes on committee reports rather than on statutory language.<sup>148</sup>

Reliance on reports rather than statutory language leads to legislative history's third attraction: the limits of statutory language. The Internal Revenue Code is a self-contained legal system. As such, it can be particularly complex and self-referential. Often, its most fundamental concepts are the least well defined and yet the most closely held. These Code "fundamentals" are particularly difficult to express in statutes because statutory form is highly stylized and technical, making it inappropriate for articulating the sorts of deeper assumptions and complex interrelationships that drive many tax sections. But, where statutes fail, legislative history often does not. A paragraph in a committee report can often illuminate a bit of aspiration that a sub-sub-section can only hint at.

#### b. Types of legislative history

Although the comparative value of various types of legislative history is an interesting question, it is not the subject of this Article.<sup>149</sup>

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147. Carro & Brann, *supra* note 144, at 287.

148. Livingston, *supra* note 96, at 833-37.

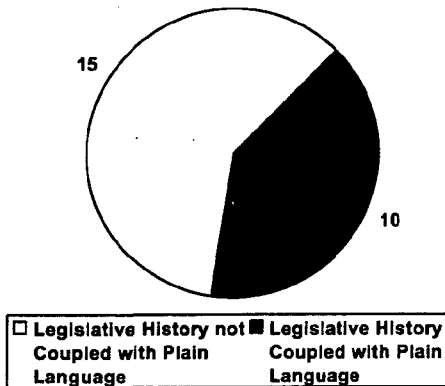
149. The debate over the use of legislative histories sometimes centers on the types of history put into play. For example, one objection to giving credence to statements from the floor is that these declarations are only the opinion of one among many. See Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1993); Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430 (1993); Stephanie Wald, *The Use of Legis-*

Accordingly, our survey does not distinguish among types of legislative histories. Nor are we directly concerned with whether it is legitimate for courts to use these histories when interpreting federal tax statutes. Instead, we are interested in how the Burger Court used the wide array of tools that fall under the heading “legislative history” when deciding federal tax matters. As a result, this section discusses committee reports, statements from the floor, statements from Treasury and even Congress’s failures to act, a topic discussed at greater length in the Regulations section of this paper.

c. Uses of legislative history

The Burger Court used legislative history in many, sometimes contradictory, ways. One way was to combine legislative history with other interpretive methods. For example, the Burger Court coupled plain language with legislative history in ten of twenty-five legislative history cases, for a total of forty percent.

Legislative History/Plain Language Decisions

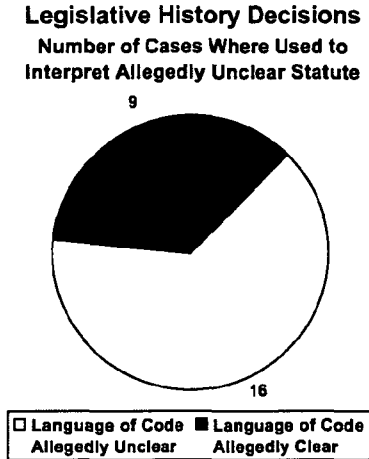


Even more frequently, however, the justices employed legislative histories to decipher garbled language. In sixteen of twenty-five cases

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*lative History in Statutory Interpretation Cases in the 1992 Supreme Court Term: Scalia Rails But Legislative History Remains on Track*, 23 Sw. U. L. REV. 47 (1993); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992). Committee reports might be criticized because they are written by committee staffers, not members of Congress, Livingston, *supra* note 96, at 833-37; and where does Congress’s failure to act fit into the picture? Is the use of legislative history ever legitimate and, if so, when?

(sixty-four percent) the justices claimed that legislative history guided them when Code language failed.<sup>150</sup>



Combined with two other categories, we found that the Burger Court used legislative history in at least four ways: (1) to support another method of statutory interpretation such as plain language or deep structure; (2) to test regulations; (3) to signify congressional intent where there was no congressional expression; and (4) to offer guidance for “unclear language.”

d. Dissents

Legislative history was attractive to all the justices, who turned to it at one time or another in majority opinions, concurrences, and dissents. Yet the mere fact that legislative history was widely used did not make it controversial. Although the amount of controversy engendered was slightly higher than average, legislative history majorities did not generate as many dissents as we saw in Plain Language cases<sup>151</sup> and will see again in Deep Structure cases.<sup>152</sup> The twenty-five legislative history cases generated nineteen dissents, for a total of seventy-six percent.

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150. The plain language decisions, combined with the unclear language decisions, total more than 100% because legislative history was sometimes used by both the majority and the dissent in the same case. Thus, in the 25 cases we discuss there are more than 25 opinions using legislative history.

151. See *supra* Part III.B.2.b.

152. See *infra* Part III.E.

e. Treatment of Taxpayer

Although legislative history was often combined with other methods, the taxpayer won more when the Burger Court invoked legislative history than when the Court relied solely on plain language, regulations, or deep structure. Eight of the Court's twenty-five legislative history cases supported the taxpayer's position, so that the taxpayer won thirty-two percent of the time.<sup>153</sup>

2. The Burger Court's use of Legislative History in federal tax matters

The Burger Court used legislative history from a number of different perspectives, befitting legislative history's wide range of uses. Because the Burger Court so often combined use of legislative history with other interpretive methods, legislative history's use is first sampled in combination with Plain Language and Deep Structure. We then examine how the Burger Court interpreted the lack of congressional action and follow by studying use of legislative history in combination with regulations and, finally, with unclear language.

a. Legislative History combined with plain language and deep structure

(1) Legislative history and plain language

As we saw above, plain language decisions are sometimes based on an unadorned assertion of straightforward statutory language. Occasionally, legislative history is added for a double demonstration of plain meaning. Sometimes, conflicting sides both find support in legislative history and plain language. A case that combines all of these perspectives is *St. Martin Evangelical Lutheran Church*.<sup>154</sup>

*St. Martin* concerned the scope of exemption from federal unemployment insurance taxes for certain religious schools under the Federal Unemployment Tax Act. The problem arose because of a series of amendments to the Act, each of which had narrowed the number of statutory exemptions. For example, until 1970, all services "per-

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153. Decisions that supported the taxpayer were: *Commissioner v. Engle*, 464 U.S. 206 (1984); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21 (1978); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Snow v. Commissioner*, 416 U.S. 500 (1974); *United States v. Byrum*, 408 U.S. 125 (1972).

154. *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981).



formed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3)" were exempt.<sup>155</sup> Under this provision the religious schools in *St. Martin* qualified for the exemption.

In 1970, Congress eliminated the broad exemption outlined above and substituted three narrower exemptions, one for churches, one for ministers, and one for schools.<sup>156</sup> Again, the religious schools in *St. Martin* were exempt.

In 1976, Congress eliminated the exemption for schools while retaining the exemption for churches and ministers.<sup>157</sup> Thus arose the *St. Martin* problem. Were the religious schools in *St. Martin* now subject to the Federal Unemployment Insurance Act because Congress repealed the exemption for schools, or were they still eligible for an exemption because their employees worked for a church?<sup>158</sup> In *St. Martin*, both the majority and the concurrence agreed on the plain language of the Federal Unemployment Tax Act: that under the statute's plain language, religious schools remained exempt so long as they were not separately incorporated from their governing church.<sup>159</sup> Because the schools in *St. Martin* were not separately incorporated, their exemption remained intact. The majority and the concurrence disagreed on the Act's legislative history, however, and how the *St. Martin* result should have been reached. That disagreement had to do with plain language and legislative history.

According to both the majority and concurrence, the schools in *St. Martin* were spared because they were eligible as both "schools" and "churches" before 1976, and only the school exemption was eliminated by the 1976 amendments. The majority and Justice Stevens disagreed, however, on whether Congress actually intended to keep these religious schools exempt after the 1976 amendments or whether the exemption was compelled by poor draftsmanship.

According to the majority, the statute's legislative history showed that Congress wanted to retain exemptions for religious schools even after the 1976 amendment. The majority based its view on the House and Senate reports concerning the 1970 church exemption, which said:

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155. *Id.* at 776.

156. *Id.* at 777.

157. *Id.*

158. *Id.*

159. *Id.* at 784 (majority opinion); *id.* at 790 (Stevens, J., concurring).

This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.<sup>160</sup>

For the majority, this 1970 legislative history demonstrated that the church exemption originally covered church-controlled religious schools. Further, the majority reasoned that, because this church exemption was untouched by the 1976 amendments, Congress intended to keep church-related schools exempt even after it eliminated the exemption for schools.

Just as surely as the 1970 legislative history cleared up the matter for the majority, the 1976 legislative history confused the issue for Justice Stevens. Based on House and Senate reports that stated that the 1976 amendments covered "all educational institutions," Justice Stevens concluded that Congress meant to eliminate the exemption for religious schools.<sup>161</sup> However, by failing to amend the church exemption along with the school exemption, Congress fell into a drafting trap that kept the religious schools exempt.<sup>162</sup> Justice Stevens was thus able to argue that, although legislative history clearly showed that

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160. *Id.* at 781 (quoting H.R. REP. NO. 612, 91st Cong., 1st Sess. 44 (1969)).

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"Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services, performed for institutions of higher education."

*Id.* at 789 n.1 (Stevens, J., concurring) (quoting H.R. REP. NO. 755, 94th Cong., 1st Sess. 56 (1975)).

"The bill would require the States to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education)."

*Id.* (quoting S. REP. NO. 1265, 94th Cong., 2d Sess. 2 (1976)).

162. *Id.* at 790 (Stevens, J., concurring).

Congress meant to repeal the church school exemption, the statute's plain language compelled him to spare the schools. "Despite this legislative history, I agree with the Court's conclusion . . . . Although Congress' intention to cover such employees was, in my judgment, clear, the 1976 Amendments simply failed to give effect to that intention."<sup>163</sup>

For both the majority and the concurrence, then, plain language was the deciding factor. But, for the majority, that plain language was supported by a legislative history that, Justice Stevens argued, entirely undermined it.<sup>164</sup> We again see the power of plain language first discussed in Part III.A.: words can take on a power that is greater than their author's intent.

In addition, the majority and the concurrence show radically different deference to Congress and yet end up in agreement. The majority could claim that it was only following Congress' intent because the majority's version of legislative history and plain language agree. But the concurrence has a trickier problem. Which intent? The mistaken intent of the statute or the true intent of the legislative history? Finally, does it make a difference if each side ends up in the same place, or does it only confirm that plain language can (and does) support widely different opinions?

## (2) Legislative history and deep structure

Of all the decisions that use legislative history, perhaps the most challenging is *Bob Jones University v. United States*.<sup>165</sup> As we will see in more detail in the Deep Structure section of this paper, the *Bob Jones* decision is difficult to reconcile with any of the standard interpretive tools discussed in this article.<sup>166</sup> Neither the statutory language, the Treasury regulations, nor the legislative history clearly support the majority's decision. In fact, as pointed out in Justice Rehnquist's dissent, all of these sources actually favor the opposi-

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163. *Id.*

164. Other cases in which the justices combined plain language and legislative history are: *Davis v. United States*, 495 U.S. 472 (1990); *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977).

165. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

166. See *infra* Part III.E.

tion.<sup>167</sup> Yet the majority stretches and shapes these materials to its purpose, thereby hiding its own activist role. Nowhere is this artifice more clever than when the *Bob Jones* majority uses legislative history.

In *Bob Jones* the Court decided that racially discriminatory religious schools were ineligible for tax exemptions under Section 501(c)(3). This was a complex decision because, from the exemption's creation until 1970, the Internal Revenue Service routinely favored these schools.<sup>168</sup> And even after it began to deny exemptions in 1970, the Service did not change its regulations (which would have required an extensive public comment period)<sup>169</sup> but, instead, announced its denial in a revenue ruling.<sup>170</sup> Thus, when the Burger Court was asked to deny the exemption in 1983, it was faced with a long history against that position. Further, the shorter history supporting denial of the exemption to the taxpayer was only based on a revenue ruling, while the longer history was based on the weightier statute and regulations. Despite these limitations, however, the Burger Court managed to construct an elaborate legislative history against the exemption.

First, the Court asserted that: "It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."<sup>171</sup> This the Court had to do to avoid the statute, which supported the exemption.

Next, the Court found that the exemption should be analyzed within the framework of the Internal Revenue Code and against the background of congressional purposes.<sup>172</sup> This approach allowed the Court to construct a legislative history from sources beyond the statute, again because the statute's specific history supported an exemption.

The Court found another, more forgiving, history in the law of charitable trusts.<sup>173</sup> According to the Court, one hundred years of decisions supported the view that no action was charitable if it was

167. *Bob Jones*, 461 U.S. at 612-23 (Rehnquist, J., dissenting).

168. *Id.* at 577.

169. See generally Asimow, *supra* note 96, *passim* (discussing the requirement and role of the public comment period in formulating and implementing Treasury regulations).

170. *Bob Jones*, 461 U.S. at 578. Revenue Rulings are less weighty authority than regulations. See generally Galler, *supra* note 96, *passim* (arguing that courts should not accord revenue rulings extraordinary treatment).

171. *Bob Jones*, 461 U.S. at 586.

172. *Id.*

173. *Id.* at 588 n.12.

against public policy.<sup>174</sup> Furthermore, since 1954, public policy had stood against racial discrimination in schools.<sup>175</sup> This public policy was reflected in the revenue ruling banning the exemption.

Moreover, since 1970, Congress knew that the Service was denying exemptions to racially discriminatory schools. Yet, despite this knowledge, Congress did nothing to reconfirm the exemption. This lack of legislative action became the legislative history on which the Court based its support for the revenue ruling.<sup>176</sup>

The lack of legislative action as a form of legislative history did not trouble Justice Powell, who concurred,<sup>177</sup> but it certainly staggered Justice Rehnquist, who stated:

Perhaps recognizing the lack of support in the statute itself, or in its history, for the 1970 IRS change in interpretation, the Court finds that “[t]he actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority,” concluding that there is “an unusually strong case of legislative acquiescence in and ratification by implication of the 1970 and 1971 rulings.” The Court relies first on several bills introduced to overturn the IRS interpretation of § 501(c)(3). But we have said before, and it is equally applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent. These bills and related hearings indicate little more than that a vigorous debate has existed in Congress concerning the new IRS position.<sup>178</sup>

b. Failure to act as legislative history

The Court again viewed Congress’s failure to act as legislative history to make its point in *United States v. Foster Lumber Company*.<sup>179</sup> In *Foster Lumber*, discussed in more detail in the Regulations section below,<sup>180</sup> the taxpayer argued that Congress would not create a deduction—here, a Code section 172 net operating loss—merely to “waste” its benefits by creating rules limiting its use.<sup>181</sup> The Court responded by showing that, for the particular deduction in question, Congress had indeed acted in 1924 to prevent “waste.” However, the Court also found that Congress then backed away from

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174. *Id.* at 591.

175. *Id.* at 593-99.

176. *Id.* at 599.

177. *Id.* at 607 (Powell, J., concurring in part and concurring in the judgment).

178. *Id.* at 620 (Rehnquist, J., dissenting) (citations omitted).

179. *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976).

180. *See infra* Part III.D.

181. *Foster Lumber*, 429 U.S. at 42-44.

this position in 1939 by eliminating the anti-waste provision. The 1924 legislation thus showed the Court that Congress knew how to prevent waste when it wanted to. Accordingly, if after 1939 Congress failed to cure the taxpayer's problem, then its failure to do so indicated its intent to allow the waste.<sup>182</sup>

### c. Legislative history and regulations

With the advent of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*<sup>183</sup> and its emphasis on deference to Treasury regulations, the use of legislative history to support or reject regulations takes on new meaning. Assuming no clear statutory language, how influential should legislative history be when a regulation clearly covers a matter? Although more fully explored in the Regulations section below, the Burger Court's use of legislative history and Agency regulations deserves some discussion here.

The Burger Court used legislative history to interpret regulations in *National Muffler Dealers Association v. United States*<sup>184</sup> and *United States v. Vogel Fertilizer Company*,<sup>185</sup> among other cases.<sup>186</sup> In *National Muffler*, the question was whether an association of Midas Muffler franchisees was a tax-exempt business league under section 501(c)(6) of the Internal Revenue Code. Agency regulations limited business league exemptions to organizations "of the same general class as a chamber of commerce or board of trade . . . [whose] activities [are] directed to the improvement of business conditions or to the promotion of the general objects of *one or more lines of business* as distinguished from the performance of particular services for individual persons."<sup>187</sup> Courts have subsequently interpreted these regulations and their predecessors as limited to either (1) an entire industry or (2) to all the components of an industry within a geographic area.<sup>188</sup> Using these regulations as authority, the Internal Revenue

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182. *Id.* at 44-46.

183. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

184. *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979).

185. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982).

186. Examples of other decisions include: *Commissioner v. Engle*, 464 U.S. 206 (1984); *Jewett v. Commissioner*, 455 U.S. 305, 309 (1982); *Central Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21 (1978); *Fulman v. United States*, 434 U.S. 528 (1978).

187. *National Muffler*, 440 U.S. at 482 (quoting *Treas. Regs. 74, Art. 528 (1929)*) (emphasis added).

188. *National Muffler*, 440 U.S. at 475.

Service denied the exemption because Midas Muffler franchisees represented only a segment of an "entire industry."<sup>189</sup>

In upholding the denial of exemption, the Burger Court spent considerable time on the business league exemption's legislative history.<sup>190</sup> According to the Court, that history showed that from 1913 until 1929 Congress and the Treasury experimented with several definitions. In response to litigation that occurred during this period, the Treasury adopted the "line of business" rule in 1929. This rule, which limited the exemption to groups open to entire industries, remained unchanged for the next fifty years and, consequently, was supported by fifty years of subsequent reenactment.<sup>191</sup> Given this basis in legislative history, the regulation was due "serious deference."<sup>192</sup>

In contrast to *National Muffler*, in *Vogel Fertilizer* the Court used legislative history to invalidate a regulation. *Vogel* concerned the extent of the controlled corporations rule under section 1563(a)(2) of the Internal Revenue Code. Controlled corporations are separate entities that are treated as one when they share a set amount of common ownership, an undesirable treatment for the controlled corporations in *Vogel*. The question the Court faced was whether the common ownership rules were to be interpreted narrowly or broadly.

Despite acknowledging that the controlled corporations regulations were technically consistent with the statute,<sup>193</sup> the Court rejected them, stating:

This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design. The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's "origin and purpose."

The legislative history of § 1563(a)(2) resolves any ambiguity in the statutory language and makes it plain that Treas. Reg. § 1.1563-1(a)(3) is not a reasonable statutory interpretation. Through the controlled-group test, Congress intended to curb the abuse of multiple incorporation—large organizations subdividing into smaller corporations and receiving unintended tax benefits from the multiple use of surtax exemptions, accumulated earnings credits, and various

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189. *Id.* at 474-75.

190. *Id.* at 478-84.

191. For a greater discussion of the reenactment doctrine, see *infra* Part III.D.

192. *National Muffler*, 440 U.S. at 484.

193. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982).

other tax provisions designed to aid small businesses. . . . The intended targets of § 1563(a)(2) were groups of interrelated corporations—corporations characterized by *common* control and ownership.<sup>194</sup>

As we will see in more detail in our discussion of Regulations, below, *National Muffler* and *Vogel Fertilizer* are out of line with *Chevron* to the extent that *Chevron* calls for greater deference to Agency regulations. Instead, *National Muffler* and *Vogel* are each based on deference to Congress, whether through plain language or legislative history.

What becomes clear below, however, is that this deference is more apparent than real. When confronted with regulations, the Burger Court was much more likely to uphold the Treasury than these two cases demonstrate. Yet the Burger Court claimed to bow to legislative supremacy, a point expanded upon below. Whether or not it actually followed Congress in its federal tax decisions, the Burger Court made sure to bow in its rhetoric to legislative supremacy.

Perhaps this is a fourth reason why legislative history was so popular with the Burger Court. As we saw in *St. Martin*, legislative history is as flexible as plain language and can support any position. It is particularly well suited for legislative supremacy stances, however, because it creates the impression of deference.

#### d. Legislative history as a guide to unclear language

Despite objections from opponents of legislative history,<sup>195</sup> the Burger Court most frequently used legislative history to clarify statutory language.<sup>196</sup> Examples cover every tax topic and almost every conceivable question; and furthermore, legislative history was used

194. *Id.* at 26-27 (citations omitted).

195. See, e.g., Paul R. Michel, *Judicial Decisionmaking: The Role of Text, Precedent and Rule of Law*, 17 HARV. J.L. & PUB. POL'Y 57 (1994).

196. Burger Court decisions that used legislative history to explain unclear language include: *United States v. American Bar Endowment*, 477 U.S. 105 (1986) (majority and dissent); *Commissioner v. Engle*, 464 U.S. 206 (1984) (majority and dissent); *Bob Jones Univ. v. United States*, 461 U.S. 330 (1983) (majority); *Jewett v. Commissioner*, 455 U.S. 305 (1982) (majority and dissent); *United Cal. Bank v. United States*, 439 U.S. 180 (1978) (majority); *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21 (1978) (dissent); *Fulman v. United States*, 434 U.S. 528 (1978) (majority); *Commissioner v. Kowalski*, 434 U.S. 77 (1977) (majority); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977) (majority); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977) (dissent); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976) (dissent); *Central Tablet Mfg. v. United States*, 417 U.S. 673 (1974) (majority); *Snow v. Commissioner*, 416 U.S. 500 (1974) (majority); *United States v. Mississippi Chem.*, 405 U.S. 298 (1972) (majority); *United States v. Generes*, 405 U.S. 93 (1972) (concurrence); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971) (majority).



this way extensively by majorities, dissenters, and concurrers, both to support the taxpayer and the government.<sup>197</sup> *Commissioner v. Engle*<sup>198</sup> displays many sides of legislative history as a guide to unclear language.

*Engle* concerned percentage depletion allowances for domestic oil and gas wells. Under the percentage depletion allowance system, qualifying taxpayers deduct a statutorily determined amount from their taxable income. In *Engle* that amount was determined in part by "average daily production of domestic crude oil." The deduction was questioned in *Engle* because the taxpayers' income was not tied to oil or gas production and, thus, was paid whether or not there was any "average daily production."<sup>199</sup>

In *Engle* the majority found that the statute could be read in at least three ways: (1) as denying any deduction not specifically tied to production,<sup>200</sup> (2) as allowing a deduction regardless of whether physical extraction occurred during the year for which the deduction was claimed,<sup>201</sup> or (3) as deferring deductions earned in non-production years to future years when production occurred.<sup>202</sup> Given that "[e]ach of these possible interpretations of new § 613A can be reconciled with the language of the statute itself,"<sup>203</sup> the Court reflected that "[o]ur duty . . . is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"<sup>204</sup> In searching out this congressional purpose, "[t]he circumstances of the enactment of particular legislation may be particularly relevant"<sup>205</sup> because:

[t]he true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language,

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197. See cases cited *supra* note 196.

198. *Commissioner v. Engle*, 464 U.S. 206 (1984).

199. *Id.* at 212. In one case, the taxpayers assigned their rights while retaining overriding royalties. In 1975, they received \$7600 on these royalties even though nothing was produced. *Id.* In the second case, the wells produced, but the lessors' contract gave the taxpayers payments whether the wells produced or not. *Id.* at 213.

200. *Id.* at 215.

201. *Id.* at 216.

202. *Id.* at 216-17.

203. *Id.* at 217 ("Congress' repeated references to 'production' during the 'taxable year' could not have been completely inadvertent, but each of the possible interpretations gives meaning to those references.").

204. *Id.* (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

205. *Id.*

cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part.<sup>206</sup>

In its version of that legislative history, the majority found that “[t]he reasonableness of each possible interpretation of the statute can also be measured against the legislative process by which § 613A was enacted.”<sup>207</sup> This process showed that section 613A was adopted in response “to the public outcry concerning the country’s growing dependence on foreign energy and to the alleged excessive profits that major integrated oil companies were earning.”<sup>208</sup> Given that “Congress was concerned with shrinking domestic production levels and with assisting smaller producers to compete with the larger ones,”<sup>209</sup> it could not have meant to “withdraw the percentage depletion allowance on lease bonus or advance royalty income arising from oil and gas properties.”<sup>210</sup> Accordingly, the deduction was allowed.

Again, despite the majority’s forceful tale, there was another equally plausible reading presented by the dissent. First, once it was clear that the statute could sustain multiple meanings, Justice Blackmun argued for bypassing legislative history altogether in favor of a regulation.<sup>211</sup> According to Justice Blackmun this deference was justified because “the Commissioner is better able than any court, including this one, to assess the practical consequences of particular interpretations and to resolve statutory ambiguities in ways that minimize administrative difficulties.”<sup>212</sup> But, if the majority was going to defer to Congress instead of the Agency, then Justice Blackmun would show that its version of legislative history was incorrect.

Given the poverty of § 613A’s legislative history as a source for the Court’s conclusion that the Commissioner’s interpretation is unreasonable, the Court ultimately must rest its analysis on its characterization of the underlying purpose of Congress. Reasoning principally from the fact that the Tax Reduction Act of 1975 was enacted during a period of national concern over energy shortages, the Court assumes that Congress’ fundamental purpose was to “in-

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206. *Id.* at 223 (quoting *Helvering v. Morgan’s, Inc.*, 293 U.S. 121, 126 (1934)) (alteration in original).

207. *Id.* at 220.

208. *Id.* at 217.

209. *Id.* at 224.

210. *Id.* at 223-24.

211. *Id.* at 230 (Blackmun, J., dissenting).

212. *Id.*

crease production by the independent producers and royalty owners." . . .

With due respect, this analysis simply ignores the terms and structure of the statute that it purports to construe. Section 613A(c) cannot have been meant to increase production by independent producers over pre-existing levels; it did not create a new tax subsidy but merely preserved an old one.<sup>213</sup>

### 3. Conclusions

In this paper we examine various themes that traverse the Burger Court's federal tax opinions. One theme is rhetoric. What we learn is that the Burger Court justices were fond of the rhetoric of legislative supremacy, a theme that echoes in every area studied. In Plain Language the Court painted itself as the passive discoverer of congressional intent.<sup>214</sup> As we will see in Regulations, the Burger Court used legislative supremacy as justification for deferring to the Internal Revenue Service. Even when the Court was acting on its own, as in *Deep Structure*,<sup>215</sup> it used the lack of congressional action (as in *Bob Jones*) as a way to defer to Congress.<sup>216</sup> There is no doubt that congressional supremacy was an important aspect of many Burger Court tax opinions.

There is also no doubt that legislative history was quite popular with the justices. Twenty-five cases had opinions that relied on legislative history to some extent,<sup>217</sup> sometimes with different versions of a history used by a majority, concurrence, and dissent, each seeking to support its interpretation as mere congressional will.

That many versions of the same legislative history are used for different causes demonstrates that legislative history is as (or more) malleable than plain language. Further, if legislative history exists at all, it is probably far more abundant than the applicable statutory language, offering more to choose from in crafting an argument. Consequently, an opinion that uses legislative history gets both the maximum flexibility that comes from a malleable medium that can be shaped to fit many arguments and the rhetorical safety that comes

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213. *Id.* at 233-34 (Blackmun, J., dissenting).

214. *See supra* Part III.B.

215. *See infra* Part III.E.

216. *See* discussion *infra* Part III.C.2.b.; *supra* notes 165-82 and accompanying text.

217. *See* cases cited *supra* note 146.

with deference to Congress. It is no wonder that legislative history is an aspect of so many arguments.

Whether rhetorical deference is matched by actual deference, however, is another matter. In this regard, legislative history is so widespread that it loses a specific focus. It does not so much show deference to a particular institution as it shows deference for deference's sake—to any relevant institution, depending on the circumstances. In some areas, such as regulations, it appears that the Court actually deferred to the Agency, even as it claimed to be deferring to Congress. In *Deep Structure*, the Court is essentially followed its own interpretation of Code language and structure. In *Plain Language and Legislative History* we see that deference can be (and often is) used to support arguments on either side. Thus, we cannot say that the high use of plain language and legislative history necessarily means a high deference to Congress as well.

#### D. Deference to Treasury Regulations

##### 1. Introduction

The federal tax system is subject to tremendous executive control, much of it exercised through Agency regulations.<sup>218</sup> Recently, debates over how courts should treat regulations have centered on *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>219</sup> Because the Burger Court promulgated *Chevron*, and because of the vast number of tax regulations, we expected *Chevron's* mark on many Burger Court decisions. Remarkably, we found instead that the Burger Court used a myriad of approaches to Treasury regulations, none of which fit the *Chevron* model.

In this section we examine the Burger Court's deference to Treasury regulations. First, we focus on *Chevron* in general. Next, we examine *Chevron's* use in tax cases. Because we found that courts have

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218. As a practical matter the vast majority of tax returns are handled exclusively by the Internal Revenue Service, which applies its own regulations and rules.

The Department of Treasury issues regulations through the Internal Revenue Service under the authority granted it by I.R.C. § 7805 (1988 & Supp. IV 1992). The Internal Revenue Service issues hundreds of pages of regulations each year.

219. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

In *Chevron*, the Burger Court established a two-prong approach for testing the validity of agency regulations, a mode of inquiry that was "understood to mark a significant transformation in the Supreme Court's jurisprudence of deference." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 971 (1992).

not relied on *Chevron*, we then review the Burger Court's rationales for deciding federal tax cases involving regulations.

2. Deference to regulations—in general

a. Introduction—importance of *Chevron*

Courts use a variety of approaches to agency regulations. As Professor Merrill states:

The attitude of courts toward administrative interpretations of statutes has ranged between two extremes. At one pole, courts ignore the administrative view. When operating in this “independent judgment” mode, a court employs traditional tools of statutory interpretation—analysis of text, legislative history, and various canons of construction—to arrive at what it regards as the best interpretation of the statute, just as it would in a case where the executive branch has not spoken previously. At the other pole, courts frame the inquiry in terms of whether the administrative interpretation is one that a reasonable interpreter might embrace. In this “deference” mode, a court implicitly acknowledges that the statute is susceptible to multiple readings. The task of the court is viewed not as discovering the best interpretation, but rather as assuring that the executive view does not contradict the statute and otherwise furthers legitimate objectives.<sup>220</sup>

Before *Chevron* was decided, Merrill continues, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes. The approach was instead pragmatic and contextual. One feature of the Court's practice was that deference could range over a spectrum from “great” to “some” to “little” (although no attempt was ever made to calibrate different degrees of deference with any precision). A particularly common approach was to cite the views of those charged with administration of the statute as one of several reasons for adopting a particular construction.<sup>221</sup>

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220. *Merrill*, *supra* note 219, at 971 (footnote omitted).

221. *Id.* at 972 (footnotes omitted). Merrill perceived judicial deference to be greatest before *Chevron* in three situations. First, a court might address “Congress’ interpretative intent.” *Id.* at 973. A legislative, as opposed to an interpretative regulation, *see infra* notes 243-252 and accompanying text, reflects such intent. Thus, for example, a court would be more likely to defer to a regulation if it were legislative than if it were interpretative. Second, a court might defer to a regulation by emphasizing the agency’s possession of specific attributes, such as expertise, or by voicing a determination to apply a standard consistently. Merrill, *supra* note 219, at 973. Finally, a court might be swayed to sustain a regulation by an agency’s reasoned consideration in promulgating the regulation. *Id.* at 974. For another article about *Chevron* that underscores *Chevron*’s historical antecedents, see Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

*Chevron* involved an Environmental Protection Agency (“EPA”) regulation of an air pollution statute. The statute granted permits to operate “stationary sources” of air pollution,<sup>222</sup> a term of art defined by EPA regulations.<sup>223</sup> These regulations allowed businesses to aggregate several pieces of equipment at one industrial site—in technical terms, to treat the equipment as being in one “bubble”—instead of separately testing each piece. Thus, a plant owner could modify a single piece of equipment without meeting permit requirements for that piece if his alterations did not increase the total pollution generated by all the equipment within the bubble.<sup>224</sup> Although the District of Columbia Circuit Court of Appeals set aside these EPA regulations,<sup>225</sup> on review, the Burger Court declared that:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>226</sup>

Thus, the Court established a two-prong test. Under the first prong, the question is whether Congress has “directly addressed the precise question at issue.” If the answer to this question is no, then a court must ask whether the regulation “is based on a permissible construction of the statute.” If so, the regulation controls. Given that it is almost impossible for Congress precisely to address all possible applications of any statute, in most situations, *Chevron* shifts deference from Congress to the agency.

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Both our research and other commentators indicate that legislative regulations are given great weight in the tax area. See *infra* notes 243-52 and accompanying text.

222. *Chevron*, 467 U.S. at 840.

223. See *id.*

224. *Id.*

225. *Id.* at 841-42.

226. *Id.* at 842-43 (footnotes omitted).

b. The overall impact of *Chevron*

*Chevron* is controversial for several reasons. First, its all-or-nothing approach allows courts to ignore regulations if Congress had addressed the precise matter but requires that courts defer to regulations if Congress is not clear. Again, given that, at least for some judges, the plain language of statutes is always unclear,<sup>227</sup> *Chevron* shifts from deference to Congress to deference to the Agency. Second, *Chevron* reverses the interpretation default mode of lesser to greater deference. Under *Chevron*, courts must justify their independent judgment if they disregard a regulation but need offer no justification to apply a regulation. Finally, *Chevron* minimizes the importance of other traditional tools of statutory construction, such as legislative history.<sup>228</sup>

c. Courts' reliance upon *Chevron* in federal tax cases

Although *Chevron* did not involve Treasury regulations specifically, *Chevron* offers guidance about regulations generally; and tax cases often involve regulations. Federal tax is an area where the "regulatory scheme is technical and complex, the agency consider[s] the matter [under regulation] in a detailed and reasoned fashion, and the decision [affecting the regulation inevitably] involves reconciling conflicting policies."<sup>229</sup> Despite what we might expect, however, neither

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227. See *supra* Part III.B.

228. Commentators have had diverse reactions to *Chevron*. Some commentators have viewed *Chevron* as an assault on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which established the principle of judicial review over executive and legislative actions. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); cf. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (pre-*Chevron* article arguing that *Marbury*'s standard of judicial review of constitutional law cannot be extended as easily onto administrative agencies). Others have argued that deference is due to administrative agencies' regulations and that *Chevron* reasonably restores such respect. See, e.g., Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990). Yet others question *Chevron*'s importance and would derive new rules from *Chevron* that neither restore the right of judicial review nor require a court to slavishly defer to an agency's pronouncements. See, e.g., Merrill, *supra* note 219, at 975-1025 (asserting that *Chevron*'s importance is overrated and, in any case, unworkable, because the Court did not uniformly apply *Chevron* after deciding it); Sunstein, *supra* note 221 (discussing *Chevron* generally and calling for further examination); Breyer, *supra* note 96 (arguing for giving greater judicial deference to administrative agencies in areas of their expertise).

For other discussions about *Chevron*, see Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (suggesting that *Chevron* should not be interpreted to require mechanical application of regulations); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (reviewing the effect of *Chevron* on subsequent decisions and concluding, among other things, that judicial deference to agencies has increased).

229. *Chevron*, 467 U.S. at 865.

the Burger Court specifically, nor courts in general, have applied *Chevron* to tax cases.<sup>230</sup>

### (1) The Burger Court

In the federal tax area, the Supreme Court has paid some, albeit scant, heed to *Chevron*. Three of the forty-six decisions included in our study were decided after *Chevron*,<sup>231</sup> and one of these cases involved regulations; but the Court did not mention *Chevron* in that decision.<sup>232</sup> Perhaps the Burger Court did not rely on *Chevron* because the case was decided late in the Burger era. Yet, as we point out below, the Burger Court's tax decisions do not even foreshadow *Chevron*. Further, although the Rehnquist Court inherited *Chevron* and thus had more time to apply it, the Rehnquist Court's tax decisions are, in general, *Chevron*-free as well.

### (2) The Rehnquist Court

The Rehnquist Court relied on *Chevron* in *Pension Benefit Guaranty Corp. v. LTV Corp.*<sup>233</sup> In *LTV* the Court upheld the Pension Benefit Guaranty Corporation's actions after examining the legislative history of the pertinent law and finding no contrary legislative intent. However, the Court was sustaining the Agency's actions, not its regulations.<sup>234</sup> Beyond this decision, the Rehnquist Court applied *Chevron* to federal tax cases in only a cursory fashion.<sup>235</sup>

230. Evidence about whether *Chevron* has been followed outside the tax area is conflicting. Compare *Merrill*, *supra* note 219, *passim* (*Chevron* not applied) with *Schuck & Elliott*, *supra* note 228, *passim* (*Chevron* applied). It is therefore difficult to judge whether the Burger Court swam with, or against, the tide in the federal tax area.

231. *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *United States v. American College of Physicians*, 475 U.S. 834 (1986); *Paulsen v. Commissioner*, 469 U.S. 131 (1985).

232. See *United States v. American College of Physicians*, 475 U.S. 834 (1986).

The Burger Court did note *Chevron* in a federal procedural tax case, *United States v. Boyle*, 469 U.S. 241 (1985), but in rather cursory fashion in a footnote. *Id.* at 246 n.4 (recognizing that a long-standing regulation consistent with a statute is to be given deference).

233. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

234. *Id.* at 647-52.

235. Two examples of the cursory fashion in which the Rehnquist Court has cited *Chevron* in federal tax cases are: *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 576 (1993) (Souter, J., dissenting) (pointing out majority's failure to defer to long-standing regulation and citing *Chevron*, as well as several other cases, for support); and *United States v. Burke*, 504 U.S. 229, 242 (1992) (Scalia, J., concurring) (arguing that Internal Revenue Service's regulation is not a reasonable interpretation of statute, citing *Chevron*).



(3) Lower federal courts

Other federal courts also have a spotty history with *Chevron*. Some courts, such as the Sixth Circuit, have followed *Chevron* in federal tax cases.<sup>236</sup> Others, like the Ninth Circuit and the Tax Court, have resisted *Chevron*, even when addressing the same issues confronted by the Sixth Circuit.<sup>237</sup>

d. What standards did the Burger Court apply when deciding whether to rely on regulations in federal tax cases?

The Burger Court did not use the *Chevron* model to judge Treasury regulations either in its deference to those regulations or by using *Chevron's* specific two-prong approach. What standards, then, did the Burger Court use to decide how to apply regulations in federal tax cases?

The Burger Court analyzed regulations in eighteen of the cases in our forty-six case data base.<sup>238</sup>

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236. A review of significant tax cases citing to *Chevron* suggests that the Sixth Circuit was the most rigorous in applying the case. In *Peoples Fed. Sav. & Loan Ass'n v. Commissioner*, 948 F.2d 289 (6th Cir. 1991), the taxpayer opposed the Service's promulgation of a regulation that replaced contradictory, older regulations. After a thorough review, the court concluded that Congress had not addressed the precise issue in question, so that the regulation, which was both a "reasonable and permissible" interpretation, should be sustained. *Id.* at 304.

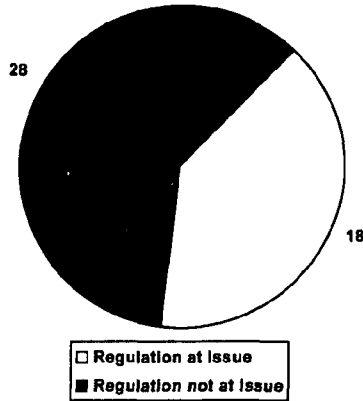
The court also relied heavily on *Chevron* to sustain the Service's position in a revenue ruling in *Johnson City Medical Ctr. v. United States*, 999 F.2d 973 (6th Cir. 1993) (Federal Insurance Contribution Act taxes at issue).

237. In contrast to the Sixth Circuit, the Ninth Circuit refused to apply *Chevron* when it confronted the *Peoples Federal* issue. See *Pacific First Fed. Sav. Bank v. Commissioner*, 961 F.2d 800 (9th Cir. 1992).

The Tax Court also faced the *Peoples Federal* issue after having been scolded by the Sixth Circuit for failing to follow *Chevron* when the Tax Court decided *Peoples Federal*. *Georgia Fed. Bank v. Commissioner*, 98 T.C. 105 (1992) (applying *Chevron* but finding an inadequate congressional statement and thus concluding that the regulation was unreasonable and, therefore, invalid); see also *Nalle v. Commissioner*, 997 F.2d 1134 (5th Cir. 1993) (citing *Chevron* as confirmation that less deference is owed to interpretive regulations by an agency other than the agency charged with enforcement of the statute at issue); *Gary v. United States*, 708 F. Supp. 1188, 1191 (D. Colo. 1989) (recognizing *Chevron* for the premise that courts should examine congressional intent and legislative history, but holding that the language of statute, if "clear in context" is controlling absent contrary legislative history).

238. The 18 cases are: *United States v. American College of Physicians*, 475 U.S. 834 (1986); *Commissioner v. Tufts*, 461 U.S. 300 (1983); *Jewett v. Commissioner*, 455 U.S. 305 (1982); *United States v. Vogel Fertilizer*, 455 U.S. 16 (1982); *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979); *Thor Power Tool v. Commissioner*, 439 U.S. 522 (1979); *Fulman v. United States*, 434 U.S. 528 (1978); *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21 (1978); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976); *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974); *United States v. Cartwright*, 411 U.S. 546 (1973);

## Number of Cases Analyzing Regulations



Thus, regulations were a common, though not overwhelming, aspect of the Burger Court's federal tax decisions. In these eighteen cases, the reviewed regulation was almost always sustained and almost always used to decide in the government's favor. The four decisions overturning regulations were also the four cases decided in the taxpayer's favor.

We found four agency regulation review patterns in the Burger Court's opinions, none of which foreshadowed *Chevron*:<sup>239</sup> (1) the Court examined "legislative regulations,"<sup>240</sup> upholding the few legislative regulations it considered, usually in the government's favor; (2) the Court relied on the "reenactment" doctrine,<sup>241</sup> again upholding the regulations, and again usually deciding in the government's favor; (3) the Court applied regulations without justifying its deference to the regulations, and the government usually won in these cases as well; (4) the Court searched for and implemented a congressional mandate when applying regulations.<sup>242</sup> It was primarily in this last category that the Court decided in the taxpayer's behalf.

Commissioner v. First Sec. Bank, 405 U.S. 394 (1972); United States v. Generes, 405 U.S. 93 (1972); Woodward v. Commissioner, 397 U.S. 572 (1970).

239. For these patterns' reflections of courts' general approach to regulations before *Chevron*, see *supra* note 221.

240. See *infra* text accompanying notes 243-52 (detailing situations where regulations were issued pursuant to Congress's express delegation of power to the Internal Revenue Service to issue regulations).

241. Under Reenactment doctrine, where a regulation is in existence at the time Congress reenacts the pertinent law, it follows that Congress knows of the regulation's existence and approves of it when reenacting the law.

242. This approach resembles *Chevron*, in part because of its explicit search for a congressional intent. Ultimately, however, it must be distinguished from *Chevron* because of the rea-

(1) Legislative regulations

The Burger Court heard three cases involving legislative regulations<sup>243</sup> and sustained the regulations in each. Two of the decisions favored the government. In *Commissioner v. Portland Cement Co.*,<sup>244</sup> the government contested depletion deductions under Section 611(a). Section 611 states that the “reasonable” depletion “allowance [is] in all cases to be made under regulations prescribed by the [Commissioner].”<sup>245</sup>

After examining the section 611 regulations, the Court questioned whether it was compelled to follow them and concluded that:

These regulations command our respect, for Congress has delegated to the Secretary of the Treasury, not to this Court, the task “of administering the tax laws of the Nation.” We therefore must defer to Treasury Regulations that “implement the congressional mandate in some reasonable manner.” To put the same principle conversely, Treasury Regulations “must be sustained unless unreasonable and plainly inconsistent with the revenue statutes.” Indeed, our customary deference to Treasury Regulations is particularly appropriate in this case, for the Court previously has recognized the necessity of a “broad rule-making delegation” of authority in the area of depletion.<sup>246</sup>

Deference to this regulation was the predominant factor in the Court’s decision.

A legislative rule was also at stake in *Thor Power Tool Co. v. Commissioner*.<sup>247</sup> One of the issues in *Thor Power* was accounting for inventory, a topic governed by sections 446 and 471 of the Internal

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sons which signalled *Chevron’s* departure from prior law: *Chevron’s* all-or-nothing approach, its reversion of the default mode for examining regulations, and its rejection of other methods of statutory construction.

243. Courts and commentators often distinguish between “legislative” and “interpretive” regulations. A legislative regulation is promulgated pursuant to direct congressional delegation. See Asimow, *supra* note 96, at 350 (“Legislative rules complete an incomplete statute and affect rights or obligations.”). In contrast, interpretive regulations are issued under the Agency’s general rule-making authority. Perhaps the most important distinction between the two types of regulations is that, traditionally, legislative regulations receive more judicial deference. See *id.* at 350-57.

I.R.C. § 7805(a) authorizes the Secretary of the Treasury to issue regulations. Professor Asimow argues that tax regulations promulgated pursuant to this provision are generally treated as interpretive regulations, while regulations promulgated pursuant to a more specific statutory authorization are treated as legislative regulations. Asimow, *supra* note 96, at 357-61.

244. *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981).

245. I.R.C. § 611(a) (1988).

246. *Portland Cement*, 450 U.S. at 169 (citations omitted).

247. *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979).

Revenue Code. Section 446(a) requires taxpayers to compute their taxable income in accordance with their regular accounting methods. Section 446(b), however, cautions that if the taxpayer's method "does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the [Commissioner], does clearly reflect income."<sup>248</sup> Section 471 specifically addresses inventories and again defers to the opinion of the Secretary of the Treasury.<sup>249</sup>

As in *Portland Cement*, deference to the legislative regulation was central to the Court's opinion in *Thor Power*, and again the government won. In *Thor Power*, however, the Court also focused on the taxpayer's failure to prove facts needed to prevail under the regulations.

Only in *Commissioner v. First Security Bank*<sup>250</sup> did the Court support the taxpayer. In that action, the Commissioner tried to reallocate income between two related corporations under a regulation which stated:

"The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income from the property and business of each of the controlled taxpayers."<sup>251</sup>

The Court upheld the regulation but used the case's facts to apply the regulation against the government, stating:

This regulation is consistent with the control concept heretofore approved by this Court, although in a different context. The regulation, as applied to the facts in this case, contemplates that Holding Company—the controlling interest—must have "complete power" to shift income among its subsidiaries. It is only where this power exists, and has been exercised in such a way that the "true taxable income" of a subsidiary has been understated, that the Commissioner is authorized to reallocate under § 482. But Holding

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248. I.R.C. § 446(b) (1988). Although this authorization does not rise to the level of authority to promulgate regulations necessary to carry out the purpose of the statute, it nevertheless shows reliance on the Commissioner to exercise discretion and vests in him a rule-making power that more nearly resembles a legislative rule than an interpretive rule. See Asimow, *supra* note 96.

249. Section 471(a) states: "Whenever in the opinion of the Secretary the use of inventories is necessary . . . , inventories shall be taken by such taxpayer on such basis as the Secretary may prescribe. . . ." I.R.C. § 471(a) (1988).

250. *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972) (reallocation of income under § 482).

251. *Id.* at 404 (quoting 26 C.F.R. § 1.482-1(b)(1) (1971)).

Company had no such power unless it acted in violation of federal banking laws. The “complete power” referred to in the regulations hardly includes the power to force a subsidiary to violate the law.<sup>252</sup>

(2) Reenactment doctrine

The Burger Court occasionally relied on the reenactment doctrine, which asserts that regulations have legislative approval if Congress reenacts the underlying Internal Revenue Code section while knowing how that section has been regulated. As with legislative regulations, the reenactment doctrine is based on deference to Congress rather than to the Executive. Reenactment doctrine is contrary to *Chevron*, where deference to the Executive controls unless Congress has made a clear and precise statement.<sup>253</sup> The reenactment doctrine focuses on, and defers to, the subtler congressional message of letting sleeping dogs lie.<sup>254</sup>

The Burger Court’s clearest articulation of the reenactment doctrine appears in *National Muffler Dealers Ass’n v. United States*.<sup>255</sup> There, a group of franchisees sought an exemption as a “business league” under section 501(c)(6). Section 501(c)(6)’s oldest predecessor was enacted in 1913, while the regulation’s closest predecessor was originally promulgated in 1929.<sup>256</sup> According to the Burger Court, the regulation had “stood almost without change for half a century through several re-enactments and one amendment of the statute.”<sup>257</sup> Thus, the Court concluded:

while the Commissioner’s reading of § 501(c)(6) perhaps is not the only possible one, it does bear a fair relationship to the language of the statute, it reflects the views of those who sought its enactment, and it matches the purpose they articulated. It evolved as the Commissioner administered the statute and attempted to give to a new phrase a content that would reflect congressional design. The regulation has stood for 50 years, and the Commissioner infrequently

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252. *Id.* at 404-05.

253. *See supra* text accompanying and following note 226.

254. In pragmatic terms, there is often little difference between deferring to Congress’s deference to the Executive’s regulation, manifested in Congress’s silence, and deferring to the Executive itself. Yet there is great methodological difference between deferring to the Executive via Congress’s silence and deferring to the Executive via *Chevron*’s rule, which calls for Executive deference regardless of Congress’s implied approval or disapproval.

255. *National Muffler Dealers Ass’n v. United States*, 440 U.S. 472 (1979).

256. *See id.* at 477-78 (history of the statute); *id.* at 482 (history of the regulation).

257. *Id.* at 482 (citation omitted).

but consistently has interpreted it to exclude an organization like the Association that is not industrywide.<sup>258</sup>

The Court also took the statute's legislative history into account in its decision to sustain the regulation and to decide in the government's favor.<sup>259</sup>

The Court paid similar respect to an aged regulation in *Don E. Williams Co. v. Commissioner*.<sup>260</sup> There the taxpayer's ability to deduct a contribution to a pension plan was at issue. The predecessor statute was enacted in 1939, and the predecessor regulation was promulgated in 1942. "With the statute re-enacted in the 1954 Code, this administrative construction may be said to have received congressional approval."<sup>261</sup> Other factors that entered into the Court's decision in favor of the Commissioner were the statute's plain meaning and its legislative history.<sup>262</sup>

### (3) Regulations accepted without justification

The Court sustained Treasury regulations in five decisions without justifying its deference to the Agency's rule. In four decisions, the regulation was peripheral to the Court's reasoning; in one case the regulation was central to the Court's decision.

#### (a) The regulation is peripheral to the Court's reasoning

For example, in *Woodward v. Commissioner*,<sup>263</sup> the Court held that the taxpayers' stock appraisal costs were nondeductible capital expenditures. The Court cited the section 263 regulations to illustrate the capital expenditure concept, but the regulations were not central to the Court's opinion.<sup>264</sup>

In *Commissioner v. Kowalski*,<sup>265</sup> the taxpayer argued that a meal allowance he received from his employer was excluded from his taxable income. In deciding in the Commissioner's favor, the Court recognized regulations promulgated under prior law, which created an

258. *Id.* at 484.

259. *Id.* at 477-84.

260. *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977).

261. *Id.* at 576-77. Two other reenactment decisions were *United States v. American College of Physicians*, 475 U.S. 834 (1986) (19-year-old regulation), and *Jewett v. Commissioner*, 455 U.S. 305 (1982) (24-year-old regulation). The government won both of these cases.

262. *Don E. Williams*, 429 U.S. at 574-75 (plain meaning); *id.* at 575-77 (legislative history).

263. *Woodward v. Commissioner*, 397 U.S. 572 (1970).

264. *Id.* at 576.

265. *Commissioner v. Kowalski*, 434 U.S. 77 (1977).

exclusion for items paid “for the convenience of the employer.”<sup>266</sup> The Court continued, however, to hold that current law had negated the convenience-of-the-employer doctrine.<sup>267</sup>

In *United States v. Foster Lumber Co.*,<sup>268</sup> the Court confronted the intersection of capital gains and a Section 172 net operating loss carryback.<sup>269</sup> Because capital gains are taxed at a lower rate than ordinary income, Foster Lumber argued that its section 172 carrybacks were “absorbed” by its ordinary income, but not by its capital gain.<sup>270</sup> In its decision the Court noted that the taxpayer’s view of the statute did not conform to the regulations.<sup>271</sup>

In *Commissioner v. Tufts*<sup>272</sup> the Court cited Treasury regulations to support its view that the subchapter K partnership tax rules do not prevent a partner-level tax on partnership gain.<sup>273</sup> Although this concept was central to the Court’s decision, the regulation was not.

(b) The regulation is central to the Court’s reasoning—*Consumer Life*

In *United States v. Consumer Life Insurance Co.*,<sup>274</sup> the Court considered how to allocate insurance company reserves to determine whether the corporation was a “life insurance” company. The Court deferred to a Treasury regulation, which made “state practice determinative.”<sup>275</sup>

(c) Summary

The taxpayer won only one of these five cases, *Consumer Life*, which is also the only decision where the regulation took center stage.<sup>276</sup> Thus, when the Burger Court accepted a regulation without

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266. *Id.* at 87.

267. *Id.* at 90-96.

268. *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976).

269. Generally, I.R.C. § 172 (1988 & Supp. IV 1992) allows a deduction for net operating losses—the excess of its business deductions over its business income in a particular year—against taxable income in another year. After the loss is carried back to reduce taxable income in that earliest possible year, it is carried over to the next later year, and the next. The amount carried over is the original § 172 deduction, less whatever taxable income existed in the earliest year of the carryback.

270. The significance of this argument is that it provides maximum tax savings by matching the income-reducing § 172 deductions to the high-taxed ordinary income.

271. *Foster Lumber*, 429 U.S. at 41 n.8 (citing Treas. Reg. § 1.172-4 (1976)).

272. *Commissioner v. Tufts*, 461 U.S. 300 (1983).

273. *Id.* at 315-17.

274. *United States v. Consumer Life Ins. Co.*, 430 U.S. 725 (1977).

275. *Id.* at 752 n.37 (citing Treas. Reg. § 1.801-5(b) (1960)).

276. *See id.*

justifying its deference to that regulation, the regulation was usually peripheral to the Court's decision, and the government was likely to win—albeit on other grounds.

e. Deference to congressional mandate

While *Chevron* has not made its way into federal tax cases, deference to congressional intent was important to the Burger Court. The Court often asked whether a regulation implemented a perceived congressional purpose and rejected those that failed its test. However, in the five cases where the Court looked for congressional guidance, it applied the regulation only twice.<sup>277</sup> Unlike the cases in the prior three categories, the deference-to-Congress cases favored taxpayers who won three of the five cases in this subset.

(1) Regulations deferred to

*Fulman v. United States*<sup>278</sup> concerned the dividends-paid deduction, which could reduce a personal holding company tax. The question was whether the deduction was measured by the distributed property's fair market value or by the corporation's "adjusted basis" in the property. The question was important, because if the adjusted basis—ordinarily, what property costs a taxpayer<sup>279</sup>—was less than the property's fair market value, and that adjusted basis was used in the computation, the dividends-paid deduction would be less as well.

The Court quickly noted Congress's failure to provide a rule for valuing distributed property in calculating the dividends-paid deduction.<sup>280</sup> However, the Court used legislative history to establish that the regulation's use of adjusted basis controlled.<sup>281</sup>

In *Commissioner v. Idaho Power Company*,<sup>282</sup> the capital expenditure issue was raised again, as it had been in *Woodward*,<sup>283</sup> and again the Court examined the section 263 regulations:

The purpose of § 263 is to reflect the basic principle that a capital expenditure may not be deducted from current income. It serves to prevent a taxpayer from utilizing currently a deduction properly

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277. See *Fulman v. United States*, 434 U.S. 528 (1978); *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974).

278. *Fulman v. United States*, 434 U.S. 528 (1978).

279. See I.R.C. § 1012 (1988 & Supp. IV 1992)

280. *Fulman*, 434 U.S. at 533.

281. *Id.* at 537-38.

282. *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974).

283. See *supra* note 263 and accompanying text.



attributable, through amortization, to later tax years when the capital asset becomes income producing. The regulations state that the capital expenditures to which § 263(a) extends include the “cost of acquisition, construction, or erection of buildings.” This manifests an administrative understanding that for purposes of § 263(a)(1), “amount paid out” equates with “cost incurred.” The Internal Revenue Service for some time has taken the position that construction-related depreciation is to be capitalized.<sup>284</sup>

Thus, where there was a broad congressional mandate and a silent statute, the Burger Court relied on congressional purpose to justify the more specific regulation.

## (2) Regulations overturned

The regulations involved in the other three cases in this area were not sustained by the Court. In all three, the Court found that the regulation undercut congressional intent.

In the first of these three cases, *United States v. Vogel Fertilizer Company*,<sup>285</sup> the Court examined the term “controlled group of corporations” under section 1563(a)(2). In general, section 1563(a)(2) imposes the “controlled group of corporations” label where the same individuals own both large portions of a controlled group of corporations’ voting shares and a majority of the group’s stock. In *Vogel Fertilizer*, the question was whether a “controlled group of corporations” existed where one person owned most of the voting stock and another owned much of the remaining stock. Treasury Regulation § 1.1563-1(a)(3) required that the interests be considered in combination; thus in the *Vogel Fertilizer* situation, the controlled group label would stick. The Court, however, focused on the statute’s legislative history,<sup>286</sup> and held that the same individuals were required to own both types of stock before the government could find a controlled group.

In *Central Illinois Public Service Co. v. United States*,<sup>287</sup> the Court considered whether reimbursed expenses were subject to withholding tax as on wages. Because the reimbursed amounts were income to the recipients, the government argued, they were “wages.” Again the Court used legislative history to invalidate a regulation that treated expense reimbursements as income.<sup>288</sup> As a result, the employer was

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284. *Idaho Power*, 418 U.S. at 16 (citation omitted).

285. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982).

286. *Id.* at 27.

287. *Central Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21 (1978).

288. *Treas. Reg. § 31.3401(a)-1(b)(2)* (1977).

not subject to withholding, even though the employee was taxed on the income.

The final case, *United States v. Cartwright*,<sup>289</sup> involved valuation of mutual fund shares for estate tax purposes. Treasury Regulation § 20.2031-8(b) fixed value at the shares' "asked" price, which included a sales charge. Ignoring the regulation, the taxpayer used the lower "redemption price" to fix value.<sup>290</sup> The Court found the regulation inconsistent with the statute creating mutual funds and refused to follow the Agency.<sup>291</sup>

#### f. Dissents

When Burger Court tax opinions involved regulations, the decisions did not generate an extraordinary number of dissents. Dissents were filed in twelve of the eighteen decisions in which the Court discussed regulations (sixty-seven percent).<sup>292</sup> Neither did the decisions generate a large number of dissents when tax opinions did not involve regulations, however. Dissents were filed in nineteen of the twenty-eight cases in which regulations were not involved (sixty-eight percent).<sup>293</sup> The difference between these two figures is statistically insignificant. In contrast, the justices dissented in eighty-three percent of the cases where the Court justified its ruling on the plain meaning doctrine as opposed to only sixty-two percent of non-plain meaning cases.<sup>294</sup> As a result, dissenting opinions in plain meaning cases be-

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289. *United States v. Cartwright*, 411 U.S. 546 (1973).

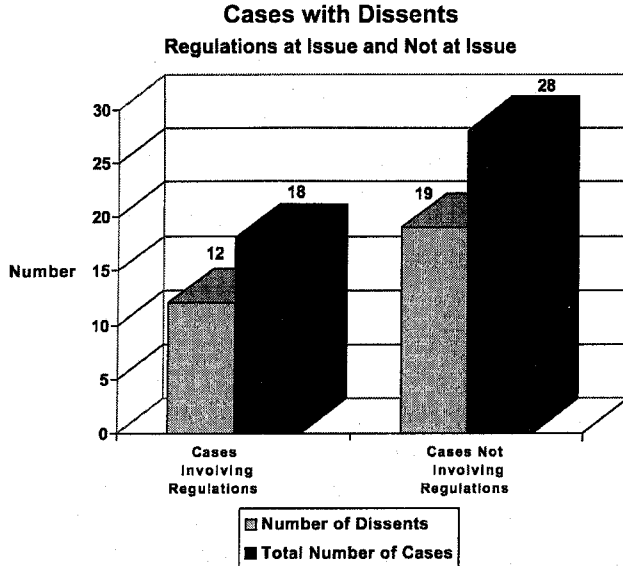
290. *Id.* at 548-49.

291. *Id.* at 557.

292. *Commissioner v. Tufts*, 461 U.S. 300 (1983); *Jewett v. Commissioner*, 455 U.S. 305 (1982); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979); *Fulman v. United States*, 434 U.S. 528 (1978); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976); *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974); *United States v. Cartwright*, 411 U.S. 546 (1973); *United States v. Genes*, 405 U.S. 93 (1972).

293. *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *Paulsen v. Commissioner*, 469 U.S. 131 (1985); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *Commissioner v. Engle*, 464 U.S. 206 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983); *Diedrich v. Commissioner*, 457 U.S. 191 (1982); *United States v. Swank*, 451 U.S. 571 (1981); *HCSC-Laundry v. United States*, 450 U.S. 1 (1981); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978); *Ivan Allen Co. v. United States*, 422 U.S. 617 (1975); *Central Tablet Mfg. v. United States*, 417 U.S. 673 (1974); *United States v. Chicago, Burlington & Quincy R.R.*, 412 U.S. 401 (1973); *United States v. Basye*, 410 U.S. 441 (1973); *United States v. Byrum*, 408 U.S. 125 (1972); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971); *Nash v. United States*, 398 U.S. 1 (1970); *United States v. Davis*, 397 U.S. 301 (1970).

294. See *supra* notes 129-30 and accompanying text.



came our standard for measuring dissents in regulation cases. If dissenting opinions reveal the controversial nature of “plain meaning,” then in the federal tax regulations area, the Burger Court justices agreed—or disagreed—no more nor no less than in any other substantive federal tax area.

We therefore conclude that decisions based on regulations were likely to trigger less strife than decisions based on plain language. Of the various ways that regulations were handled—legislative, reenactment, illustrative and deference to congressional purpose—the only variance in dissents appeared in the three legislative regulation cases; and only one of those three cases generated a dissent.<sup>295</sup> In all other areas, a comparable number of dissenting opinions was filed.

g. Conclusion

(1) Summary of findings

When the Burger Court used regulations in its decision-making process, the Court was likely to:

- Agree as much as usual.

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295. There were no dissents in *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981), or *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979). There was a dissent in *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972).

And the majority opinions prompted no great increase in dissents as we saw in the Plain Language subset. This tendency to agree indicates that the justices are more comfortable with basing decisions on regulations than on plain language and more often agree about what a regulation means than they do about what a statute means.

- Use regulations in one of three ways: (a) to justify the outcome, (b) to illustrate some feature of its reasoning, or (c) to test against a broader congressional purpose.

These three applications reflect institutional choice. When regulations are used to justify outcomes, the Court is deferring to the Agency. When a regulation is used to illustrate some feature of the Court's reasoning, the Court is imposing its own reading on the statute and using various sources (regulations, of course, as well as legislative history and other sources) to justify its opinion. When the regulation is tested against a broader congressional purpose, the Court uses the regulation to justify the Court's view of Congress's will—whether or not the regulation effectuates that view—even when there is no precise statutory language.

- Employ language indicating a deference to Congress rather than a deference to the Agency.

Even when the Court explicitly found that the regulation was controlling, as with legislative regulations, it justified its deference by looking to Congress, not the Agency. Three of the four categories we found—legislative regulations, reenactment doctrine, and congressional mandate—are based on deference to Congress. The last—regulations used as illustration—does not provide any explicit justification for using the cited regulations. When the Court looked to a congressional mandate to justify its decision, it usually bypassed the regulation in favor of some broader statutory policy.

- Employ the regulation in the government's favor. Thus, even though the Court's rhetoric focuses on Congress, its actions favor Agency regulations. Further, the Court's decisions almost always benefitted the government over the taxpayer.

## (2) Explanation of findings

How the Burger Court used regulations presents an interesting question: why did the Court spend so much time saying that it was deferring to Congress when it actually relied on regulations? This contradiction between what the Court said and did is particularly disconcerting because it seems so unnecessary. After all, *Chevron* justi-

fies the same reliance on regulations in one simple, straightforward rule. Furthermore, *Chevron* is easier to apply and easier to predict than the four categories we outline above. Thus, the Court could expect lower courts and taxpayers to follow that rule more religiously and thereby reduce demands on its resources. Yet, *Chevron* was not foreshadowed in earlier Burger Court federal tax decisions and it made almost no impact in federal tax matters even after its pronouncement. This leads us to two questions: (1) in the federal tax area, why would the Burger Court want to favor the Agency over the Congress; and (2) if it had good reasons for favoring the Agency, why did the Burger Court continue to use the language of deference to Congress in the tax area, when it had abandoned that approach in other substantive areas? We demonstrate below that the Burger Court's preference for the Agency reflects an understanding that the Agency is best suited to decide federal tax matters, while the Burger Court's rhetoric acknowledges taxation's unique status in our federal system.

a) A preference for the Agency

As pointed out by Professor Neil Komesar, the Supreme Court has an extremely limited capacity for deciding matters.<sup>296</sup> For example, the Certiorari section demonstrates that the Burger Court addressed about as many tax matters as it could—a mere forty-six cases in sixteen years.<sup>297</sup> Given its physical limitations, the Court's effectiveness lies not in its deciding cases but in selecting which other institution will control an area.<sup>298</sup> According to Komesar, in making this selection, the Court can never find the perfect institution; instead, each institution has strengths and weaknesses that the Court should compare. For Komesar, two significant criteria for making this judgment are the political malfunctions of majoritarian and minoritarian bias.<sup>299</sup>

Majoritarian bias exists when the majority is able to capture the political process to the detriment of minorities. The Court acknowledged this majoritarian bias in the famous footnote four in *United*

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296. KOMESAR, *supra* note 141, at ch. 7.

297. *See supra* Part II.C.2.a.(5).

298. KOMESAR, *supra* note 141, at 134-38.

299. *Id.* at 136; *see generally id.* ch. 3 (offering a re-examination of the traditional minoritarian-bias "interest group" theory of politics to include the influence of majority interests).

*States v. Carolene Products*.<sup>300</sup> Majoritarian bias occurs in the political process when: (1) the minority is discrete, insular and immutable; (2) the majority's stakes in the outcome are easily communicated; (3) the majority's interests can be inexpensively exploited by politicians; and as a result, (4) the majority is politically active.<sup>301</sup> For example, Professor Moran has pointed out that tax rates are an easily communicated symbol of perceived "wrongs" in the federal tax system, even though deductions and credits have a greater impact on tax liability.<sup>302</sup>

Minoritarian bias exists when a minority is able to use the political process for its own ends, even when those ends work against the majority's interests. Minoritarian bias can occur when: (1) the minority has high stakes in a particular result; (2) the adverse effect on the majority is spread thinly over a large population; and (3) the issue is so complex that the majority's information and organization costs are high.<sup>303</sup> For example, Professors Doernberg and McChesney show that the complex process of tax legislation leaves that process open to influence by special interests.<sup>304</sup>

Using majoritarian and minoritarian bias as criteria, which institution is best suited for handling those tax matters that come before the Court? We believe that, in the tax area, Congress is more subject to both malfunctions than the Agency. Thus, as we demonstrate below, the Court's preference for the Agency is sound regardless of what rhetoric the Court uses to justify that preference.

## b) Minoritarian bias

One distinction between legislatures and agencies is that agencies are made up of specialists, while legislators are, of necessity, general-

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300. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (arguing for application of stringent judicial review when statutes prejudice "discrete and insular" minorities).

301. KOMESAR, *supra* note 141, at 73-79.

302. See Beverly I. Moran, *Income Tax Rhetoric (or Why Do We Want Tax Reform?)*, 1992 WIS. L. REV. 2063.

303. KOMESAR, *supra* note 141, at 68-69.

304. See Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987).

Professor Pierce demonstrates another example of minoritarian bias in the regulation of oil and gas rates in the 1950s and 1960s where because: (1) the process of utility regulation is complicated; (2) the cost of communicating to the majority the adverse effects of allowing utilities to earn excessive rates was high; and (3) declining overall rates eliminated the simple symbol that could inexpensively educate the majority on the issue that rates were out of proportion with costs during this period. See Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2048 (1989). When rising utility rates helped create a cheap, easily exploited symbol, the political malfunction shifted and majoritarian bias helped decrease rates. *Id.*

ists. Specialists obviously have more expertise than generalists, but in terms of institutional choice, that expertise is a two-edged sword. Increased knowledge is valuable because it allows for more insightful and tailored problem solving; yet it is also dangerous because, where the expertise is in a single area or industry, agencies become obvious targets for “repeat players”—special interest groups and industry-interested parties—who have the incentive to lobby, educate, and bribe agency officials.<sup>305</sup>

Thus, in the usual case, we would expect to find more majoritarian bias in agencies than in Congress. While on the one hand, it is harder for citizens to either monitor or influence agencies because of their less “public” activities, at the same time, repeat players often have the expertise and incentive to learn about agency practices and influence agency personnel. What is true in the usual case, however, is not always true in the federal tax area.

In the federal tax system, congressional committees—the House Ways and Means Committee, the Senate Finance Committee, and the Joint Committee on Taxation—are filled with committee members and staffers who are long-term players. These groups are smaller than the Agency and their members and staffs stay on as long or longer than their counterparts at the Service or Treasury. Further, the complex process of legislating in the tax area makes it difficult for low-stakes, large majorities to gather the same information that is cost effective for high-stakes, repeat players to obtain. Thus, in the tax system, Congress presents an easier target for special interests than does the Agency.<sup>306</sup>

### c) Majoritarian bias

Congress is also subject to more majoritarian bias than the Agency for at least two reasons: first, because members of Congress are elected, they are more sensitive to majoritarian concerns;<sup>307</sup> second, because the traditional rhetoric of taxation is politically expedient, an atmosphere is created in which Congress is pressured to favor the larger middle class over the smaller lower and upper income groups.<sup>308</sup> The problem for the Court is that the types of congressional actions that would provoke majoritarian bias are not conducive

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305. KOMESAR, *supra* note 141, at 95-96.

306. See Doernberg & McChesney, *supra* note 304, *passim*.

307. KOMESAR, *supra* note 141, at 74-75.

308. Moran, *supra* note 302, at 2066.

to Court review. Unlike property law, where minorities can rely on such protections as the Takings Clause,<sup>309</sup> neither the Constitution nor the courts have developed similar protections in the tax law. Thus, even if it wanted to, the Court has little to say about congressional actions that might raise majoritarian concerns, such as the setting of rates or the granting of deductions and credits.

Accordingly, if the Burger Court looked at the tax system as a series of institutions and decided tax questions based on which institution is best suited to monitor tax matters, it would often select the Agency over Congress. The mystery is that the Burger Court developed the *Chevron* rule, which was perfectly tailored to shift power from Congress to the Agency, and then it (and the Rehnquist Court after it) failed to invoke that rule.

d) The unique position of taxation in the federal system

We believe that the Court's rhetorical preference for Congress lies in the American view of taxation, a view that developed long before the income tax. Americans are taught in elementary school that a major reason for the American revolution was the colonists' antipathy to taxation without representation. Yet we rarely consider how that ancient concern shapes our present interests and institutions. It was no accident that, on the federal level, the Constitution gives Congress the exclusive right to tax.<sup>310</sup> Nor was it an accident that this preference for Congress is further modified by the requirement that all tax legislation begin in the House of Representatives,<sup>311</sup> sometimes called the "people's" house, rather than in the more elite Senate. These decisions illustrate our cultural need to reconcile taxation with ideals of democracy and to focus those ideals in the Congress.<sup>312</sup> So while the Court may be willing to defer to the Executive when it comes to issues such as air pollution, it cannot bring itself to use fundamentally un-democratic rhetoric when deciding tax matters.

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309. U.S. CONST. amend. V.

310. U.S. CONST. art. I, § 8, cls. 1, 18; U.S. CONST. amend. XVI.

311. U.S. CONST. art. I, § 7, cl. 1.

312. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).



## E. The Deep Structure of the Internal Revenue Code

### 1. Introduction

Prior sections of Part III focused on how the Burger Court used the plain language doctrine, legislative history, and regulations to uncover the meaning of the Code's language.<sup>313</sup> Both Congress and the Agency are active players in the federal tax system, and each institution produces a wide array of rules and regulations, which provide guidance for courts reviewing tax-related cases. Despite the activist efforts of both the Congress and the Agency, courts often are forced to make decisions without external guidance; or worse, they are constrained to use rules that create structural anomalies. When neither Congress nor the Agency has spoken, the Court can refuse to decide and wait for a rule to develop, hoping that Congress or the Agency will address the issue; or it can allow different rules to stand in different circuits.<sup>314</sup> Still, problems arise that should not be left unaddressed. And when such problems arose during the Burger Court's tenure, the justices actively shaped tax law in accordance with their own views of tax structure.

### 2. What is a deep structure opinion?

Because words strung together have no inherent meaning outside of context, all meaning comes from an intersection of reader, text, and context. Plain language opinions, as well as opinions based on legislative history and regulations, all exhibit an appreciation for this interaction. We sharpen this discussion by examining Burger Court opinions that fashioned tax law without the assistance of statutory language, regulatory guidance or legislative history. In other words, we examine Burger Court opinions where the Court itself felt compelled to resolve a tax-related issue.

In studying the interaction between reader and text, we move from an author-based approach (for example, plain language and legislative history) towards a more contextual and reader-based method (for example, regulations). In this section we examine the consequences when both the Congress and the IRS remained passive, yield-

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313. Even when the Court relied on the Agency by using regulations, it asked author-based questions like whether Congress delegated its authority to the Agency to develop a rule or whether the regulation furthered some congressional purpose. See *supra* notes 243-52 and accompanying text.

314. Clearly, many disputes remain untouched for years. See *supra* Part II (discussing how few disputes reach the Supreme Court).

ing to the Burger Court to take an active role in shaping federal tax law. In Deep Structure opinions the Burger Court abandoned some of its deferential rhetoric and acknowledged the Supreme Court's role as a law maker—on par with other institutions.

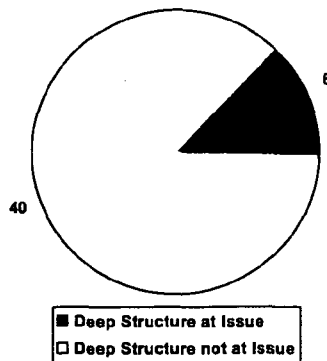
### 3. Number of deep structure opinions

According to Professor Lawrence Zelenak:

The Code presents an unusual number of situations in which the adequacy of language is challenged. It also provides an unusually helpful context for interpreting its many difficult passages. The combination of inadequate language and strong context results in a large number of situations in which context seems to be at odds with language.<sup>315</sup>

Yet, despite many opportunities to involve itself in tax-related issues, we found very few Burger Court deep structure opinions in our study. Of the forty-six cases in our data set, only six (thirteen percent) relied on deep structure. Furthermore, five of these cases generated dissent-

**Number of Cases Looking at Deep Structure**



ing opinions, making this form of interpretation as controversial as the plain language doctrine.

For us, the small number of deep structure opinions combined with the high number of dissents, indicates the Burger Court's polemic view of the deep structure rhetoric. The Burger Court's view of the deep structure method, however, is remarkable, given that when the Court did utilize a deep structure analysis, it produced some of the Burger Court's most memorable and important tax law decisions.

315. Zelenak, *supra* note 96, at 639 (footnote omitted).

4. The deep structure decisions

a. *United States v. Chicago, Burlington & Quincy Railroad*

The Burger Court's first tentative foray into a deep structure analysis was in *United States v. Chicago, Burlington & Quincy Railroad Company*.<sup>316</sup> In *Chicago, Burlington*, a railroad company received over \$2,000,000 worth of railroad lines, stations, and bridges from the federal government. Generally, companies—as well as individuals—are otherwise subject to taxation when receiving property for free. The railroad company—which had not been taxed on the \$2,000,000 worth of assets it had received from the government—sought a double tax benefit by claiming that the property value of the assets it had received from the federal government had depreciated in value, thereby entitling it both to an exclusion from income and a deduction from income for the single transaction.<sup>317</sup>

In a tortured decision, Justice Blackmun distinguished precedent, the Internal Revenue Code, as well as past Agency practice to deny the railroad company's deduction.<sup>318</sup> The dissent, however, criticized the majority's rationalizations and emphasized that "the [majority opinion] cites nothing in the statute, the regulations, or our prior cases to warrant this [result]."<sup>319</sup>

Reading *Chicago, Burlington* against the background of the precedent referred to by Justice Blackmun, the dissent's argument should prevail. Indeed it is very difficult to distinguish between the railroad company in *Chicago, Burlington* and other taxpayers who were allowed deductions against property they received without being taxed. The majority's decision, however, was correct when one considers the Internal Revenue Code's deep structure.

One of the first principles of income taxation is that all income is included in gross income and is therefore subject to taxation unless specifically excluded by Congress. True, the transferred property in *Chicago, Burlington* was excluded from the railroad's gross income; but at the same time, no other receipts were excluded from the rail-

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316. *United States v. Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401 (1973).

317. To understand the double benefit, assume that the railroad had two sources of income: (1) \$2,000,000 of property from the federal government and (2) \$2,000,000 of ticket sales earned over a 30-year period. If the railroad is allowed to deduct the cost of the property it not only avoids a tax on the \$2,000,000 of property, it also avoids any tax on the ticket sales by deducting the cost of the property against the fees.

318. *Chicago, Burlington*, 412 U.S. at 405-16.

319. *Id.* at 424 (Stewart, J., dissenting).

road's gross income. A depreciation deduction allowed against the property received tax-free, on the other hand, would produce the same result as an exclusion. It would allow "a seemingly anomalous result . . . that a corporate taxpayer receiving property from a non-shareholder . . . not only received the property free from income tax but was allowed to assert a deduction for depreciation on the asset so received tax free."<sup>320</sup> The Burger Court could have left the issue in *Chicago, Burlington* for Congress to resolve—in fact, Congress did explicitly deny such deductions after the Burger Court's ruling. But rather than wait for Congress to remedy the situation, the Burger Court—taking on an activist role—refused the deduction based on its understanding of the Internal Revenue Code's internal logic: no allowance of double benefit.

b. *Hillsboro National Bank v. Commissioner*

The Court waited ten years before it returned to the deep structure methodology. In 1983 and 1984 the Court rendered five of its six deep structure opinions.

In *Hillsboro National Bank v. Commissioner*,<sup>321</sup> a corporate taxpayer purchased cattle feed intending to use it the following year. The following year, however, the corporation liquidated and distributed the feed to its shareholders. Taken together, these two events created a problem. On the one hand, the corporation received a Section 162 business deduction because of the implicit assumption that the corporation would consume the feed as part of its business operations.<sup>322</sup> On the other hand, the following year—when the feed was distributed to the shareholders—the corporation escaped taxation under the corporate liquidation provisions. The shareholders, in turn, were able to deduct the remaining feed as a business expense.<sup>323</sup> Under the scheme, therefore, the corporation immunized itself from taxation—even though it never used the unconsumed feed in its business—

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320. *Id.* at 407.

321. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983). This flurry of cases in a small time period may account for Professor Zelenak's belief that the Internal Revenue Code is uniquely suited for nonliteral interpretations. Based on the small number of deep structure decisions during the entire tenure of the Burger Court, however, we think that the Court disagreed.

322. I.R.C. § 162 (1988 & Supp. IV 1992), provides a deduction for expenses paid or incurred in carrying on a trade or business.

323. I.R.C. § 336 (1982) (amended 1986) (corporation not taxed when it distributes property during its liquidation); I.R.C. §§ 333 and 334(c) (repealed 1986) (basis shareholders obtain in certain liquidations when property is distributed to them). Here the basis in the feed was necessary for the shareholders to deduct the feed.

while, at the same time, the corporate shareholders were also able to deduct the remaining feed as a business expense.

The Internal Revenue Code's annual accounting periods are partly to blame for what happened in *Hillsboro*, because they allow transactions made in one year to be treated separately from related transactions that occur in other years.<sup>324</sup> Because these annual accounting periods sometimes distort income, the Supreme Court long ago developed the "tax benefit rule": taxpayers must match related transactions.<sup>325</sup>

Relying on precedent, the taxpayer in *Hillsboro* argued that the tax benefit rule only applied when a previously deducted amount was "recovered" in a later year. In contrast, the government asserted that the rule applied when "later events are inconsistent with the deductions."<sup>326</sup> The Court concluded that:

The purpose of the rule . . . is to approximate the results produced by a tax system based on transactional rather than annual accounting. It has long been accepted that a taxpayer using accrual accounting who accrues and deducts an expense in a tax year before it becomes payable and who for some reason eventually does not have to pay the liability must then take into income the amount of the

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324. Timing is very important in federal income tax. It operates on an annual accounting cycle. For example, assume that a taxpayer has \$100 of income and a \$100 deduction. If both transactions occur in the same year, she has no taxable income and therefore pays no tax. See I.R.C. § 63 (1988 & Supp. IV 1992) (defining taxable income); *id.* § 1 (imposing tax on taxable income). If, however, she earns the \$100 of income in one year and incurs the deduction in the next, she has taxable income of \$100 in the first year upon which she must pay tax and a \$100 deduction in the next which will be of use if she has other income against which to deduct the expense.

Timing also is problematic when a taxpayer deducts an expense in one year and then discovers that her basis for the deduction is removed in a latter year; for example, a taxpayer who deducts state income tax she has paid in one year and receives a refund for the tax in the next. See I.R.C. § 164 (1988 & Supp. IV 1992) (deduction for state income tax). I.R.C. § 111(a) (1988 & Supp. IV 1992), excludes the recovery "to the extent such amount did not reduce the amount of tax" in the prior year. For example, if the taxpayer did not deduct the state income tax she had paid, she would exclude the refund from her income because it did not reduce her tax in the prior year. See Treas. Reg. § 1.111-1(b)(3) (amended 1960) (only recovery of bad debt deduction leads to income under § 111).

325. The tax benefit rule was first created by the Treasury Department in 1913. The courts did not begin to accept the rule until 1929, but were convinced by 1931.

As late as 1929, for example, the Board of Tax Appeals seemed uncertain about the validity of a Treasury regulation providing that income was realized on collecting a debt previously charged off as worthless. Within a few months, however, the Board of Tax Appeals accepted the so-called tax benefit rule enunciated by this regulation; by 1931 it was described as the principle that "seems to be taken for granted, as indeed it must be," and it has been a basic part of the federal income tax ever since.

BITTKER & LOKKEN, *supra* note 95, at 5-45. FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS 5-45 (1981) (citations omitted).

326. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370, 381 (1983).

expense earlier deducted. . . . [T]he taxpayers' proposal would introduce an undesirable formalism into the application of the tax benefit rule.<sup>327</sup>

In the Code's text, one section specifically allowed nonrecognition—while no sections specifically required inclusion. Nevertheless, the Burger Court rejected the taxpayer's arguments, because the Court understood the Internal Revenue Code's context: that the Code's framework and structure proscribed a deduction in one year followed by an exclusion the following year.<sup>328</sup>

c. *Commissioner v. Tufts*

The Burger Court announced its most famous deep structure decision in *Commissioner v. Tufts*,<sup>329</sup> a complicated judgment that operates on many levels. In *Tufts*, five individuals and a corporation formed a partnership. The partnership borrowed \$1,850,000—from a lender who had no personal recourse against either the individual partners or the partnership as a whole—to construct an apartment complex. After deducting \$400,000 of depreciation in the apartment complex, the property's value decreased to \$1,400,000. Because the property was now worth less than the \$1,850,000 debt, the partners sold the property to a third party in exchange for his assumption of the nonrecourse debt.

In *Tufts*, the partners themselves had invested a limited amount of cash in the partnership and, because they had invested so little, the partners, on a practical level, had no economic interest in the apartment complex. Yet, despite the fact that they had no economic interest in the apartment complex, the partners were able to take a \$400,000 depreciation deduction against the mortgaged investment which, in turn, gave each partner a substantial tax savings.<sup>330</sup>

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327. *Id.* at 381-82 (citations and footnotes omitted).

328. The other taxpayer in *Hillsboro* was required to withhold a state property tax in behalf of its shareholders that had been imposed upon them. I.R.C. § 164(e) (1982), permitted the corporation to deduct the tax, and the taxpayer deducted this tax. The tax was subsequently refunded, and the government asserted that the tax benefit rule required the taxpayer to include its prior deduction in income. The Court decided in the taxpayer's favor. We regard this to be less of a deep structure case because the statute here did not so obviously permit the taxpayer to exclude the recovered amount in income. Similarly, in the Burger Court's earlier tax benefit case, *Nash v. United States*, 398 U.S. 1 (1970), an amount was excluded, despite less of a statutory directive to include the benefit in income than was the case of the liquidating corporation in *Hillsboro*.

329. *Commissioner v. Tufts*, 461 U.S. 300 (1983).

330. Assuming, for example, that the partners had a 70% marginal tax rate, they saved \$280,000 of taxes on other income without any cash investment.

The question posed by *Tufts* thus concerned the consequences of the property's sale to the third party. Would the partners be required to include the full \$1,850,000 debt in their amount realized (producing a \$400,000 gain)?; or would the partners be permitted to include the \$1,400,000 value of the property in their amount realized leading to a \$50,000 loss?

In *Chicago, Burlington* the Burger Court held that property exchanges should normally be subject to federal taxation. Under the Internal Revenue Code's plain language, the tax is calculated by subtracting the taxpayer's "amount realized" from the taxpayer's "adjusted basis."<sup>331</sup> In *Tufts*, the partnership gave up an apartment complex with a \$1,450,000 adjusted basis (original basis of \$1,850,000 less depreciations deductions of \$400,000). In exchange for what?

The partners argued that because the third party received \$1,400,000 worth of property in the exchange, they too, must have received \$1,400,000 on their side of the transaction. Relying on this rationale, the partners reported a \$50,000 tax loss from the exchange calculated as amount realized (\$1,400,000) less adjusted basis (\$1,450,000).

Although clearly advantageous to the taxpayers, this result is seriously flawed because the taxpayers get both substantial tax savings from depreciation plus an additional benefit from the loss deduction. Further, these benefits come at no economic cost because the apartment complex was financed with nonrecourse debt.

If the issue in *Tufts* had been raised during the formative years of federal tax law, the problem could have been avoided; but by the time the issue arose, both the Code and case law clearly favored the taxpayer. The Supreme Court in *Crane v. Commissioner*,<sup>332</sup> indicated that taxpayers must reflect borrowed money—including nonrecourse loans—in their basis. Thus, the partnership was correct to claim both

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331. Under I.R.C. § 1001(a) (1988 & Supp. IV 1992), the difference between the taxpayer's "amount realized" and "basis" is the gain or loss that she "realizes" and also ordinarily "recognizes" when she sells the property. I.R.C. § 1001(b) defines the amount realized as the "sum of any money received plus the fair market value of the property . . . received." I.R.C. § 1001(b) (1988 & Supp. IV 1992). Basis is defined by a variety of Code sections but, when someone acquires property by buying it, her basis is defined by I.R.C. § 1012 as "the cost of such property." I.R.C. § 1012 (1988 & Supp. IV 1992). If the amount realized exceeds the basis, the taxpayer has a gain and, if basis exceeds the amount realized, she has a loss. Realizing gain or loss has no immediate tax consequence; recognizing gain or loss, however, does have immediate tax consequences, because recognition is the point at which the taxpayer either takes more income into account because of her gain or reduces her taxable income because of the loss. I.R.C. §§ 61(a)(3), 165 (1988 & Supp. IV 1992).

332. *Crane v. Commissioner*, 331 U.S. 1 (1947).

a \$1,850,000 initial basis and a \$400,000 depreciation deduction against that basis. Under section 1001 of the Internal Revenue Code, the taxpayer's amount realized was limited to cash plus the fair market value of property received. Again, according to the holding in *Crane*, the amount realized might not include the nonrecourse debt in excess of the property's fair market value if that value was less than the debt.<sup>333</sup>

Rather than "permit the taxpayer to limit his realization to the fair market value of the property . . . [so that he obtains] a tax loss for which he has suffered no corresponding economic loss,"<sup>334</sup> the Burger Court included the full debt in the partners' amount realized.

The calculation now became:

amount realized	\$1,850,000
minus adjusted basis	(\$1,450,000)
<hr/>	
equals gain on the transfer of	\$ 400,000

As a result, the Court avoided giving the partners a tax loss without a corresponding economic loss because the partners included their prior depreciation deductions in income. This conclusion, the Burger Court noted, was based on the Code's structure:

When encumbered property is sold or otherwise disposed of and the purchaser assumes the mortgage, the associated extinguishment of the mortgagor's obligation to repay is accounted for in the computation of the amount realized. Because no difference between recourse and nonrecourse obligations is recognized in calcu-

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333. In *Crane*, the property sold was subject to a nonrecourse debt; that is, the borrower had no legal obligation to pay the debt. The lender, however, could seize the property whenever the borrower failed to make a payment. Like the taxpayer in *Tufts*, *Crane* argued that, because she had no legal obligation to pay the nonrecourse debt, her amount realized was limited to the property's fair market value without the debt.

However, because the value of the property was greater than the amount of the debt at the time of the sale, the Supreme Court argued that the borrower/taxpayer could be expected to make payments on the debt, even though it was nonrecourse debt, so that she could obtain the amount of the sales proceeds that exceeded the debt. Because the borrower could be expected to pay the debt, the Court reasoned that the full debt could be included in amount realized because the nonrecourse debt was similar to recourse debt. In other words, part of the value that the taxpayer received on the exchange was the economic, albeit not legal, release from debt.

Unlike *Crane*, the property in *Tufts* was worth less than the amount of the mortgage. Accordingly, the Supreme Court's economic argument failed. The Court acknowledged this failure in the famous footnote 37 in *Crane*, where the Court stated that:

Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot.

*Crane*, 331 U.S. at 14 n.37.

334. Commissioner v. Tufts, 461 U.S. 300, 313 (1983).



lating basis, . . . the Commissioner may ignore the nonrecourse nature of the obligation in determining the amount realized upon disposition of the encumbered property. He thus may include in the amount realized the amount of the nonrecourse mortgage assumed by the purchaser. The rationale for this treatment is that the original inclusion of the amount of the mortgage in basis rested on the assumption that the mortgagor incurred an obligation to repay. Moreover, this treatment balances the fact that the mortgagor originally received the proceeds of the nonrecourse loan tax-free on the same assumption. Unless the outstanding amount of the mortgage is deemed to be realized, the mortgagor effectively will have received untaxed income at the time the loan was extended and will have received an unwarranted increase in the basis of his property.<sup>335</sup>

It is important to note that nothing in the Internal Revenue Code defined the phrase "amount realized" to include debt relief. Yet, as the Burger Court correctly recognized, the Court-created rule inherently flowed from the Internal Revenue Code's structure which discourages deductions against untaxed income.

d. *Bob Jones University v. United States*

In *Bob Jones University v. United States*,<sup>336</sup> the Burger Court distinctly relied on a deep structure analysis to reach its decision. The issue in *Jones* was whether racially discriminatory church schools were tax exempt under section 501(c)(3) of the Internal Revenue Code. The statute itself was silent on the issue, and more important, Agency practice favored the exemption.<sup>337</sup> Still, lacking external guidelines, the Burger Court declared that "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."<sup>338</sup> The Burger Court thus denied the exemption explaining that:

Section 501(c)(3) . . . must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the Congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the

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335. *Id.* at 308-10 (citation and footnotes omitted).

336. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

337. As pointed out by the dissent, the government granted exemptions to schools that discriminated for over 40 years before changing its policy in 1970. *Id.* at 617-19 (Rehnquist, J., dissenting).

338. *Id.* at 586.

Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.<sup>339</sup>

The decision in *Jones* clearly was discordant with the Internal Revenue Code's plain language. Moreover, the legislative history of the section, as well as the regulations, were contradictory at best. For many years, the government routinely processed exemptions for racially discriminatory schools<sup>340</sup> while, for a short period of time, the Agency denied exemptions to the same schools.<sup>341</sup> Congress had not directly confronted the issue, although several failed attempts were made in both Houses to influence the rule.<sup>342</sup> Although the Court purported to rely on plain language (the meaning of the word "charity"), legislative history, and Agency practice to reach its decision, the Court in fact had very little external guidance. As the dissent pointed out: "In approaching this statutory construction question the Court quite adeptly avoids the statute it is construing. This I am sure is no accident, for there is nothing in the language of § 501(c)(3) that supports the result obtained by the Court."<sup>343</sup>

Yet, despite the lack of guidance, the Burger Court made the right decision. Recognizing that tax exemptions are a form of public subsidy,<sup>344</sup> the Burger Court abandoned the use of the Internal Revenue Code, and instead relied on its own understanding of the importance of public finance. The Burger Court knew that the government could not use the tax system indirectly to reward conduct that the government could not fund directly.

#### e. *Dickman v. Commissioner*

The Supreme Court again revealed its appreciation of Code structure in *Dickman v. Commissioner*,<sup>345</sup> a case concerning the appli-

339. *Id.*

340. From the time the exemption was adopted until 1970, the Internal Revenue Service routinely processed applications from racially discriminatory schools. *Id.* at 619-20 (Rehnquist, J., dissenting).

341. The Internal Revenue Service changed its policy in 1970. *Id.* at 585.

342. The Court cites 13 attempts to overturn the Agency rule against discriminatory schools. *Id.* at 600 n.25.

343. *Bob Jones Univ. v. United States*, 461 U.S. 574, 612-13 (1983) (Rehnquist, J., dissenting).

344. See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

345. *Dickman v. Commissioner*, 465 U.S. 330 (1984).

cation of the gift tax to interest-free loans. The question in *Dickman* was whether parents owed a gift tax when they lent their son an interest-free demand loan.<sup>346</sup>

By subjecting the interest free use of money to the gift tax, the Court firmly established that the free use of money is a valuable property right:

The right to the use of \$100,000 without charge is a valuable interest in the money lent, as much so as the rent-free use of property consisting of land and buildings. In either case, there is a measurable economic value associated with the use of the property transferred. The value of the use of money is found in what it can produce; the measure of that value is interest—"rent" for the use of the funds. We can assume that an interest-free loan for a fixed period, especially for a prolonged period, may have greater value than such a loan made payable on demand, but it would defy common human experience to say that an intrafamily loan payable on demand is not subject to accommodation; its value may be reduced by virtue of its demand status, but that value is surely not eliminated.<sup>347</sup>

While the Court clearly recognized that a taxpayer who received interest-free money had an economic advantage over other taxpayers, the Court could not refer to any section of the Internal Revenue Code for support that sanctioned the imposition of a tax on monies obtained from an interest-free loan. Instead, the Court relied on two deeply imbedded tax policies.

First, the Court acknowledged that its new Court-created rule would ultimately protect the integrity of income taxation:

A substantial no-interest loan from parent to child creates significant tax benefits for the lender quite apart from the economic advantages to the borrower. This is especially so when an individual in a high income tax bracket transfers income-producing property to an individual in a lower income tax bracket, thereby reducing the taxable income of the high-bracket taxpayer at the expense, ultimately, of all other taxpayers and the Government. Subjecting interest-free loans to gift taxation minimizes the potential loss to the

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346. See I.R.C. § 2501(a)(1) (1988 & Supp. IV 1992) (gift tax imposed on gifts). Alternatively, this transaction could be treated as generating income to the borrower. See, e.g., *J. Simpson Dean v. Commissioner*, 35 T.C. 1083 (1961). For current income tax treatment of interest-free loans, see IRC § 7872.

The income and gift taxes are separate taxes; therefore, treating the transaction as a gift for some purposes and as income for others is not necessarily inconsistent.

347. *Dickman*, 465 U.S. at 337.

federal fisc generated by the use of such loans as an income tax avoidance mechanism for the transferor.<sup>348</sup>

Second, the Court acknowledged that its new Court-created rule also protected the integrity of estate taxation:

Gift taxation of interest-free loans also effectuates Congress' desire to supplement the estate tax provisions. A gratuitous transfer of income-producing property may enable the transferor to avoid the future estate tax liability that would result if the earnings generated by the property—rent, interest, or dividends—became a part of the transferor's estate. Imposing the gift tax upon interest-free loans bolsters the estate tax by preventing the diminution of the transferor's estate in this fashion.<sup>349</sup>

Thus, the Court concluded:

Our holding that an interest-free demand loan results in a taxable gift of the use of the transferred funds is fully consistent with one of the major purposes of the federal gift tax statute: protection of the estate tax and the income tax. . . . Failure to impose the gift tax on interest-free loans would seriously undermine this estate and income tax protection goal.<sup>350</sup>

Like *Tufts*, the *Dickman* decision was grounded on the underlying purposes of the Code—in this case, gift taxation—as opposed to specific Code sections or legislative history.

f. *Paulsen v. Commissioner*

The majority in *Paulsen v. Commissioner*<sup>351</sup>—discussed at length in the plain language section<sup>352</sup>—strongly defended the application of the deep structure analysis when in declared:

Satisfying the literal terms of the reorganization provisions, however, is not sufficient to qualify for nonrecognition of gain or loss. The purpose of these provisions is “to free from the imposition of an income tax purely ‘paper profits or losses’ ” wherein there is no realization of gain or loss in the business sense but merely the recasting of the same interests in a different form.<sup>353</sup>

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348. *Id.* at 339.

349. *Id.*

350. *Id.* at 338.

351. *Paulsen v. Commissioner*, 469 U.S. 131 (1985).

352. *See supra* notes 113-16 and accompanying text.

353. *Paulsen*, 469 U.S. at 136 (citations omitted).

## 5. Conclusions

Our study revealed that the Burger Court seldom applied a deep structure analysis to its federal tax law cases. When a Burger Court majority opinion invoked a deep structure analysis to reach its decision, it was almost always rebutted and criticized by a dissenting opinion. Of the six majority opinions that applied the deep structure analysis, for example, five of them had dissenting opinions. Our study also revealed that when the Burger Court did apply a deep structure analysis, the Court's holding often favored the government over the taxpayer.<sup>354</sup> Still, despite the fact that there were only six deep structure opinions, the Burger Court's deep structure pronouncements were among its most important and interesting tax decisions.

When we questioned why and when the Burger Court decided to use the deep structure interpretive method, we realized certain similarities between the deep structure decisions and patterns we distinguished in our analysis of the Burger Court's certiorari-selection process.

Recall that one of the patterns we noted in the Court's certiorari-selection process section was that the Burger Court often selected several cases that dealt with the same topic. For example, we found seven cases concerning accounting methods,<sup>355</sup> five concerning capital expenditures,<sup>356</sup> three concerning interest,<sup>357</sup> three concerning depletion,<sup>358</sup> two concerning the tax benefit rule,<sup>359</sup> and two concerning assignment of income.<sup>360</sup> In the certiorari section we concluded that

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354. One of two taxpayers in *Hillsboro* avoided tax. In all the other cases, the government prevailed.

355. *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981); *Thor Power Tool v. Commissioner*, 439 U.S. 522 (1979); *United Cal. Bank v. United States*, 439 U.S. 180 (1978); *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977); *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977); *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977); *Ivan Allen Co. v. United States*, 422 U.S. 617 (1975).

356. *Commissioner v. Idaho Power*, 418 U.S. 1 (1974); *United States v. Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401 (1973); *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 (1971); *United States v. Hilton Hotels*, 397 U.S. 580 (1970); *Woodward v. Commissioner*, 397 U.S. 572 (1970).

357. *Dickman v. Commissioner*, 465 U.S. 330 (1984); *Commissioner v. National Alfalfa Dehydrating & Milling*, 417 U.S. 134 (1974); *United States v. Mississippi Chem.*, 405 U.S. 298 (1972).

358. *Commissioner v. Engle*, 464 U.S. 206 (1984); *United States v. Swank*, 451 U.S. 571 (1981); *Commissioner v. Portland Cement*, 450 U.S. 156 (1981).

359. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983); *Nash v. United States*, 398 U.S. 1 (1970).

360. *United States v. Basye*, 410 U.S. 441 (1973); *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972).

what attracted the Burger Court to these subsets was that they raised particular topics that were difficult to address in one statute, regulation, or decision. These were questions that made “language inadequate”—at least the language generally found in statutes and regulations. Because answering these issues require a sophisticated understanding of the Code’s underlying purpose, context and policies, these topics are more readily understood through rules that develop over time.<sup>361</sup> We believe that similar concerns motivated the Burger Court’s deep structure decisions.

Tax law is complex and context-driven, and rules often need more room to develop. As time goes on, Congress responds with more elaborate rules and while shifting more oversight responsibilities to the Agency. At the same time, the Treasury Department endures by producing more complex regulations. Indeed, sometimes, these regulations become so complex that they take on a life of their own.<sup>362</sup>

Promulgating more complex and specific rules is an appropriate response for a certain group of taxpayers—those with high stakes and plenty of legal talent at their disposal. This group of taxpayers have the incentive, skill and willingness to take advantage of every opportunity to outsmart the tax system. The same group also spent much of the Agency’s time and resources. The greater the specificity of a sale, the less likely that a taxpayer will be able to avoid its impact.<sup>363</sup> This aggressive behavior justifies the production of more rules to control and contain members of this group.

On the other hand, other taxpayers will find themselves foundering in an overloaded and rule-filled system that they cannot navigate, and which some will deliberately defy because the knowledge required for compliance is too costly to obtain. What these taxpayers need is a series of first principles that can be applied to their planning and reporting. First principles, however, are not suited for recitation in a series of rules because more activist taxpayers could use them against the government, and because the concepts are too difficult to explain in statutes or regulations.

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361. See *supra* notes 46-62.

362. Interview with Lawrence Lokken, Section Newsletter (American Bar Association Section on Taxation) Vol. 11 number 1, Fall, 1991, at 15-18.

363. For example, the tax shelter industry was substantially curtailed by the complex passive activity rules of § 469. For more on § 469, see BITTKER & LOKKEN, *supra* note 95, ¶ 28.1.

Like the handpicked cases we discussed in the Certiorari section, the deep structure cases raise questions that are better explained in a series of decisions as opposed to a statute or regulation.

These decisions generally do not benefit aggressive taxpayers who are subjected to a wide array of IRS rules and Congressional mandates. These decisions, rather, benefit those taxpayers who can take advantage of Court-created guidelines to better understand the underlying policies of the Code, as well as complex intricacies that often lead to taxpayer confusion.

Our study in this section demonstrates that the Burger Court had a sophisticated understanding of both the Internal Revenue Code's structure and the federal tax system. The Burger Court was able to select cases that required what only a Supreme Court could provide: a series of narrative explanations that would assist in shaping and formulating federal tax law. The Burger Court fully understood that Courts can shape law through the legal equivalent of a series of short stories and, more important, used this institutional feature to highlight first principles as applied to a selected series of transactions over time.

#### IV. FINAL EVALUATION

The portrait of one Court, taken in full knowledge of all its certiorari selections and case decisions, is more reassuring than we were led to believe. Viewed from this broader vantage point, the Burger Court appears to have handled a difficult area relatively well. Given its limited resources it chose cases through which it could make a difference, becoming actively involved in a number of issues. Given the Court's constitutional restrictions and the view of democracy and taxation that it shares with the rest of America, its rhetoric understandably deferred to Congress. Given the Court's preference for the Executive (as most radically highlighted in *Chevron*), the Burger Court often, again understandably, favored the Agency in application. That preference might also flow from the Court's perception that Congress is subject to greater institutional pressures than the Agency. Although the Code's sometimes vague statutory language and rich context invite nonliteral interpretations, the Burger Court rarely ventured too far on its own, relying on Congress even in its deep structure decisions. Taken together, the picture reveals a moderate Court that was knowledgeable about tax law and the tax system. More important, the Burger Court used its knowledge to good result.

APPENDICES

APPENDIX A

All petitions for writs of certiorari in federal income tax cases made during Chief Justice Burger's tenure as Chief Justice

Key to Appendix A:

Example:

54 U.S.L.W. 3669 United States v. General Dynamics (Fed. Cir.) G  
3706 Flynn v. Commissioner (6th Cir.)

54 U.S.L.W. 3669: Indicates that *General Dynamics'* petition for certiorari was noted in volume 54 of *U.S. Law Week* on page 3669.

(Fed. Cir.): Indicates that *General Dynamics* was appealed from the United States Court of Appeals for the Federal Circuit.

G: Indicates that the government was the party that filed the petition for certiorari.

3706: Indicates that *Flynn's* petition for certiorari appears at page 3706 of volume 54 of *U.S.L.W.*

(6th Cir.): Indicates that the case was appealed from the United States Court of Appeals for the Sixth Circuit.

No notation following the circuit designation, indicates that the taxpayer filed the petition.

(corporate tax, partnership tax) ] BUSINESS TAX PETITIONS  
(corporate tax, partnership tax)

38 U.S.L.W. 3040 United States v. Davis (6th Cir.) G  
3167 Anders v. Commissioner (10th Cir.)  
3188 Nash v. United States (5th Cir.)  
3307 Baker Commodities v. United States (9th Cir.)  
3516 Hollywood Baseball Ass'n v. Commissioner (9th Cir.)

39 U.S.L.W. 3044 Stanley, Inc. v. Schuster (6th Cir.)  
3080 Gordon v. Commissioner (2d Cir.)  
3172 Lansing Broadcasting v. Commissioner (6th Cir.)  
3206 Payton v. United States (5th Cir.)  
3240 Benedek v. Commissioner (2d Cir.)  
3263 Cresta Corp. v. Commissioner (2d Cir.)  
3284 Tollefsen v. Commissioner (2d Cir.)  
3336 Waterman S.S. Corp. v. Commissioner (5th Cir.)



- 3492 Sammons v. United States (5th Cir.)  
40 U.S.L.W. 3229 Vulcan Materials v. United States (5th Cir.)  
3423 United States v. Basye (9th Cir.) G  
3460 Virginia Nat'l Bank v. United States (4th Cir.)  
3475 Rafferty v. Commissioner (1st Cir.)  
3536 Crenshaw v. United States (5th Cir.)  
41 U.S.L.W. 3352 Stephens, Inc. v. United States (8th Cir.)  
42 U.S.L.W. 3095 Miele Estate v. Commissioner (3d Cir.)  
3160 Brown v. United States (6th Cir.)  
3170-1 Union Equity Coop. Exch. v. Commissioner (10th Cir.)  
3206 Rose Ann Coates Trust v. Commissioner (9th Cir.)  
3279 Central Tablet Mfg. v. United States (6th Cir.)  
3324 Braswell Motor Freight Lines v. United States (5th Cir.)  
3368 Bay Sound Transp. v. United States (5th Cir.)  
3375 Pacific Transp. v. Commissioner (9th Cir.)  
3492 Fehrs Fin. v. Commissioner (8th Cir.)  
3602-3 Hempt Bros. v. United States (3d Cir.)  
3684 Commissioner v. Chef Foods (2d Cir.) G  
3699 Irving Berlin Music v. United States (Ct. Cl.)  
43 U.S.L.W. 3116 Ivan Allen Co. v. United States (5th Cir.)  
3380 Barry v. United States (6th Cir.)  
3532 Zychinski v. Commissioner (8th Cir.)  
3679 Elot H. Raffety Farms v. United States (8th Cir.)  
44 U.S.L.W. 3243 Home Sav. & Loan Ass'n v. Commissioner (9th Cir.)  
3311 Moloney v. United States (6th Cir.)  
3324 Greenberg v. Commissioner (4th Cir.)  
3571 W & W Fertilizer v. United States (Ct. Cl.)  
45 U.S.L.W. 3578 Telephone Answering Serv. v. Commissioner (4th Cir.)  
3606 Fulman v. United States (1st Cir.)  
3742 Ringwalt v. United States (8th Cir.)  
46 U.S.L.W. 3154 Fairfax Auto Parts v. Commissioner (4th Cir.)  
47 U.S.L.W. 3163 Singleton v. Commissioner (5th Cir.)  
3255 Mains v. United States (6th Cir.)  
3430 Shimberg v. United States (5th Cir.)  
3755-6 R.M. Smith, Inc. v. Commissioner (3d Cir.)  
3807 Dayton Hydraulic v. United States (6th Cir.)  
48 U.S.L.W. 3008 Tooke v. Commissioner (9th Cir.)  
3048 Yaffe Iron & Metal v. United States (8th Cir.)  
3144 Millette & Assocs. v. Commissioner (5th Cir.)  
3471 Lorch v. Commissioner (2d Cir.)

- 3547 Dolese v. United States (10th Cir.)  
49 U.S.L.W. 3042 Schaffan v. Commissioner (10th Cir.)  
3068 Chrome Plate v. United States (5th Cir.)  
3203 Ogiony v. Commissioner (2d Cir.)  
3295 Heverly v. Commissioner (3d Cir.)  
Chapman v. Commissioner (1st Cir.)  
3522 Redding v. Commissioner (7th Cir.)  
3591 Teichgraeber v. Commissioner (2d Cir.)  
3694 United States v. Vogel Fertilizer (Ct. Cl.) G  
3795 Commissioner v. Delta Metalforming (5th Cir.) G  
3888 Ratcliff v. Commissioner (2d Cir.)  
50 U.S.L.W. 3288 Jones v. Commissioner (5th Cir.)  
3308 Russo v. Commissioner (5th Cir.)  
3560 Boynton v. Commissioner (5th Cir.)  
51 U.S.L.W. 3214 Hilton v. Commissioner (9th Cir.)  
White Tool & Mach. v. Commissioner (6th Cir.)  
3372 Snell v. United States (8th Cir.)  
Fike v. Commissioner (9th Cir.)  
3909 David Metzger Trust v. Commissioner (5th Cir.)  
52 U.S.L.W. 3565 Paulsen v. Commissioner (9th Cir.)  
53 U.S.L.W. 3350 Texas Farm Bureau v. United States (5th Cir.)  
3796 Christofferson v. United States (8th Cir.)  
54 U.S.L.W. 3092 CWT Farms v. Commissioner (11th Cir.)  
3187-8 Hestnes v. Commissioner (7th Cir.)  
3402 Kenton Meadows v. Commissioner (4th Cir.)  
3471 Thomas Int'l v. United States (Fed. Cir.)

## CONSTITUTIONAL LAW

- 38 U.S.L.W. 3292 Upshaw Estate v. Commissioner (7th Cir.)  
3352 Autenrieth v. United States (9th Cir.)  
40 U.S.L.W. 3052 Diehl v. United States (5th Cir.)  
41 U.S.L.W. 3300 Patterson v. United States (9th Cir.)  
3360 Bland v. McHann (5th Cir.)  
3559 Commissioner v. Moritz (10th Cir.) G  
3576 Walters v. "Americans United" (D.C. Cir.) G  
42 U.S.L.W. 3700 United States v. American Friends Serv. Comm.  
(E.D. Pa.) G  
43 U.S.L.W. 3116 Jacobs v. Gromatsky (5th Cir.)  
3310 Cupp v. United States Dist. Ct. (W.D. Pa.)  
3586 Terzian v. United States (2d Cir.)  
45 U.S.L.W. 3814 Hakim v. Commissioner (6th Cir.)  
46 U.S.L.W. 3313 Barter v. United States (7th Cir.)  
47 U.S.L.W. 3288 Mapes v. United States (Ct. Cl.)

- 3676 Bennett v. Secretary of Defense (D.C. Cir.)  
48 U.S.L.W. 3262 Stout v. United States (7th Cir.)  
3652 Ward v. Commissioner (5th Cir.)  
3720 Coleman v. United States (4th Cir.)  
49 U.S.L.W. 3340 Thomas v. United States (8th Cir.)  
3671 Purvis v. Commissioner (9th Cir.)  
3830 Smith v. Commissioner (9th Cir.)  
50 U.S.L.W. 3189 Leitch v. Commissioner (9th Cir.)  
Mangrum v. United States (9th Cir.)  
3384 Lewis v. United States (9th Cir.)  
3903 Rowe v. United States (Ct. Cl.)  
3957 Kalita v. Commissioner (7th Cir.)  
51 U.S.L.W. 3187 Leitch v. Commissioner (9th Cir.)  
3766 Druker v. Commissioner (2d Cir.)  
3808 Epps v. Baer (4th Cir.)  
52 U.S.L.W. 3131 Warren v. Commissioner (7th Cir.)  
3470 Allen v. Commissioner (11th Cir.)  
3642 Mekic v. United States (3d Cir.)  
3709 Moon v. United States (2d Cir.)  
3710 Tucker v. United States (5th Cir.)  
3784 Meyer v. Commissioner (3d Cir.)  
Gross v. United States (9th Cir.)  
3836 Young v. Commissioner (D.C. Cir.)  
53 U.S.L.W. 3580 Carver v. United States (6th Cir.)  
3693 Ficalora v. Commissioner (2d Cir.)  
3796 Holderman v. United States (2d Cir.)  
3875 Thibault v. Weiss (3d Cir.)  
Williams v. Govine (D. Conn.)  
54 U.S.L.W. 3011 Pfluger v. United States (7th Cir.)  
3032 Castaldi v. United States (2d Cir.)  
3159-60 Stelly v. Commissioner (5th Cir.)  
3419 Hazelwood v. United States (6th Cir.)  
3641 Texas Ass'n of Concerned Taxpayers v. United States  
(5th Cir.)  
3669-70 Cade v. United States (11th Cir.)  
3785 Carley v. United States (2d Cir.)  
3816 Cook v. Peter Kiewit Son's Co. (9th Cir.)

## DEDUCTIONS

- 38 U.S.L.W. 3020 Tauferner v. United States (10th Cir.)  
3032 Northeastern Consol. v. United States (7th Cir.)  
Sullivan v. Commissioner (2d Cir.)

- Jefferson Standard Life Ins. v. United States (4th Cir.)
- 3039 Hayman v. Commissioner (D.C. Cir.)
- 3040 Gotthelf v. Commissioner (2d Cir.)
- 3047 Tyne v. Commissioner (7th Cir.)  
Regan v. United States (9th Cir.)
- 3060 Southeastern Canteen v. Commissioner (6th Cir.)
- 3092 Sanford v. Commissioner (2d Cir.)
- 3098-9 Woodward v. Commissioner (8th Cir.)
- 3136 Galewitz v. Commissioner (2d Cir.)
- 3144 United States v. Hilton Hotels (7th Cir.) G
- 3155 Bay Sound Transp. v. United States (5th Cir.)
- 3236 Leslie v. Commissioner (2d Cir.)  
Wynn v. United States (3d Cir.)
- 3240 Quality Chevrolet v. Commissioner (10th Cir.)
- 3415 Lanrao, Inc. v. United States (6th Cir.)
- 3459 Stratmore v. United States (3d Cir.)
- 39 U.S.L.W. 3079-80 Commissioner v. Steadman (6th Cir.) G
- 3100 Martin v. Commissioner (9th Cir.)  
Commissioner v. Lincoln Sav. & Loan Ass'n (9th Cir.) G
- 3110 Callahan Mining v. Commissioner (2d Cir.)
- 3172 Consumers Power v. United States (6th Cir.)
- 3206-7 Commissioner v. Callahan Mining (2d Cir.) G
- 3231 M.F.A. Cent. Coop. v. Bookwalter (8th Cir.)  
Stubbs v. United States (9th Cir.)
- 3240 Business Dev. v. United States (4th Cir.)
- 3263 Ward v. United States (Ct. Cl.)
- 3263-4 United States v. Generes (5th Cir.) G
- 3284 Anchor Coupling v. United States (7th Cir.)  
Mitchell v. Commissioner (6th Cir.)
- 3291 Wheatley v. Chicago Bridge & Iron (3d Cir.)
- 3304 Alvarez v. United States (5th Cir.)
- 3336 United States v. Mississippi Chem. (5th Cir.) G
- 3432 McAfee v. United States (10th Cir.)
- 3466 Rose v. Commissioner (5th Cir.)
- 40 U.S.L.W. 3044 Rosenspan v. United States (2d Cir.)  
Sanders v. Commissioner (9th Cir.)
- 3063-4 Kappel v. United States (3d Cir.)
- 3188 S.F.H., Inc. v. Commissioner (3d Cir.)
- 3229 Golsen v. Commissioner (10th Cir.)  
Blaine v. United States (5th Cir.)
- 3270-1 St. Louis-San Francisco Ry. v. United States (Ct. Cl.)

- 3292 United States Steel v. United States (2d Cir.)  
3376 Mountain Fuel Supply v. United States (10th Cir.)  
Kovtun v. Commissioner (9th Cir.)  
3516 Landerman v. Commissioner (7th Cir.)  
Kennedy v. Commissioner (3d Cir.)  
3552 Geoghegan & Mathis, Inc. v. Commissioner (6th  
Cir.)  
41 U.S.L.W. 3126-7 United States v. Chicago, Burlington & Quincy R.R.  
(Ct. Cl.) G  
3195 Carey v. Commissioner (4th Cir.)  
3244 Road Materials v. Commissioner (4th Cir.)  
3292 Plantation Patterns v. Jemison (5th Cir.)  
3303 Cities Serv. Oil v. United States (Ct. Cl.)  
3384 Heisler v. United States (9th Cir.)  
3560 Shutler v. United States (10th Cir.)  
3575-6 Northern Natural Gas v. United States (8th Cir.)  
3603 Fausner v. Commissioner (5th Cir.)  
3662 Hoover, Inc. v. Commissioner (6th Cir.)  
42 U.S.L.W. 3004 Shiosaki v. Commissioner (9th Cir.)  
3131 Rose v. Commissioner (5th Cir.)  
Commissioner v. Idaho Power (9th Cir.) G  
3206 Rexach v. United States (1st Cir.)  
3279-80 Coker v. Commissioner (2d Cir.)  
3280 Snow v. Commissioner (6th Cir.)  
3559 Rosenthal v. Commissioner (9th Cir.)  
3602 Susquehanna Coal v. Commissioner (3d Cir.)  
Georator v. United States (4th Cir.)  
3603 Miller Box v. United States (5th Cir.)  
3639 DeMichele v. Commissioner (2d Cir.)  
3671 Shroul v. Commissioner (8th Cir.)  
3672 Meade Estate v. Commissioner (5th Cir.)  
3699 Rose v. Commissioner (5th Cir.)  
Kimbell v. United States (5th Cir.)  
43 U.S.L.W. 3156 Goldman v. Commissioner (6th Cir.)  
3408 Charles Schneider & Co. v. Commissioner (8th Cir.)  
3443 United States v. Foster Lumber (8th Cir.) G  
3468 Data Prods. v. United States (9th Cir.)  
3492 Warner Co. v. United States (3d Cir.)  
3508 United States v. Data Prods. (9th Cir.) G  
Cummings v. Commissioner (2d Cir.)  
3619 Bodzin v. Commissioner (4th Cir.)  
3679-80 Hogan v. United States (6th Cir.)

- 44 U.S.L.W. 3003-4 St. Petersburg Bank & Trust v. United States (5th Cir.)  
3068 Weary v. United States (10th Cir.)  
3076 Brady v. Commissioner (3d Cir.)  
3100 Tunnell v. United States (3d Cir.)  
3112 Nichols v. Commissioner (5th Cir.)  
3156 Tulia Feedlot v. United States (5th Cir.)  
3267-8 Jamieson v. Commissioner (7th Cir.)  
3387 Madden v. Commissioner (9th Cir.)  
3407 Melnik v. United States (9th Cir.)  
3443 Mathews v. Commissioner (5th Cir.)  
3482 Lea Assocs. v. United States (Ct. Cl.)  
3571 Williams v. Commissioner (7th Cir.)  
3615 Dowell v. United States (5th Cir.)  
45 U.S.L.W. 3156 Levy v. United States (Ct. Cl.)  
3290 Gino v. Commissioner (9th Cir.)  
Saia Elec. v. Commissioner (5th Cir.)  
3479 Casco Bank & Trust v. United States (1st Cir.)  
3523 Winn v. Commissioner (4th Cir.)  
3658 First Nat'l Bank v. Commissioner (7th Cir.)  
3742 Poirier & McLane Corp. v. Commissioner (2d Cir.)  
46 U.S.L.W. 3046 Nemser v. Commissioner (2d Cir.)  
3348-9 Hoover v. United States (6th Cir.)  
3349 Laird v. United States (5th Cir.)  
3488 Schott v. United States (5th Cir.)  
Thor Power Tool v. Commissioner (7th Cir.)  
3670 Sun Oil v. Commissioner (3d Cir.)  
47 U.S.L.W. 3020 Horne v. Commissioner (9th Cir.)  
3288 OTM Corp. v. United States (5th Cir.)  
3357 Clement v. United States (Ct. Cl.)  
3564 Steere Tank Lines v. United States (5th Cir.)  
3577 Southland Royalty v. United States (Ct. Cl.)  
3614 Davis v. Commissioner (6th Cir.)  
3737 Sharon v. Commissioner (9th Cir.)  
48 U.S.L.W. 3144 Jack's Cookie v. United States (4th Cir.)  
3362 Commissioner v. Quinlivan (8th Cir.) G  
3380 Pickering v. Commissioner (2d Cir.)  
3547 Patrick v. Commissioner (4th Cir.)  
3574 Allstate Sav. & Loan Ass'n v. Commissioner (9th Cir.)  
3741 United States v. Swank (Ct. Cl.) G  
49 U.S.L.W. 3041 Commissioner v. Portland Cement (10th Cir.) G

	3203-4	Berkley Mach. Works & Foundry v. Commissioner (4th Cir.)
	3590	Payte v. United States (5th Cir.)
	3591	Blodgett v. United States (Ct. Cl.)
	3795	Battelstein v. IRS (5th Cir.)
	3942	Hantzis v. Commissioner (1st Cir.)
50 U.S.L.W.	3041	Hamrick v. Commissioner (4th Cir.)
	3063	Malmstedt v. Commissioner (4th Cir.)
	3260	Carnation Co. v. Commissioner (9th Cir.)
		Pacific Power & Light v. United States (9th Cir.)
	3288	Holgerson v. Commissioner (9th Cir.)
	3391	Silverton v. Commissioner (9th Cir.)
	3872	Cappuccilli v. Commissioner (2d Cir.)
51 U.S.L.W.	3166	Bothke v. Commissioner (9th Cir.)
	3187	McCabe v. Commissioner (2d Cir.)
	3350	Commissioner v. Engle (7th Cir.) G
	3400	Cousino v. Commissioner (6th Cir.)
	3451	White v. Commissioner (9th Cir.)
	3521	Farmer v. United States (Cl. Ct.)
	3561	Record Wide Distribs. v. Commissioner (8th Cir.)
	3694	Lomas Santa Fe, Inc. v. Commissioner (9th Cir.)
	3766	Lukovsky v. Commissioner (8th Cir.)
	3781	Briggs v. Commissioner (9th Cir.)
	3814	Brountas v. Commissioner (1st Cir.)
		CRC Corp. v. Commissioner (3d Cir.)
	3849	Levine v. Commissioner (2d Cir.)
	3877	Ellis Banking v. Commissioner (11th Cir.)
52 U.S.L.W.	3225	American Int'l Coal v. Commissioner (3d Cir.)
	3673	Dailey v. Commissioner (8th Cir.)
	3709	Lyddan v. United States (2d Cir.)
	3710	Sankary v. Commissioner (9th Cir.)
	3766	Felton v. Commissioner (7th Cir.)
	3899	Moller v. United States (Fed. Cir.)
		M&K Farms v. United States (9th Cir.)
	3915	Gajewski v. Commissioner (2d Cir.)
53 U.S.L.W.	3350-1	Hauser v. Commissioner (9th Cir.)
	3410	Brady v. Commissioner (3d Cir.)
		Gindes v. United States (Fed. Cir.)
	3467	Pryor v. Commissioner (11th Cir.)
	3658	Odend'hal v. Commissioner (4th Cir.)
54 U.S.L.W.	3106	Piggy Bank Stations v. Commissioner (5th Cir.)
	3107	Moss v. Commissioner (7th Cir.)
	3258	Estate of Rockefeller v. Commissioner (2d Cir.)

- 3337 United States v. Hughes Properties (Fed. Cir.) G
- 3402 Western Reserve Oil & Gas v. New (9th Cir.)
- 3570 Cohen v. Commissioner (10th Cir.)
- 3669 United States v. General Dynamics (Fed. Cir.) G
- 3706 Flynn v. Commissioner (6th Cir.)

**ESTATE PLANNING**

- 38 U.S.L.W. 3060 Sappington v. United States (4th Cir.)
- 3459 Ruehlmann v. Commissioner (6th Cir.)
- 3500 Cleveland Trust v. United States (6th Cir.)
- 39 U.S.L.W. 3060 Jenkins v. United States (5th Cir.)
- 3344 Select Minority Trust v. United States (5th Cir.)
- 3396 Sid W. Richardson Found. v. United States (5th Cir.)
- 3466 Missouri Pac. R.R. v. United States (Ct. Cl.)
- 40 U.S.L.W. 3036 Lion v. Commissioner (4th Cir.)
- 3052 Stewart v. Commissioner (3d Cir.)
- 3127-8 First Nat'l Bank v. United States (5th Cir.)
- 3200 United States v. Byrum (6th Cir.) G
- 3228 Miami Beach First Nat'l Bank v. United States (5th Cir.)
- 3243 Fried Estate v. Commissioner (2d Cir.)
- 3488 Bel v. United States (5th Cir.)
- 41 U.S.L.W. 3060 Witkowski Estate v. United States (5th Cir.)
- Lafayette Estate v. Commissioner (5th Cir.)
- 3084 United States v. Cartwright (2d Cir.) G
- 3127 Bishop v. United States (5th Cir.)
- 3235 United States v. Chandler (9th Cir.) G
- 3279 Harris Trust & Sav. Bank v. United States (7th Cir.)
- 3279-80 Mott v. United States (Ct. Cl.)
- 3336 Haverlah Estate v. United States (5th Cir.)
- 3368 First Nat'l Bank v. United States (5th Cir.)
- 3399 Detroit Bank & Trust v. United States (6th Cir.)
- 3559 Tubbs v. United States (5th Cir.)
- 3620 Jones v. Commissioner (3d Cir.)
- 3630 Harkness v. United States (Ct. Cl.)
- 42 U.S.L.W. 3131 Stark v. United States (8th Cir.)
- 3279 Chotin v. United States (Ct. Cl.)
- 3492 Duffy v. United States (6th Cir.)
- 3516 Hicks v. United States (10th Cir.)
- 43 U.S.L.W. 3176 Sutton v. Commissioner (4th Cir.)
- 3312 Essex v. Vinal (8th Cir.)
- 3323 Krause v. Commissioner (6th Cir.)
- 3562 Wyckoff Estate v. Commissioner (10th Cir.)



	3632	Smith Estate v. Commissioner (2d Cir.)
44 U.S.L.W.	3244	Bratton v. United States (6th Cir.)
	3311	Paxton v. Commissioner (9th Cir.)
	3407	Terriberry v. United States (5th Cir.)
	3523	Gall v. United States (5th Cir.)
45 U.S.L.W.	3184	Thalheimer v. Commissioner (4th Cir.)
	3289	Estate of Steffke v. Commissioner (7th Cir.)
	3422-3	National Bank v. United States (2d Cir.)
46 U.S.L.W.	3023	Estate of Chesterton v. United States (Ct. Cl.)
47 U.S.L.W.	3676	Proesel v. United States (7th Cir.)
48 U.S.L.W.	3170	Old Nat'l Bank v. United States (7th Cir.)
		Sheedy v. United States (7th Cir.)
	3299	Pennsylvania Bank & Trust v. United States (3d Cir.)
	3669	Estate of Alperstein v. Commissioner (2d Cir.)
49 U.S.L.W.	3184	SAICI v. United States (2d Cir.)
	3522	Silverman v. United States (9th Cir.)
	3631	Cady v. Commissioner (8th Cir.)
	3694	Newman v. Commissioner (5th Cir.)
	3848	Jewett v. Commissioner (9th Cir.)
51 U.S.L.W.	3294	Wright Estate v. United States (9th Cir.)
	3326	Robinson v. United States (5th Cir.)
	3450	First Nat'l Bank v. United States (8th Cir.)
	3494	Brigham Young Univ. v. United States (10th Cir.)
	3624	Estate of Frieders v. Commissioner (7th Cir.)
	3864	Estate of Ceppi v. Commissioner (1st Cir.)
		Rush v. United States (6th Cir.)
52 U.S.L.W.	3594	Behar v. Southeast Bank Trust (11th Cir.)
	3622	Doring v. United States (8th Cir.)
	3693-4	United States v. Boyle (7th Cir.) G
	3836	Commissioner v. Estate of Van Horne (9th Cir.) G
53 U.S.L.W.	3252	Fein v. United States (8th Cir.)
	3467	Reed v. United States (7th Cir.)
54 U.S.L.W.	3018	United States v. Hemme (S.D. Ill.) G
	3174	Whitt v. Commissioner (11th Cir.)
	3174-5	Hemme v. United States (S.D. Ill.)
	3353	Estate of Smith v. United States (5th Cir.)
	3513	Pyle v. United States (7th Cir.)
	3514	Manufacturers Hanover Trust v. United States (2d Cir.)
	3721	Payne v. United States (5th Cir.)
	3816	Sherrod v. Commissioner (11th Cir.)

## EXEMPT ORGANIZATIONS

- 38 U.S.L.W. 3361 Founding Church of Scientology v. United States (Ct. Cl.)  
 3448 Cannon v. Green (D.D.C.)  
 3500 United States v. Maryland Sav.-Share Ins. (D. Md.)  
 G
- 39 U.S.L.W. 3252 Coit v. Green (D.D.C.)  
 40 U.S.L.W. 3252 Coit v. Green (D.D.C.)  
 3308 Washington Trust Bank v. United States (9th Cir.)  
 3339 United States v. Christian Echoes Nat'l Ministry  
 (N.D. Okla.) G  
 3367-8 University Hill Found. v. Commissioner (9th Cir.)
- 41 U.S.L.W. 3576 Christian Echoes Nat'l Ministry v. United States  
 (10th Cir.)  
 3630-1 Bob Jones Univ. v. Connally (4th Cir.)  
 3631 Rose Hill Memorial Park Ass'n v. United States (Ct. Cl.)
- 42 U.S.L.W. 3112 Old Dominion Box v. United States (4th Cir.)  
 3130-1 Crenshaw County Private Sch. Found. v. Connally  
 (5th Cir.)  
 3644 Contracting Plumbers Coop. Restoration v. United  
 States (2d Cir.)
- 43 U.S.L.W. 3323 Haswell v. United States (Ct. Cl.)  
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- 44 U.S.L.W. 3143 Land O'Lakes v. United States (8th Cir.)  
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- 47 U.S.L.W. 3357-8 Clarence LaBelle Post No. 217, VFW v. United  
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- 49 U.S.L.W. 3317-8 HCSC-Laundry v. United States (3d Cir.)  
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- 45 U.S.L.W. 3007 Boise Cascade v. United States (Ct. Cl.)  
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- 46 U.S.L.W. 3230 Harmont Plaza v. Commissioner (6th Cir.)  
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3888 United States v. Baggot (7th Cir.) G  
3942 Watson v. United States (5th Cir.)  
51 U.S.L.W. 3084 Hall v. United States (9th Cir.)  
3148 Considine v. United States (Cl. Ct.)  
3187 Antelman v. Decataldo (1st Cir.)  
3206 Mirkin v. United States (1st Cir.)  
3400 El Paso Co. v. United States (5th Cir.)

- 3450 Timms v. United States (9th Cir.)  
 United States v. Arthur Young & Co. (2d Cir.) G
- 3451 Arthur Young & Co. v. United States (2d Cir.)
- 3463-4 Barbaran v. United States (11th Cir.)
- 3540 Murray v. United States (8th Cir.)
- 3591 Everett v. United States (9th Cir.)
- 3724-5 Eisenberg v. United States (5th Cir.)
- 3743 Zack v. Commissioner (6th Cir.)
- 3780 Afshar v. Commissioner (4th Cir.)  
 Badaracco v. Commissioner (3d Cir.)
- 3781 Deleet Merchandising v. United States (3d Cir.)
- 3891 T-1740 Trusts v. Commissioner (D.C. Cir.)
- 52 U.S.L.W. 3004 Commissioner v. Dowell (10th Cir.) G
- 3017 Sun Chem. v. United States (Fed. Cir.)
- 3037 Wynshaw v. United States (2d Cir.)
- 3052 Nesmith v. Commissioner (5th Cir.)  
 Lask v. United States (8th Cir.)  
 Mertsching v. United States (10th Cir.)
- 3131 Drey v. United States (8th Cir.)  
 Ocean Sands Holding v. Commissioner (4th Cir.)
- 3145 Mallette Bros. Constr. v. United States (5th Cir.)
- 3181 Leaseway v. United States (6th Cir.)
- 3226 Fernandez v. United States (11th Cir.)
- 3274 Schlansky v. United States (6th Cir.)
- 3328 Pettineo v. United States (3d Cir.)  
 Tilford v. Commissioner (6th Cir.)
- 3354 Ducommun v. Commissioner (10th Cir.)  
 Jacques v. United States (9th Cir.)
- 3391 Kleinman v. United States (11th Cir.)
- 3402 Hall v. United States (6th Cir.)
- 3408 Gryder v. Commissioner (8th Cir.)
- 3496 Dale v. Commissioner (2d Cir.)
- 3552-3 Siebert v. Baptist (11th Cir.)
- 3594 Gray v. Commissioner (6th Cir.)
- 3622 Tiffany Fine Arts v. United States (2d Cir.)
- 3641 Stonehill v. United States (9th Cir.)  
 Brooks v. United States (9th Cir.)
- 3642 Trio Mfg. v. United States (11th Cir.)
- 3657 Jones v. Berry (9th Cir.)
- 3725 Dorison v. United States (4th Cir.)
- 3728 United States v. Dahlstrom (9th Cir.) G
- 3884 Turk v. United States (10th Cir.)  
 McAnlis v. United States (11th Cir.)

		Franks v. United States (10th Cir.)
		Watkins v. United States (4th Cir.)
53 U.S.L.W.	3027	Zolla v. United States (9th Cir.)
	3077	Zukowski v. United States (2d Cir.)
	3081	Heyward v. United States (4th Cir.)
	3104	Eisenberg v. United States (7th Cir.)
	3139	Rutter v. Commissioner (5th Cir.)
	3163	Kraft v. Commissioner (7th Cir.)
	3179	Beer v. Commissioner (6th Cir.)
	3197	Manning v. Nelson (2d Cir.)
	3252-3	Chaplain v. Commissioner (4th Cir.)
	3296	Redhouse v. Commissioner (9th Cir.)
	3351	Bulkley v. United States (10th Cir.)
		Parker v. United States (11th Cir.)
	3442	United States v. National Bank of Commerce (8th Cir.) G
	3518	Barth v. United States (2d Cir.)
	3607-8	Mims v. IRS (4th Cir.)
	3626	Garman v. United States (4th Cir.)
	3709	Huene v. United States (9th Cir.)
	3764	Riggins v. IRS (5th Cir.)
	3817	Sorenson v. Secretary of Treasury (9th Cir.)
	3872	Bibby v. United States (6th Cir.)
	3887	Terrell v. United States (5th Cir.)
		Beeker v. United States (9th Cir.)
	3898	Afflerbach v. United States (10th Cir.)
54 U.S.L.W.	3031	Zuger v. United States (2d Cir.)
	3127	Moeller v. Carradine (8th Cir.)
	3238	Dale v. Commissioner (2d Cir.)
	3337-8	W.C. Garcia & Assocs. v. Sassi (9th Cir.)
	3352-3	Coplin v. United States (Fed. Cir.)
	3366	Mann v. United States (9th Cir.)
		Bressler v. United States (7th Cir.)
	3429-30	Smith v. United States (11th Cir.)
	3490	Interfirst Bank v. United States (5th Cir.)
		Resha v. United States (6th Cir.)
	3513	United States v. Harris (11th Cir.) G
	3526	Christensen v. United States (10th Cir.)
	3543	Halter v. Secretary of Treasury (9th Cir.)
	3619	Temple Univ. v. United States (3d Cir.)
	3641	Huckaby v. United States (5th Cir.)
		Aruba Bonaire Curacao Trust v. Commissioner (D.C. Cir.)

- 3655-6 United States v. Merchants Nat'l Bank (11th Cir.) G
- 3669 MacKenzie v. United States (2d Cir.)
- 3706 Mosher v. IRS (5th Cir.)
- 3736 McKee v. United States (4th Cir.)
- 3750 Jersey Shore State Bank v. United States (3d Cir.)
- 3768 Merchants Nat'l Bank v. United States (11th Cir.)

**TAX CRIMES**

- 38 U.S.L.W. 3045 Agoranos v. United States (5th Cir.)
- 3088 McCarthy v. United States (10th Cir.)
- 3110 Lodwick v. United States (8th Cir.)
- 3187 Acker v. United States (6th Cir.)
- 3193 Mackey v. United States (7th Cir.)
- 3203 Fahey v. United States (9th Cir.)
- 3240 O'Connor v. Commissioner (2d Cir.)
- 3256 Baird v. United States (2d Cir.)
- 3257 Wainwright v. United States (10th Cir.)
- 3281 McCabe v. United States (7th Cir.)
- 3306 Lewis v. United States (9th Cir.)
- 3323 Campione v. United States (7th Cir.)
- 3324 White v. United States (2d Cir.)
- 3409 Caiello v. United States (2d Cir.)
- 3411 Matosky v. United States (7th Cir.)
- 3445 Simon v. United States (9th Cir.)
- 3490 Miriani v. United States (6th Cir.)
- 39 U.S.L.W. 3043 Davis v. United States (5th Cir.)
- 3075 Hanon v. United States (8th Cir.)
- Tiktin v. United States (6th Cir.)
- Prudden v. United States (5th Cir.)
- Scott v. United States (6th Cir.)
- 3098 Nolan v. United States (10th Cir.)
- 3181 Mengarelli v. United States (9th Cir.)
- 3202 Tonahill v. United States (5th Cir.)
- 3228 Townsend v. United States (7th Cir.)
- 3288 Mitchell v. United States (1st Cir.)
- O'Connor v. United States (1st Cir.)
- 3289 Stone v. United States (5th Cir.)
- 3300 Hogg v. United States (6th Cir.)
- 3315 Jaskiewicz v. United States (3d Cir.)
- 3324 Hamilton v. United States (2d Cir.)
- 3459 MacLeod v. United States (8th Cir.)
- 3461 Balistrieri v. United States (7th Cir.)
- 3474 Viviana v. United States (2d Cir.)



	3498	Stribling v. United States (6th Cir.)
		Frank v. United States (9th Cir.)
	3514	Carpenter v. United States (5th Cir.)
	3529	Stein v. United States (7th Cir.)
40 U.S.L.W.	3136	Guon v. United States (9th Cir.)
	3137	Egenberg v. United States (2d Cir.)
	3140	Bailey v. Commissioner (6th Cir.)
	3183	Wilson v. United States (5th Cir.)
	3259	Philpott v. Hill (7th Cir.) G
	3260	Carzoli v. United States (7th Cir.)
	3305	Urban v. United States (5th Cir.)
	3402	Nemetz v. United States (3d Cir.)
	3434	Pénosi v. United States (5th Cir.)
	3530	Coblentz v. United States (2d Cir.)
	3535	Gettelman v. Commissioner (7th Cir.)
	3591	McKee v. United States (6th Cir.)
	3591-2	Wainwright v. United States (10th Cir.)
	3604	Wenger v. United States (2d Cir.)
	3605	Berger v. United States (2d Cir.)
41 U.S.L.W.	3074	Bland v. United States (5th Cir.)
	3105	Milder v. United States (8th Cir.)
	3118	Egan v. United States (6th Cir.)
	3160	Ming v. United States (7th Cir.)
	3232	Lehman v. United States (7th Cir.)
	3259	Carter v. United States (6th Cir.)
	3290	Merrick v. United States (10th Cir.)
	3348-9	Slatko v. United States (5th Cir.)
	3418	Waller v. United States (5th Cir.)
	3434	Waitkins v. United States (7th Cir.)
	3465	Newman v. United States (5th Cir.)
		Krilich v. United States (7th Cir.)
	3488	Lachmann v. United States (1st Cir.)
	3489-90	Rosenfield v. United States (3d Cir.)
	3506	Jenning v. United States (9th Cir.)
	3518	Harrison v. United States (7th Cir.)
	3529	Parenti v. United States (3d Cir.)
	3544	Hagen v. United States (10th Cir.)
42 U.S.L.W.	3055	Bernabei v. United States (6th Cir.)
	3249	Marra v. United States (6th Cir.)
	3260	Moody v. United States (5th Cir.)
	3273	Daly v. United States (8th Cir.)
	3273-4	Tager v. United States (10th Cir.)
	3309	Brewer v. United States (10th Cir.)

- 3339 Ledford v. Commissioner (9th Cir.)
- 3355 Krowczyk v. United States (7th Cir.)
- 3442 DiVarco v. United States (7th Cir.)
- 3444 Slutsky v. United States (2d Cir.)
- 3453 Tunnell v. United States (5th Cir.)
- 3502-3 Erckman v. United States (7th Cir.)
- 3526 Sahley v. United States (6th Cir.)
- 3560 Brobeck v. United States (3d Cir.)
- 3613 Considine v. United States (9th Cir.)
- 3616 Malnik v. United States (5th Cir.)
- 3669 Fencel v. United States (7th Cir.)
- 43 U.S.L.W. 3006 Madden v. United States (9th Cir.)
- 3015 Hawk v. United States (9th Cir.)
- 3035 Klee v. United States (9th Cir.)
- 3098 Lowder v. United States (4th Cir.)
- 3111 Amos v. United States (8th Cir.)
- 3125 Ferraro v. United States (3d Cir.)
- 3334 Paterno v. United States (2d Cir.)
- 3335 Denti v. United States (2d Cir.)
- Smith v. United States (4th Cir.)
- 3350-1 Mirelez v. United States (5th Cir.)
- 3376 Lawhon v. United States (5th Cir.)
- 3405 Burkhart v. United States (6th Cir.)
- 3406 United States v. Kashmir (5th Cir.) G
- 3427-8 Robson v. United States (9th Cir.)
- 3605 Cirami v. United States (2d Cir.)
- 3605-6 Terrell v. United States (5th Cir.)
- 3606 Abbas v. United States (9th Cir.)
- 3616-7 Gray v. United States (5th Cir.)
- 3638 Beckwith v. United States (D.C. Cir.)
- Bowness v. United States (5th Cir.)
- 3647-8 Merritt v. United States (5th Cir.)
- 3662 McCorkle v. United States (7th Cir.)
- 3663 Greenspahn v. United States (5th Cir.)
- 44 U.S.L.W. 3064 Ross v. United States (5th Cir.)
- Vincent v. United States (6th Cir.)
- 3072 Ryan v. Commissioner (7th Cir.)
- 3108 Serra v. United States (9th Cir.)
- 3153 Greenlee v. United States (3d Cir.)
- Liebert v. United States (3d Cir.)
- 3210 Vernell v. United States (5th Cir.)
- 3250 Fisher v. United States (2d Cir.)
- 3321 Shaffer v. Wilson (10th Cir.)

- 3352 United States v. Beattie (2d Cir.) G  
3401 Pandilidis v. United States (6th Cir.)  
3457-8 Meier v. Keller (9th Cir.)  
3476-7 Gentile v. United States (2d Cir.)  
3504 Leonard v. United States (2d Cir.)  
3549 McNulty v. United States (9th Cir.)  
3566-7 Truitt v. Lenahan (6th Cir.)  
3627 Haddad v. United States (6th Cir.)  
Cooper v. United States (9th Cir.)  
3628 Bugliarelli v. United States (2d Cir.)  
3688 Wangrud v. United States (9th Cir.)  
3689 White v. United States (4th Cir.)  
3692 Snow v. United States (9th Cir.)  
3722 Bianco v. United States (2d Cir.)  
Lacy v. United States (5th Cir.)  
3723 Stone v. United States (8th Cir.)  
3723-4 United States v. Pomponio (4th Cir.) G  
45 U.S.L.W. 3148 Littrell v. United States (8th Cir.)  
3182 Bernabei v. United States (6th Cir.)  
3195 Intrieri v. United States (2d Cir.)  
3291 Estate of Klein v. Commissioner (2d Cir.)  
3316 Gillis v. United States (6th Cir.)  
3470 Miller v. United States (9th Cir.)  
3548 Afflerbach v. United States (10th Cir.)  
3589 Hemphill v. United States (8th Cir.)  
3670 Kaplan v. United States (3d Cir.)  
3721 Methot v. United States (9th Cir.)  
3756 Hoopes v. United States (10th Cir.)  
46 U.S.L.W. 3042 Turner v. United States (5th Cir.)  
3172 Pace v. United States (6th Cir.)  
3226 United States v. LaSalle Nat'l Bank (7th Cir.) G  
3490 Pomponio v. United States (4th Cir.)  
3558 Anthony v. United States (9th Cir.)  
3571 Tsanas v. United States (2d Cir.)  
3653 Dillon v. United States (10th Cir.)  
47 U.S.L.W. 3002 Clinton v. United States (9th Cir.)  
3011 Holladay v. United States (5th Cir.)  
3012 McLaughlin v. United States (3d Cir.)  
3074 Giacalone v. United States (6th Cir.)  
3095 White v. United States (6th Cir.)  
3172 Taylor v. United States (5th Cir.)  
3252 Constanzo v. United States (2d Cir.)  
3304 Boulet v. United States (5th Cir.)

- 3428 *General Motors v. United States* (6th Cir.)
- 3467-8 *Stobaugh v. United States* (9th Cir.)
- 3486 *Londe v. United States* (8th Cir.)
- 3499 *Granberg v. United States* (9th Cir.)  
*Evans v. United States* (5th Cir.)
- 3511 *Rucci v. United States* (2d Cir.)
- 3521 *Hankins v. United States* (5th Cir.)
- 3559 *Fairchild Indus. v. Harvey* (4th Cir.)
- 3608-9 *Moенckmeier v. United States* (5th Cir.)
- 3640 *Johnson v. United States* (9th Cir.)
- 3656 *Bengel v. United States* (3d Cir.)
- 3722 *United States v. Euge* (8th Cir.) G
- 3776-7 *Shelton v. United States* (9th Cir.)
- 3790 *Bomher v. United States* (3d Cir.)
- 3800 *Hallman v. United States* (9th Cir.)
- 3817 *McBrearty v. United States* (9th Cir.)
- 48 U.S.L.W. 3162-3 *Jacka v. United States* (10th Cir.)
- 3163 *Marcy v. United States* (7th Cir.)
- 3178 *Genser v. United States* (3d Cir.)
- 3179 *Watkins v. United States* (9th Cir.)
- 3244 *Renfro v. United States* (6th Cir.)
- 3247 *Brown v. United States* (10th Cir.)
- 3406 *Millican v. United States* (5th Cir.)
- 3491 *Smith v. United States* (6th Cir.)
- 3492 *Warinner v. United States* (8th Cir.)
- 3539 *Buckner v. United States* (9th Cir.)
- 3541 *Hudler v. United States* (10th Cir.)
- 3542 *Sawyer v. United States* (7th Cir.)
- 3543 *Awerkamp v. United States* (7th Cir.)
- 3571 *Sparks v. United States* (10th Cir.)
- 3605 *Clemente v. United States* (2d Cir.)  
*Penrod v. United States* (4th Cir.)
- 3645 *Jahoda v. United States* (7th Cir.)
- 3669 *West v. United States* (10th Cir.)
- 3680 *Larson v. United States* (8th Cir.)
- 3682 *Pliss v. United States* (2d Cir.)
- 3684 *Breger v. United States* (2d Cir.)  
*Amen v. United States* (2d Cir.)
- 3807 *Neff v. United States* (9th Cir.)
- 3839-40 *Lefkowitz v. United States* (9th Cir.)
- 49 U.S.L.W. 3194-5 *Carlson v. United States* (9th Cir.)
- 3273 *Callow v. United States* (10th Cir.)
- 3498 *Enstam v. United States* (5th Cir.)

	3562	Hedman v. United States (7th Cir.)
		Moore v. United States (7th Cir.)
	3563	Bagley v. United States (9th Cir.)
	3564	Nicoladze v. United States (9th Cir.)
	3580	Castelli v. United States (3d Cir.)
	3624	Jones v. United States (5th Cir.)
	3715	Burns v. United States (9th Cir.)
	3811-2	Hazelip v. United States (9th Cir.)
	3869	Gust v. United States (2d Cir.)
	3885	Schwenk v. United States (8th Cir.)
50 U.S.L.W.	3029	Samara v. United States (10th Cir.)
	3031	American Law Ass'n v. Merkel (9th Cir.)
	3202	Akmakjian v. United States (9th Cir.)
	3330	Sutherland v. United States (5th Cir.)
	3382-3	Middlebrook v. United States (5th Cir.)
	3405-6	Gray v. United States (6th Cir.)
	3492	Ness v. United States (9th Cir.)
		Menius v. United States (4th Cir.)
	3575	Sarcinelli v. United States (7th Cir.)
	3677	Fogg v. United States (5th Cir.)
	3867	Hebel v. United States (8th Cir.)
	3922	McCarty v. United States (5th Cir.)
		Barksdale v. United States (11th Cir.)
51 U.S.L.W.	3007	Amon v. United States (10th Cir.)
	3078	Keltner v. United States (4th Cir.)
	3103	Butcher v. United States (9th Cir.)
	3123	Knapp v. United States (2d Cir.)
	3156	Sanzo v. United States (2d Cir.)
	3206	Manning v. United States (4th Cir.)
	3264	Colacurcio v. United States (9th Cir.)
	3309	Pate v. United States (2d Cir.)
	3382	Dean v. United States (9th Cir.)
	3383	Oggoian v. United States (7th Cir.)
	3446	Tucker v. United States (5th Cir.)
	3587	Stuart v. United States (8th Cir.)
	3589-90	Groom v. United States (3d Cir.)
	3689	Bunch v. United States (6th Cir.)
	3809	Rapaport v. United States (2d Cir.)
	3830	Ingredient Tech. v. United States (2d Cir.)
	3875	Ardt v. United States (7th Cir.)
	3925	David v. United States (6th Cir.)
52 U.S.L.W.	3126	PB v. United States (3d Cir.)
	3146	Damico v. United States (3d Cir.)

- 3175 Cruz v. United States (11th Cir.)
- 3297 Sasscer v. United States (4th Cir.)
- 3313 Radue v. United States (11th Cir.)
- 3373-4 Hull v. United States (3d Cir.)
- 3374 Kozachenko v. United States (5th Cir.)
- 3555 Greger v. United States (9th Cir.)
- 3563 Patmon, Young & Kirk v. United States (6th Cir.)
- 3667 Vittorio v. United States (11th Cir.)
- 3725 Eisenberg v. United States (4th Cir.)
- 53 U.S.L.W. 3075 Lillie v. United States (9th Cir.)
- 3382 Barshov v. United States (11th Cir.)
- 3572-3 Todaro v. United States (2d Cir.)
- 3693 Kramer v. United States (7th Cir.)
- 3705 O'Brocta v. United States (3d Cir.)
- 3721 Blauvelt v. United States (5th Cir.)
- 54 U.S.L.W. 3106-7 Senft v. United States (2d Cir.)
- 3156 Zuger v. United States (2d Cir.)
- 3429 Long v. United States (6th Cir.)
- 3525-6 Marchant v. United States (8th Cir.)
- 3669 Marcantonio v. United States (7th Cir.)
- 3800 Schaut v. United States (9th Cir.)

APPENDIX B

Petitions for Certiorari in Federal Tax Cases by Substantive Area, Term, and the Party Petitioning

Key:

Appendix B converts Appendix A into tables. Thus, the box "1969/business tax" indicates that six business tax petitions were filed during the 1969 Term, only one of which was filed by the government ("G"). Furthermore, the information at the bottom of the business tax column indicates that 85 petitions were filed in this area during the Burger Court era, of which six were filed by the government.

Term	business tax	constitutional law	deductions	estate planning	exempt orgs
1969	6(5 1G)	2	20(19 1G)	3	4(3 1G)
1970	9	0	23(18 5G)	4	1
1971	6(5 1G)	1	13	8(7 1G)	5(4 1G)
1972	1	6(4 2G)	11(10 1G)	15(13 2G)	3
1973	13(12 1G)	2(1 1G)	16(15 1G)	4	3
1974	4	3	11(9 2G)	5	4(3 1G)
1975	4	0	13	4	1
1976	3	1	7	3	0
1977	1	1	6	1	2
1978	5	2	7	1	3
1979	5	3	8(6 2G)	4	3
1980	12(10 2G)	3	7(6 1G)	5	6
1981	3	5	7	0	3
1982	5	3	15(14 1G)	7	3(2 1G)
1983	1	8	8	6(4 2G)	1
1984	2	5	5	2	4(3 1G)
1985	4	8	10(8 2G)	9(8 1G)	4(3 1G)
Total	84(79 5G)	53(50 3G)	187(171 16G)	81(75 6G)	49(44 5G)

## APPENDIX B (continued)

Term	Income	Procedure	Tax Crimes	Total for Term
1969	9(7 2G)	20(17 3G)	17	81(73 8G)
1970	7(6 1G)	8(7 1G)	22	74(67 7G)
1971	11(10 1G)	15	16(15 1G)	75(70 5G)
1972	13(12 1G)	24(23 1G)	18	91(84 7G)
1973	26(22 4G)	29(27 2G)	17	110(101 9G)
1974	11	26(21 5G)	24(23 1G)	88(79 9G)
1975	17(13 4G)	20(19 1G)	28(26 2G)	87(80 7G)
1976	17(15 2G)	23	11	65(63 2G)
1977	10(9 1G)	21(20 1G)	8(7 1G)	50(47 3G)
1978	8	17	25(24 1G)	68(67 1G)
1979	5	23(22 1G)	24	75(72 3G)
1980	13	29(27 2G)	13	88(83 5G)
1981	12(11 1G)	27(24 3G)	13	70(66 4G)
1982	7	18(17 1G)	18	76(73 3G)
1983	3	35(33 2G)	11	73(69 4G)
1984	7	24(23 1G)	6	55(53 2G)
1985	7(6 1G)	24(22 2G)	6	72(65 7G)
Total	183(165 18G)	383(357 26G)	277(271 6G)	1303(1217 86G)



## APPENDIX C

### Cases Examined in Detail by Substantive Area

#### Key:

After each case, the party petitioning the case to the Supreme Court and the party in whose favor the Court decided are both listed.

G/T: Indicates that the government petitioned the Court and that the taxpayer won.

G/G: Indicates that the government both petitioned the Court and won.

SC: Indicates that the case involved a clear split among the circuits.  
notation

#### I. BUSINESS TAX

- A. United States v. Davis, 397 U.S. 301 (1970) - G/G, SC
- B. Nash v. United States, 398 U.S. 1 (1970) - T/T, SC
- C. United States v. Basye, 410 U.S. 441 (1973) - G/G
- D. Central Tablet Mfg. Co. v. United States, 417 U.S. 673 (1974) - T/G, SC
- E. Ivan Allen Co. v. United States, 422 U.S. 617 (1975) - T/G, SC
- F. Fulman v. United States, 434 U.S. 528 (1978) - T/G, SC
- G. United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) - G/T, SC
- H. Paulsen v. Commissioner, 469 U.S. 131 (1985) - T/G, SC

#### II. DEDUCTIONS

- A. Woodward v. Commissioner, 397 U.S. 572 (1970) - T/G, SC
- B. United States v. Hilton Hotels Corp., 397 U.S. 580 (1970) - G/G, SC
- C. Commissioner v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345 (1971) - G/G
- D. United States v. Generes, 405 U.S. 93 (1972) - G/G, SC
- E. United States v. Mississippi Chem. Corp., 405 U.S. 298 (1972) - G/G
- F. United States v. Chicago, Burlington & Quincy R.R., 412 U.S. 401 (1973) - G/G
- G. Fausner v. Commissioner, 413 U.S. 838 (1973) - T/G, SC
- H. Snow v. Commissioner, 416 U.S. 500 (1974) - T/T, SC
- I. Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134 (1974) - G/G, SC
- J. Commissioner v. Idaho Power Co., 418 U.S. 1 (1974) - G/G, SC
- K. Commissioner v. Portland Cement Co., 450 U.S. 156 (1981) - G/G, SC
- L. United States v. Swank, 451 U.S. 571 (1981) - G/T
- M. Commissioner v. Engle, 464 U.S. 206 (1984) - G/T and T/T, SC

APPENDIX C (continued)

III. ESTATE PLANNING

- A. *United States v. Byrum*, 408 U.S. 125 (1972) - G/T
- B. *United States v. Chandler*, 410 U.S. 257 (1973) - G/G, SC
- C. *United States v. Cartwright*, 411 U.S. 546 (1973) - G/T, SC
- D. *Jewett v. Commissioner*, 455 U.S. 305 (1982) - T/G, SC
- E. *Diedrich v. Commissioner*, 457 U.S. 191 (1982) - T/G, SC
- F. *Dickman v. Commissioner*, 465 U.S. 330 (1984) - T/G, SC

IV. EXEMPT ORGANIZATIONS

- A. *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979) - T/G, SC
- B. *HCSC-Laundry v. United States*, 450 U.S. 1 (1981) - T/G, SC
- C. *St. Martin Evangelical Luth. Church v. South Dakota*, 451 U.S. 772 (1981) - T/T
- D. *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) - G/G
- E. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) - T/G
- F. *United States v. American College of Physicians*, 475 U.S. 834 (1986) - G/G
- G. *United States v. American Bar Endowment*, 477 U.S. 105 (1986) - G/G

IV. INCOME

- A. *Commissioner v. First Sec. Bank*, 405 U.S. 394 (1972) - G/T, SC
- B. *United States v. Foster Lumber Co.*, 429 U.S. 32 (1976) - G/G, SC
- C. *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977) - T/G, SC
- D. *United States v. Consumer Life Ins.*, 430 U.S. 725 (1977) - T/T and G/T, SC
- E. *Commissioner v. Standard Life & Accident Ins.*, 433 U.S. 148 (1977) - G/G, SC
- F. *Commissioner v. Kowalski*, 434 U.S. 77 (1977) - G/G, SC
- G. *Central Ill. Pub. Serv. v. United States*, 435 U.S. 21 (1978) - T/T, SC
- H. *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) - T/T, SC
- I. *United Cal. Bank v. United States*, 439 U.S. 180 (1978) - T/T, SC
- J. *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979)-T/G
- K. *Hillsboro Nat'l Bank v. Commissioner*, 460 U.S. 370 (1983) - T/T and G/G
- L. *Commissioner v. Tufts*, 461 U.S. 300 (1983) G/G, SC

APPENDIX C (continued)  
 SUMMARY OF APPENDIX C

By area, number of cases petitioned by each party and number of cases won by petitioner.

-BUSINESS TAX	petitioner	cases petitioner won
	G-3	2
	T-5	1
-DEDUCTIONS	petitioner	cases petitioner won
	G-10	8
	T-4	2
-ESTATE PLANNING	petitioner	cases petitioner won
	G-3	1
	T-3	0
-EXEMPT ORGANIZATIONS	petitioner	cases petitioner won
	G-3	3
	T-4	1
-INCOME	petitioner	cases petitioner won
	G-7	5
	T-7	5

Total number of cases petitioned by each party and number of cases won by petitioner:

Petitioner	Cases won by petitioner/cases petitioned by petitioner
G	19/26
T	9/23

There were 33 splits among the circuits.

