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Sour Grapes or Sound Criticism: Is the Supreme Court Really Not Taking Enough Non-Tax Business Cases?

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SOUR GRAPES OR SOUND CRITICISM: IS THE SUPREME COURT REALLY NOT TAKING ENOUGH NON-TAX BUSINESS CASES?

GLENN W. REIMANN*

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I. INTRODUCTION

As the highest court in the land, the Supreme Court receives an enormous amount of attention from legal, political, and economic commentators. Ever since the Court gained almost complete discretion over the cases it chooses to review, the certiorari process has been one of the easiest targets for those disappointed with the Court's work product. One complaint is that the Court is not taking enough cases. A second complaint is that the Court is not taking the "right" cases. This paper will examine the criticism that the Court is not taking enough business-related cases.

In 1993, *U.S. News & World Report* published an article based on its survey of conservative and liberal commentators' views on the conduct of the Supreme Court.¹ The article, in discussing the fact that the Court is deciding fewer cases each term, stated that "the main losers as the docket shrivels are those [cases] disputing vital, if less visible, issues like taxes, pensions, federal benefits and maritime law."²

David G. Savage wrote in December 1995 that "[s]ome pro-business conservatives certainly wish the current Court were more active. They have an aggressive agenda that seeks limits on both compensatory and punitive damages, greater recognition of property rights, and a restraint on environmental regulations, among other things."³ Savage also reported that some business attorneys believe that the Court should understand the need to resolve business issues quickly due to the importance of long range planning in the corporate arena.⁴ For instance, Roy T. Englert Jr., a Washington

¹ See Ted Gest, *The Court: Deciding Less, Writing More*, U.S. NEWS & WORLD REP., June 28, 1993, at 24.

² *Id.*

³ David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert Denials Suggest an Unfolding Agenda*, ABA J., Dec. 1995, at 40, 42.

⁴ See *id.*

attorney, stated: "We think the Court ought to place more weight on the importance of an issue, rather than sitting back and waiting for a clear circuit split to develop."⁵

Many lawyers have also questioned whether law clerks are withholding business issues from the Justices.⁶ In 1993, Kenneth Starr, a former Supreme Court law clerk, expressed his concern about the Court's management of its docket.⁷ Starr stated that "[a]ll too often these days, the court [*sic*] is abdicating its responsibility to select complex cases with considerable practical importance; these are often cases of immense importance to business."⁸ Starr believes the Court is not choosing the right cases because it has delegated too much responsibility to the law clerks who prepare the memos on cases from the "cert pool."⁹ "This judicial Bermuda Triangle, [created by the use of the law clerks and the cert pool,] has succeeded in choking off much of the important but unglamorous business-related issues from the contemporary court's docket."¹⁰

Also in 1995, Stephen R. McAllister, another former Supreme Court law clerk, wrote:

From their prior clerkship experience, Supreme Court clerks are unlikely to have had much exposure to or be particularly interested in state law or commercial law issues. Both the law clerks and the Justices demonstrate remarkably little interest in commercial cases, even when they involve vast sums of money or are of considerable practical importance to an entire industry or industries. Instead, they appear far more interested in the "sexier" constitutional issues involving individual rights, in particular such areas as religion, speech and due process, or in unusual issues involving obscure provisions in the Constitution or arcane federal statutes. Thus, corporate entities and business interests generally may have a more difficult time persuading the Supreme Court to grant cert.¹¹

⁵ *Id.*

⁶ *See id.*

⁷ Kenneth Starr, *Rule of Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23.

⁸ *Id.*

⁹ *See id.* The cert pool refers to all cases petitioning for certiorari to the Supreme Court.

¹⁰ *Id.*

¹¹ Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, 64 J. KAN. B.A., Apr. 1995, at 25, 27.

The problem with these statements is that the commentators have *merely* claimed there is a problem. They have failed to state what harms have resulted from the Court's so-called inaction in this area or precisely what cases the Court should have taken. If the Court is not taking the right number of business cases, how many should the Court be reviewing each term? Why is the Court not taking the right number of business cases? Is the explanation simply that the Justices (or their law clerks) are not interested in these issues? Do the business issues before the Court provide a compelling reason for the Court to grant review? What are the other possible explanations for the Court's behavior?

This Comment will analyze the Supreme Court's decision-making process with respect to certiorari petitions. It will first discuss the origins of the Supreme Court's discretion over its docket and the tools it uses to exercise that discretion throughout the certiorari process, including the Court's rules, the cert pool, the discuss list, the conferences, and the Rule of Four. This Comment will compare the Court's activity in non-tax business cases to its review of tax cases. The analysis section discusses possible explanations for the Court's case selection decisions, including the influence of amicus curiae briefs and unresolved intercourt conflicts.

The number of tax cases that the Court reviews is being studied in an attempt to determine the number of "unglamorous" cases the Court should be taking. If the Court is not taking non-tax business cases because they are not "sexy," it should also be taking fewer tax cases. If, however, the Court is acting similarly in both areas, it may not be true that the Court is not interested in non-tax business cases. Instead, it may be that the non-tax business cases and the tax cases before the Court have not presented compelling reasons for the granting of review.¹²

II. BACKGROUND

A. Jurisdiction

1. THE CIRCUIT COURT OF APPEALS ACT OF 1891

In 1891, with the passage of the Circuit Court of Appeals Act,¹³ Congress attempted to control the workload of the Supreme Court.¹⁴ It created nine

¹² This study did not attempt to review all certiorari petitions filed during the time periods discussed. Such research was beyond the scope of the study conducted.

¹³ Judiciary Act of 1891, ch. 517, 26 Stat. 826 (1891).

¹⁴ See DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 10 (1980).

intermediate federal courts of appeals and restricted the right of appeal in certain cases to review only upon the issuance of a writ of certiorari by the Supreme Court.¹⁵ “The essential purpose of the . . . Act was to enable the Supreme Court to discharge its indispensable functions in our federal system by relieving it of the duty of adjudication in cases that are important only to the litigants.”¹⁶

Justice Frankfurter further noted:

In order to justify the establishment of the Circuit Courts of Appeals it was necessary to view certiorari as “a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations demands such exercise.”¹⁷

It was not until the passage of the Judiciary Act of 1925¹⁸ that the Court gained almost complete control over its docket.¹⁹ With the passage of the 1925 Act, “the writ of certiorari began to assume the major role that it now occupies in the Court’s jurisdictional framework.”²⁰

2. THE JUDICIARY ACT OF 1925

While testifying before the House Judiciary Committee in 1924 in support of the Judiciary Act of 1925, Justice Van Devanter stated:

[M]ore than two-thirds of the cases which come [to the Supreme Court] under our obligatory jurisdiction – from State courts, circuit courts of appeals, district courts, and the Court of Claims – result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution. This, we think,

¹⁵ See *id.*

¹⁶ *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 448 (1959) (Frankfurter, dissenting). See also ROBERT L. STERN ET. AL, *SUPREME COURT PRACTICE* 163 & n. 3 (7th ed. 1993) (referring to Frankfurter’s dissenting opinion in *Dick* as containing background and history on the Judiciary Act of 1925) [hereinafter *SUPREME COURT PRACTICE*].

¹⁷ *Dick*, 359 U.S. at 449-50 (quoting *Forsyth v. City of Hammond*, 166 U.S. 506, 514-515 (1897)).

¹⁸ Judiciary Act of 1925, 43 Stat. 936 (1925).

¹⁹ See *SUPREME COURT PRACTICE*, *supra* note 16, at 162-63 & n. 2.

²⁰ *Id.*

illustrates that the present statutes are too liberal – that they permit cases to come to us as of right with no benefit to the litigants or the public. What we learn of the cases in examining them confirms and emphasizes this conclusion. Of course, in proportion as our attention is engaged with cases of that character, it is taken away from others which present grave questions and need careful consideration.²¹

Congress responded by passing The Federal Judiciary Act of February 13, 1925, which expanded the Court's discretion in the use of the writ of certiorari.²² "[A]ppeals as of right still constituted an important segment of the Court's business, [but] they were far outnumbered by the certiorari cases in which review depended solely on the Court's discretion."²³

Chief Justice Taft stated:

The sound theory of [the Act of 1891] and of the new Act is that litigants have their rights sufficiently protected by a hearing or trial in the courts of first instance, and by one review in an intermediate appellate Federal court. The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.²⁴

While the Justices of the Supreme Court were in favor of the Judiciary Act of 1925, the change in the operation of the Court had its critics. Felix Frankfurter and James M. Landis wrote in the *Harvard Law Review*:

If the Court's time were wholly given to the adjudication of cases and the preparation of opinions, the annual output of opinions would remain substantially the same. But if its labors also demand the prompt disposition of petitions for leave to come before the Court, there is a necessary deflection of the intellectual resources of the Court available for opinion writing. Therefore the desire, and indeed,

²¹ Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928) [hereinafter Frankfurter & Landis, *Judiciary Act of 1925*].

²² See SUPREME COURT PRACTICE, *supra* note 16, at 162-63 & n. 2.

²³ *Id.* at 163 & n. 4 (citing FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE OF THE SUPREME COURT A10-A11 (1972), 56 F.R.D. at 622-23).

²⁴ *Dick*, 359 U.S. at 453 (quoting William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925)).

the necessity to keep abreast of business will operate as a pressure to decide cases without opinions.²⁵

As early as the 1928 Term, “[t]his competition between deciding cases and determining what cases should come before the Court, ha[d] already led to marked changes in the proportion of the number of weeks allotted to argument and the number of weeks devoted to the study of petitions and records and the writing of opinions.”²⁶ On July 1, 1928, the Court instituted Rule 12, which formally gave the Court the discretionary powers granted to it by Congress.²⁷ Rule 12 required petitioners to submit a statement concerning the jurisdictional basis of their appeals.²⁸ “The Court [would] retain[] the case for argument only after a finding that ‘probable jurisdiction has been shown.’”²⁹

3. THE ACT OF 1988

In 1988, the members of the Supreme Court signed a letter to Congress requesting that the mandatory jurisdiction of the Court be further limited.³⁰ “Congress responded to the Justices’ pleas and eliminated virtually all of the remaining elements of the mandatory jurisdiction.”³¹ As a result of the legislation enacted in 1988, the Court was no longer obligated to hear cases: (1) where a state court upheld a state statute challenged as being in opposition to the Constitution, treaties, or laws of the United States; (2) where a federal court in a civil case held a federal statute unconstitutional; and (3) where a federal court of appeals held a state statute unconstitutional.³²

With these changes to its jurisdiction, the Court gained almost total discretion over what cases it decides by full opinion.³³ Through its rules, the Supreme Court has provided litigants with the minimum requirements

²⁵ See Frankfurter & Landis, *Judiciary Act of 1925*, *supra* note 21, at 6.

²⁶ Felix Frankfurter and James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33, 36 (1929) [hereinafter Frankfurter & Landis, *October Term, 1928*].

²⁷ See *id.* at 43. See also SUP. CT. R. 12, 275 U.S. 603-604 (1928).

²⁸ See Frankfurter & Landis, *October Term, 1928*, *supra* note 26, at 43.

²⁹ *Id.* The requirement of the former Rule 12 is now contained in Rule 14.

³⁰ See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 409 (1996) [hereinafter Hellman, *Shrunken Docket*]. See also 28 U.S.C. § 1257.

³¹ See Hellman, *Shrunken Docket*, *supra* note 30, at 409.

³² See *id.* at 410.

³³ See William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L.REV. 273 (1996) (discussing the importance of full written opinions in the federal judicial system).

necessary for a certiorari petition to be accepted by the Supreme Court.³⁴ The Justices, however, have never fully explained precisely what is needed to obtain a grant of review. They also have never fully discussed their decision-making procedures in the certiorari process or how they exercise their discretion in that process.

The reasons why the Justices decide to grant or deny review remain cloaked in the silence of the Court. The lack of knowledge about the certiorari process has given the Court's critics almost total discretion in providing their own explanations about what influences the Justices' decisions.

B. *How the Court Exercises its Jurisdiction*

1. SUPREME COURT RULES

Rule 10 of the Supreme Court defines the guidelines for the certiorari process as follows:

- (1) Review on a writ of certiorari is not a matter of right, but of judicial discretion. *A petition for a writ of certiorari will be granted only for compelling reasons.* The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
 - (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
 - (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
 - (c) a state court or a United States court of appeals has decided an important question of federal law that has

³⁴ See generally SUPREME COURT PRACTICE, *supra* note 16.

not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.³⁵

Justice Harlan, commenting on the discretionary nature of the certiorari process at the New York City Bar Association in 1958, stated that “[f]requently the question whether a case is ‘certworthy’ is more a matter of ‘feel’ than of precisely ascertainable rules.”³⁶ One of the main considerations of the certiorari process is the importance of the issue involved.³⁷ Due to its overwhelming workload, the Court attempts to focus on problems that are “beyond the academic or the episodic.”³⁸

2. CERTIORARI

In 1996, the Supreme Court disposed of 6,687 certiorari petitions.³⁹ Assuming that a certiorari petition is filed correctly, the Clerk of the Court docket the petition pursuant to Rule 1.⁴⁰ After a brief in opposition or a waiver of the right to file a brief in opposition is filed, the Clerk distributes copies of the documents to all the Justices’ chambers, pursuant to Rule 15.5.⁴¹ After the certiorari papers are distributed, it typically takes the Court two weeks to determine whether or not to grant the request for review.⁴² However,

³⁵ SUP. CT. R. 10 (emphasis added). While Rule 10 describes the criteria the Justices use to determine whether or not to grant review, Rules 12 through 14 and 33 describe the procedure for filing the petition. In the filing process, litigants must be careful to follow the requirements of Rule 12, which discusses filing fees, the required number of copies, and the deadlines for a conditional cross-petition. See SUP. CT. R. 12. Rule 13 states that a petition is timely if it is filed with the Clerk of the United States Supreme Court within 90 days after final judgment or denial of discretionary review by the state court of last resort, or final judgment in a United States Court of Appeals. See SUP. CT. R. 13. Rule 14 discusses the contents of the certiorari petitions. See SUP. CT. R. 14. Rule 33 sets the page limits, cover color, and page size of the various documents filed with the Supreme Court. See SUP. CT. R. 33.

³⁶ See SUPREME COURT PRACTICE, *supra* note 16, at 166 & n. 7.

³⁷ See *id.* at 184-93.

³⁸ *Id.* at 184 (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)).

³⁹ See *The Supreme Court, 1996 Term*, 111 HARV. L. REV. 51, 435 (1997).

⁴⁰ See SUP. CT. R. 1.

⁴¹ See SUP. CT. R. 15.5. The Clerk of the Court distributes paid certiorari petitions every Wednesday and in forma pauperis petitions every Thursday. The Clerk will not wait for the petitioner to file a reply brief before the certiorari papers are distributed. See SUPREME COURT PRACTICE, *supra* note 16, at 225.

⁴² See SUPREME COURT PRACTICE, *supra* note 16, at 225.

when the Court is in recess, no action is taken on the certiorari petitions until the Court reconvenes in late September.⁴³

a. *The Certiorari Process and the Flimsy*

As the certiorari petitions are received in the Justices' chambers, their law clerks prepare a one to two page memorandum summarizing the petitions.⁴⁴ The memorandum, which is called a "flimsy,"⁴⁵ discusses "whether the case is properly before the Court, what federal issues are presented, how they were decided by the courts below, and summarizing the positions of the parties pro and con the grant of the case."⁴⁶ The Justices can make their decision based solely on the flimsy or they can read the certiorari papers themselves.⁴⁷ Regardless of the extent to which the Justices actually read the certiorari papers, each Justice "is responsible for a personal judgment as to every petition, however much he may delegate to his clerks."⁴⁸

In contrast to the concerns expressed when the Judiciary Act of 1925 was first passed that the certiorari process would take the Court's focus away from its more important duties, Justice White observed that the certiorari process is "not as hard as it might sound."⁴⁹ Justice Brennan said:

I find that I don't need a great amount of time to perform the screening function—certainly not an amount of time that compromises my ability to attend to decisions of argued cases. In a substantial percentage of cases I find that I need read only the 'Questions Presented' to decide how I will dispose of the case.⁵⁰

The practice of the Court seems to support Justices White and Brennan's comments. The Court ordinarily denies certiorari petition in 60 percent of the

⁴³ See *id.*

⁴⁴ See *id.* at 226.

⁴⁵ See *id.*

⁴⁶ *Id.* (quoting Justice Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973)).

⁴⁷ See *id.*

⁴⁸ *Id.* (quoting Speech by Justice Powell before the Fifth Circuit Judicial Conference, El Paso, Texas (April 11, 1973)).

⁴⁹ *Id.* at 227 (citing Justice White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982)).

⁵⁰ *Id.* at 227 & n.17 (quoting Justice Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973)).

paid cases and in 90 percent of the in forma pauperis petitions "with a minimum of time and effort."⁵¹

b. *The Cert Pool*

In order to streamline the review process, the Justices instituted the cert pool. The cert pool allows the Justices to utilize each other's law clerks for the preparation of one common, initial memorandum for each petition.⁵² However, the Justices often have one of their law clerks prepare a separate, non-pool memorandum.⁵³

Justice Stevens is the only member of the Court who does not participate in the cert pool.⁵⁴ This does not mean that Justice Stevens considers the certiorari papers more than the other Justices. In fact, Justice Stevens has said that he does "not even look[] at the papers in over 80 percent of the cases that are filed."⁵⁵

c. *The Discuss List*

The cases that the Chief Justice believes would merit review are placed on the "Discuss List."⁵⁶ The Discuss List usually contains only 30 percent of the petitions that are filed.⁵⁷ Any Justice may add a case to the Discuss List before the weekly Friday conference.⁵⁸ The other 70 percent of the cases that do not make it onto the Discuss List are automatically denied review without discussion.⁵⁹ The Discuss List is never published, and therefore it is impossible to know which cases the Justices discussed in conference.⁶⁰

⁵¹ *Id.*

⁵² *See id.* See also David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J. L. & POL. 779, 801 (1997).

⁵³ *See* SUPREME COURT PRACTICE, *supra* note 16, at 227.

⁵⁴ *See id.* at 799.

⁵⁵ *Id.* at 801 (quoting DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* (4th ed. 1996) at 164).

⁵⁶ *See* SUPREME COURT PRACTICE, *supra* note 16, at 227.

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

d. *The Conference and The Rule of Four*

The Justices consider the remaining 30 percent of the certiorari petitions that are placed on the Discuss List at their weekly Friday conferences.⁶¹ The first conference of the term spans a number of days due to the number of certiorari petitions that were received over the summer recess.⁶²

In order for the Court to grant review, a petition for a writ of certiorari must receive the votes of four Justices – the so-called “Rule of Four.”⁶³ Four votes in favor of review are required even when only eight Justices participate in a conference.⁶⁴ When there are only six or seven Justices present, the rule is sometimes relaxed.⁶⁵ There is also evidence that the rule has been relaxed in other circumstances.⁶⁶ In a letter to Senator Wheeler, Chief Justice Hughes wrote that “if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view.”⁶⁷ During the Senate Judiciary Committee’s consideration of the Judiciary Act of 1925, Justice Van Devanter testified, “We proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case, the petition should be granted.”⁶⁸

At the conclusion of the conference, the most junior member of the Court informs the Clerk of the Court of the decisions made on certiorari.⁶⁹ The Clerk then prepares the order list, which is released on the following Monday.⁷⁰

⁶¹ See *id.* at 229. The conferences begin with the Justices shaking each other’s hands. The Chief Justice starts the consideration of each certiorari petition by stating the facts and issues and then giving his recommendation for its disposition. The remaining Justices may then give their comments on the certiorari petitions in order of seniority. After each Justice who wants to speak has spoken, the voting takes place with the Justices voting in reverse order of seniority. See *id.* at 229-30 (citing CHIEF JUSTICE REHNQUIST, *THE SUPREME COURT* 289-90 (1987)).

⁶² See *id.* at 230.

⁶³ See O’Brien, *supra* note 52, at 784.

⁶⁴ See *SUPREME COURT PRACTICE*, *supra* note 16, at 231.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ *Id.* at 231 & n. 30.

⁶⁸ *Id.*

⁶⁹ See *id.* at 230.

⁷⁰ See *id.* at 228.

e. *Dissents*

Most orders denying plenary review do “no more than announce the simple fact of denial.”⁷¹ Beginning in the late 1940s, individual Justices began noting the reasons why they disagreed with certain denial orders.⁷² While these dissents do not provide a complete picture of the Court’s decision-making process, they do indicate the types of cases that individual Justices believe are certworthy.

Since the initiation of their use, the number of dissenting opinions has dramatically increased.⁷³ From 1949-1952, there was an average of fifty-six dissenting opinions per term.⁷⁴ By the 1960s that number increased to over 200 per term.⁷⁵ In the 1970s, Justice Douglas wrote a dissenting opinion for every case in which he opposed the denial order, resulting in 477 dissents in 1973 alone.⁷⁶ Justices Brennan and Marshall dissented from the denial orders that resulted in the upholding of a death sentence.⁷⁷ During their last term together on the Court (1989-90), the two Justices wrote 218 dissents.⁷⁸ Every Justice has not been in favor of this behavior. Justice Frankfurter noted that dissents from the denial to grant review damage the “integrity of the certiorari process.”⁷⁹

C. *Law Clerks*

The reliance on law clerks, of which each Justice is allowed to hire up to four, has expanded over the years.⁸⁰ There is concern in the entire federal judicial system that judges will have to spend more time supervising and less time judging as they delegate more responsibility to their clerks.⁸¹ Questions

⁷¹ *Id.* at 234.

⁷² *See id.* at 236.

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See O'Brien, supra* note 52, at 791-92 (quoting a Memorandum from Justice Frankfurter to Justice Harlan).

⁸⁰ *See* Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 767 (1983). Law clerks typically are from the top law schools in the nation. Most have clerked for a federal circuit judge before coming to the Supreme Court. *See also* McAllister, *supra* note 11, at 27.

⁸¹ *See* Posner, *supra* note 80, at 767-68.

have also been raised about the duties of the law clerks. "What are these able, intelligent, mostly young people doing? Surely not merely running citations in Shepard's and shelving the judge's law books. They are, in many situations, 'para-judges.' In some instances, it is feared, they are indeed invisible judges"⁸² By delegating functions, such as the preparation of the cert pool memorandum, it has been said that litigants first have to convince the law clerks that their petitions are certworthy.⁸³ This extra hurdle may make it harder to persuade the Justices to grant cert.⁸⁴

III. ANALYSIS

A. *How the Court Exercises its Jurisdiction - The Statistics*

1. NON-TAX BUSINESS CASES

The subjects used in this study to represent non-tax business issues include: (1) Antitrust; (2) Bankruptcy; (3) Patents/Copyrights; (4) Banking; and (5) the Securities and Exchange Commission (SEC)/Securities. Much of the law that applies to business organizations and their relationships in society is governed by the states.⁸⁵ However, the subjects listed above are generally considered to be federal law.⁸⁶

The number of cases that the Court hears will, of course, be dependent on the evolution of and trends in each of the categories that are being discussed. Also, if the Court is confronted with cases that predominately involve state law issues, or fewer cases are being litigated, the Court inevitably will take fewer cases.

This study examined the Supreme Court Terms of 1924, 1925, 1934, 1935, 1954, 1955, 1974, 1975, 1994, 1995, and 1996. Two years within each decade were chosen to control against either a sharp rise or decline in the number of opinions in any one year. The study began with 1924 in order to include years before the Court gained total discretion over its docket in 1928.⁸⁷

⁸² *Id.* at 769-70 (quoting Alvin Rubin, *Views From The Lower Court*, 23 U.C.L.A. L. REV. 448, 456 (1976)).

⁸³ *See* McAllister, *supra* note 11, at 27.

⁸⁴ *See id.*

⁸⁵ *See* Stanley Siegel, *Corporations and Other Business Organizations*, in FUNDAMENTALS OF AMERICAN LAW: NEW YORK UNIVERSITY SCHOOL OF LAW 331 (Alan B. Morrison ed., 1996).

⁸⁶ *See generally* FUNDAMENTALS OF AMERICAN LAW: NEW YORK UNIVERSITY SCHOOL OF LAW (Alan B. Morrison ed., 1996).

⁸⁷ *See* Frankfurter & Landis, *October Term, 1928*, *supra* note 26. 1928 is considered the year in which the Court gained the full discretionary powers granted to it by the Judiciary Act of 1925.

Thereafter, the study examined two years in every other decade starting with 1934.

a. *The 1920s*

Between 1924 and 1925, the percentage of non-tax business cases that were heard by the Court fell one percent, from eight to seven. In 1924, 18 of the 232 cases decided by the Supreme Court involved non-tax business issues.⁸⁸ That year, the Court heard seven cases involving antitrust issues; ten cases involving bankruptcy; and one case involving intellectual property.⁸⁹ In 1925, 15 of the 209 cases decided by the Supreme Court involved non-tax business issues.⁹⁰ That year, the Court heard two cases involving antitrust issues; nine involving bankruptcy; and four involving intellectual property.⁹¹

b. *The 1930s*

The percentage of non-tax business cases that were heard in 1934 (16 percent) and 1935 (14 percent) differed by only two points, but these percentages were double those from the previous decade. In 1934, 25 of the 156 cases decided by the Court involved non-tax business issues.⁹² That year, the Court heard one case involving antitrust issues; eight involving banking; nine involving bankruptcy; and seven involving intellectual property.⁹³ In 1935, 20 of the 146 cases decided by the Court involved non-tax business issues.⁹⁴ That year, the Court heard three cases involving antitrust issues; ten involving bankruptcy; five involving intellectual property; and two involving banking.⁹⁵

c. *The 1950s*

The percentage of non-tax business cases that were heard by the Court in 1954 (17 percent) was almost identical to those in 1934 and 1935. In 1955, however, non-tax business cases accounted for only four percent of the docket.

⁸⁸ See Frankfurter & Landis, *Judiciary Act of 1925*, *supra* note 25, at 20-21.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² See *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 608-09 (1938).

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *See id.*

In 1954, 14 of the 81 cases decided by the Court involved non-tax business issues.⁹⁶ That year, the Court heard twelve cases involving antitrust issues; one involving banking; and one involving the SEC or securities.⁹⁷ In 1955, 4 of the 94 cases decided by the Court involved business issues.⁹⁸ That year, the Court heard two cases involving antitrust issues; one involving bankruptcy; and one involving the SEC or securities.⁹⁹

d. *The 1970s*

The percentage of non-tax business cases that were heard in 1974 (12 percent) was close to the percentages in 1934, 1935 and 1954. The percentage in 1975 (6 percent) was half that of 1974. In 1974, 16 of the 137 cases decided by the Court involved non-tax business issues.¹⁰⁰ That year, the Court heard nine cases involving antitrust issues; three involving bankruptcy; one involving intellectual property; and three involving the SEC or securities.¹⁰¹ In 1975, 9 of the 159 cases decided by the Court involved non-tax business issues.¹⁰² That year, the Court heard three cases involving antitrust issues; two cases involving intellectual property; and four cases involving the SEC or securities.¹⁰³

e. *The 1990s*

The percentages of non-tax business cases that were heard by the Court in the 1990s, range from a high of 11 percent in 1995, to a low of 2 percent in 1996. In 1994, 3 of the 86 cases decided by the Court involved non-tax business issues.¹⁰⁴ That year, the Court heard one case involving bankruptcy issues; one involving the SEC or securities; and one involving banking.¹⁰⁵ In 1995, 9 of the 79 cases decided by the Court involved business issues.¹⁰⁶ That year, the Court heard one case involving antitrust issues; five cases involving bankruptcy; one case involving intellectual property; and two cases involving

⁹⁶ See *The Supreme Court, 1954 Term*, 69 HARV. L. REV. 119, 205-06 (1955).

⁹⁷ See *id.*

⁹⁸ See *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 95, 101 (1956).

⁹⁹ See *id.*

¹⁰⁰ See *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 279-81 (1975).

¹⁰¹ See *id.*

¹⁰² See *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 280-82 (1976).

¹⁰³ See *id.*

¹⁰⁴ See *The Supreme Court, 1994 Term*, 109 HARV. L. REV. 10, 346-48 (1995).

¹⁰⁵ See *id.*

¹⁰⁶ See *The Supreme Court, 1995 Term*, 110 HARV. L. REV. 1, 373-76 (1996).

the SEC or securities.¹⁰⁷ In 1996, 2 of the 86 cases decided by the Court involved non-tax business issues.¹⁰⁸ That year, the Court heard one case involving bankruptcy issues; and one case involving banking.¹⁰⁹ The following chart summarizes the data:¹¹⁰

	1924	1925	1934	1935	1954	1955	1974	1975	1994	1995	1996
Total Number of Full Opinions	232	209	156	146	81	94	137	159	86	79	86
Number of Non-Tax Business Opinions	18	15	25	20	14	4	16	9	3	9	2
Percentage of Non-Tax Business Opinions	8%	7%	16%	14%	17%	4%	12%	6%	3%	11%	2%
CATEGORIES											
Antitrust	7	2	1	3	12	2	9	3	0	1	0
Banking	0	0	8	2	1	0	0	0	1	2	1
Bankruptcy	10	9	9	10	0	1	3	0	1	5	1
Intellectual Property	1	4	7	5	0	1	1	2	0	1	0
Securities/SEC	0	0	0	0	1	0	3	4	1	0	0

f. Discussion

It is true that in recent years the Court has been hearing fewer non-tax business cases. This fact, however, may not be as significant an issue as it may seem at first glance. In 1934, the Court heard the highest number of non-tax business cases of any other period studied.¹¹¹ With only two non-tax business-related cases disposed of with full opinions, 1996 was the year that the Court heard the least number of these cases. It is important to note that since 1954, there has not been a significant change in the number of non-tax business-related cases disposed of with full opinions. The number of full opinions has ranged from a high of sixteen in 1974, to a low of four in 1955, and two in 1995.

The critics of the certiorari process must believe that there is an optimal number of non-tax business cases that the Court should hear. They have not,

¹⁰⁷ See *id.*

¹⁰⁸ See *The Supreme Court, 1996 Term, supra* note 37, at 437-39.

¹⁰⁹ See *id.*

¹¹⁰ See Appendix A for graphs of the data.

¹¹¹ The Court's increased interest in non-tax business cases that year may have been due to the fact that the country was deep in the Great Depression.

however, defined the “ideal” number. If, to arrive at the “ideal” number, it is assumed the Court was behaving properly in the 1930s (during the Great Depression) the conclusion could be reached that each term between 14 and 16 percent of the Court’s opinions should pertain to non-tax business issues. It would then follow from this conclusion that anything below that range is too few. Therefore, in 1995, with only 2 percent of the full opinion dealing with non-tax business issues, the Court was acting improperly. The problem with this argument is that there is no basis for using the 1930s as the standard. The critics of the certiorari process must first define what the standard is before they state the conclusion that the Court is not taking enough non-tax business cases. If the trends over time are compared to the present number and percentage of non-tax business issues that are considered by the Supreme Court, the situation is not as alarming as first perceived. For instance, the Court took only 1 percent fewer non-tax business cases in 1994 than it did in 1955. The Court also took only 1 percent fewer non-tax business cases in 1995 than it did in 1974. Viewed in this light, it does not seem that the Court’s actions are glaringly inappropriate.

2. TAX CASES

Tax cases provide a benchmark for determining the number of unglamorous cases that the Court should be taking. If the claim is that the Court is not taking enough non-tax business cases because they are not “glamorous” or “sexy,” the natural extension of that argument would be that the Court is also taking fewer tax cases. If the Court’s behavior with tax cases is similar to its behavior with non-tax business cases, it would be hard to argue that the Court is not taking non-tax business cases simply because it is not interested in the issues they present.

The percentages of tax cases heard by the Court demonstrate a more consistent decline in this category than in non-tax business-related cases. The percentage of tax cases range from a high of 31 in 1935 to a low of 1 in 1995. The percentage of full tax opinions for the dates examined in the study are as follows: 14 percent in 1924; 13 percent in 1925; 21 percent in 1934; 31 percent in 1935; 9 percent in 1954; 11 percent in 1955; 6 percent in 1974; 3 percent in 1975; 3 percent in 1994; 1 percent in 1995; and 5 percent in 1996. The following chart summarizes the data:¹¹²

¹¹² See Appendix B for graphs of the data.

	1924	1925	1934	1935	1954	1955	1974	1975	1994	1995	1996
Total Number of Full Opinions	232	209	156	146	81	94	137	159	86	79	86
Number of Tax Opinions	32	27	33	45	7	10	8	4	3	1	4
Percentage of Tax Opinions	14%	13%	21%	31%	9%	11%	6%	3%	3%	1%	5%

The decline in the percentage of tax cases heard by the Court is more striking than the decline in non-tax business cases. While the statistics show that there has been a reduction in both areas, the decline seems to be more systematic and steady in the tax area than in the non-tax business category. Another interesting phenomenon is that since 1975, the percentages in both categories are not that dissimilar. Since 1975, the percentages of tax cases are 3, 3, 1, and 5. The percentages for non-tax business cases in the years studied are 6, 3, 11, and 2. If tax cases represent the Court's obligation to take unglamorous cases, the similarity between the Court's behavior in these areas would indicate that the decline in the non-tax business cases is not due to lack of interest, but is simply indicative of the operation of the current Court.

B. Category Specific Discussion

Even though business law is predominantly state law in nature, there are still a number of issues that are governed by federal law.¹¹³ A possible explanation for the declining number of business cases that are reviewed by the Court may be found in the statistics of the workload of the federal judiciary. For example, in 1990, there were 569 antitrust cases filed in the Federal District Courts.¹¹⁴ In 1997, that number had fallen to 158.¹¹⁵ More dramatically, SEC/securities cases fell from 2,550 in 1990¹¹⁶ to 226 in 1997.¹¹⁷ Also, intellectual property cases fell from 5,634 in 1990¹¹⁸ to 448 in 1997.¹¹⁹

¹¹³ See Siegel, *supra* note 85, at 331.

¹¹⁴ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS (Dec. 31, 1990).

¹¹⁵ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS (Dec. 31, 1997).

¹¹⁶ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1990), *supra* note 114.

¹¹⁷ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1997), *supra* note 115.

¹¹⁸ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1990), *supra* note 114.

¹¹⁹ See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1997), *supra* note 115.

Even though these trends do not cover all of the subjects in the non-tax business category, they do indicate that certain types of federal non-tax business litigation have declined in the 1990s. Legislative changes and judicial decisions that have occurred in recent years may explain this decline in the cases. These changes are most evident with antitrust and securities law.

1. ANTI-TRUST

Litigation resulting from mergers that the government believes will violate the nation's antitrust laws has declined since the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.¹²⁰ This act requires the parties involved in mergers and acquisitions over a certain asset size to submit a substantial amount of information to the government 30 days prior to the merger's completion.¹²¹ The pre-merger notification allows the government to determine if it will seek to stop the merger through litigation.¹²² More importantly, the notification requirement alerts the government to potential competitiveness problems and gives the parties to the merger the opportunity to modify their plan to solve the problems and thereby gain the government's approval without the resort to litigation.¹²³

The government also limits its antitrust litigation through consent decree negotiations.¹²⁴ "Most recently, the Antitrust Division appears eager to use consent decrees as a tool to avoid the costs, delays, and uncertainties in civil litigation or where it is investigating conduct that has not been the subject of antitrust challenge by the government in recent years."¹²⁵ The use of consent decrees and the pre-notification requirements may explain the decline of antitrust litigation in the federal judicial system.

2. SECURITIES

The Court's recent decisions affecting securities law may have lessened the number of securities cases that are filed. In 1994, a decades-old precedent was overturned when the Court refused to read an implied cause of action against aiders and abettors of securities fraud into Section 10(b) of the Securities and

¹²⁰ See 15 U.S.C. §§ 1311 et. seq.. See also Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1397-98 (1998).

¹²¹ See Harry First, *Antitrust Law*, in FUNDAMENTALS OF AMERICAN LAW: NEW YORK UNIVERSITY SCHOOL OF LAW 427, 443 (Alan B. Morrison ed. 1996).

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See Waller, *supra* note 120, at 1408-09.

¹²⁵ *Id.* at 1409.

Exchange Act of 1934.¹²⁶ Suits against aiders and abettors “had been the most widely used theory to hold nonprivity parties responsible for such violations.”¹²⁷ The Court also eliminated the ability of private securities purchasers to sue under Section 12(2) of the Securities Act of 1933. The Court held that Section 12(2) of the Act pertained only to public offerings of securities.¹²⁸

While it may be too early to determine the impact of the Private Securities Litigation Reform Act of 1995,¹²⁹ the Act’s reform of securities laws has been described as “the most momentous event in the history of securities regulation since the adoption of the Securities Acts in 1933 and 1934.”¹³⁰ In passing the Private Securities Litigation Reform Act of 1995, Congress amended the Securities Act of 1933 and the Securities Exchange Act of 1934 to impose “significant additional requirements on plaintiffs suing in federal court to recover for securities fraud.”¹³¹ The Act created a higher standard for private securities litigation.¹³² By creating a higher standard of review, the Act may lessen the number of frivolous securities lawsuits in the federal judicial system.

C. Possible Reasons for the Court’s Case Selection Decisions

“Once the feeling gains ground that *certioraris* are granted where they should have been denied and are denied where they should have been granted, the whole mechanism of *certiorari* comes into question.”¹³³ As demonstrated by the critics mentioned in the introduction of this paper, many individuals have come to believe that the Court has improperly exercised its discretion in the *certiorari* process.

Every aspect of the *certiorari* process — from the use of the cert pool, the Justice’s reliance on law clerks, and the effects of the Court’s shrinking docket — has been examined and/or questioned. But the commentators are not raising

¹²⁶ See 15 U.S.C. §§ 78a et. seq.. See also Keith A. Rowley, *The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*, 50 BAYLOR L. REV. 99, 103-04 (1998) (discussing *Central Bank of Denver N.A. v. First Interstate Bank of Denver N.A.*, 511 U.S. 164 (1994)).

¹²⁷ Rowley, *supra* note 126, at 103-04 (quoting Lewis D. Lowenfels & Alan R. Bromberg, *A New Standard for Aiders and Abettors Under the Private Securities Litigation Reform Act of 1995*, 52 BUS. LAW. 1, 1 (1996)).

¹²⁸ See *id.* at 104 (discussing *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)).

¹²⁹ See 15 U.S.C. §§ 77z-1 et. seq.. See HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, *SECURITIES LAW SERIES: EMERGING TRENDS IN SECURITIES LAW*, 1997-98 Edition, vii (1997) (“The Act is not old enough to draw conclusions as to the long-term outlook.”).

¹³⁰ BLOOMENTHAL & WOLFF, *supra* note 129, at vii.

¹³¹ See Rowley, *supra* note 126, at 102.

¹³² See *id.* at 106.

¹³³ Frankfurter & Landis, *October Term, 1928*, *supra* note 26, at 50 (quoting Moore, *Right of Review by Certiorari to the Supreme Court*, 17 GEO. L.J. 307 (1929)).

the right issues. The commentators have done little more than state their conclusions that the Court is not taking enough business cases. The debate must be refined to be more useful in the ongoing analysis of the Supreme Court.

1. THE SHRINKING DOCKET AND CONSERVATIVE JUDGES

The Court has been taking fewer cases in recent years in all categories. The fact that the Court is taking fewer business cases does not necessarily mean that the Justices are not interested in business issues or that the law clerks are steering the Justices away from these issues. It may simply be the result of the reduction in the number of cases argued before the Court.

While some critics are concerned by the shrinking docket, many conservatives applaud the restraint of the Court.¹³⁴ Two commentators who are not conservatives themselves have explained this view. Dick Howard of the University of Virginia stated, "The Court that legal journalists and Court-watchers find a bit boring may be precisely the Court that conservatives want."¹³⁵ Mark Tushnet of Georgetown University Law Center commented that "[o]ne thing conservatives want to do is to reduce the significance of the Supreme Court in public life. One way to do that is to reduce the number of cases and to limit the cases that gain the public's attention."¹³⁶

Another view, as stated by Jesse Choper of the University of California (Berkeley) Law School, is that, "A new dynamic has taken place which is that the lower courts have generally caught up with the Supreme Court."¹³⁷ If the lower courts have caught up with the Supreme Court, it may be because there is a larger number of conservatives and moderates in the federal court system than in other years. Presidents Reagan and Bush appointed 115 judges to the federal courts of appeals.¹³⁸ By 1992, their nominees accounted for 60 percent of the circuit judges in active service.¹³⁹

The Clinton Administration's nominations to the federal judiciary do not seem to have caused a large ideological shift in that branch of government. By January 1, 1995, two years into President Clinton's first term, the percentage of judges in the federal judiciary that were appointed by Republican presidents had not changed substantially.¹⁴⁰ Due to the fact that during the first two years of

¹³⁴ See W. John Moore, *Court Is in Recess*, NAT. J., Oct. 30, 1993 at 2587.

¹³⁵ *Id.* at 2589.

¹³⁶ *Id.* at 2591-92.

¹³⁷ *Id.* at 2591.

¹³⁸ See Hellman, *Shrunken Docket*, *supra* note 30, at 419.

¹³⁹ See *id.*

¹⁴⁰ See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 291 (1995).

his term Democrats controlled the Senate, the Clinton Administration had greater control over the individuals that were appointed to the federal bench than it had in subsequent years.¹⁴¹ With the Republican take over of both houses of Congress in 1994, "President Clinton [did] not recommend attorneys whose candidacies might lead to confirmation fights."¹⁴² Despite the Administration's careful selection of nominees, in 1997, the Judiciary Committee may have slowed the confirmation process of Clinton nominees because many of the nominees were viewed by Judiciary Committee Chairman, Orin Hatch, as "judicial activists."¹⁴³ As a result of the realities of the political process, "[m]ost of the attorneys [nominated by the Clinton Administration] have relatively moderate political views, and a few have Republican Party affiliations."¹⁴⁴

Despite President Clinton's appointments, the Supreme Court is still a conservative institution. The Justices with conservative ideologies sitting on the Court are not likely to seek out cases to grant review due to their desire to limit the role of the judicial system in American life.¹⁴⁵ Also, commentators have argued that due to the conservative to moderate nature of the federal bench "the Justices see fewer cases they want to overturn."¹⁴⁶

The fact that conservative and moderate judges dominate the federal judicial system may also account for the criticisms directed at the Court. The commentators who believe the Court should be taking an active role in society will be more likely to complain that the Court is not taking the right cases. This fact will be especially true if the Court does not grant review to the cases the commentators deem to be important. Also, judicial activists lost many of their supporters on the Court in recent years. The retirements of Justices Brennan, Marshall, and Blackmun, all but ended the judicial activism of the Court. They were seen as the "stalwarts of the liberal wing of the Burger Court" and their retirements may help explain why the Court is not reaching out to take on new issues.¹⁴⁷

Cass R. Sunstein, Professor of Law at the University of Chicago, has stated that "[j]udges often use silence for pragmatic or strategic reasons or to promote

¹⁴¹ See Carl Tobias, *Fostering Balance on the Federal Courts*, 47 AM. U. L. REV. 935, 937-947 (1998).

¹⁴² *Id.* at 947 (citing Joan S. Biskupic, *Facing Fights on Court Nominees, Clinton Yields*, WASH. POST, Feb. 13, 1995 at A1).

¹⁴³ *Id.* at 953 (citing 143 Cong. Rec. S2515, S2536 (statement of Sen. Hatch) (voicing displeasure with legislating through judicial appointments)).

¹⁴⁴ *Id.* at 953. See also Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTING CONST. L. Q. 741 (1997).

¹⁴⁵ See Gest, *supra* note 1.

¹⁴⁶ See *id.*

¹⁴⁷ See Hellman, *Shrunken Docket*, *supra* note 30, at 412.

democratic goals."¹⁴⁸ He defined this practice as "judicial minimalism," which is the "phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided."¹⁴⁹ He uses this theory, among other things, as an explanation for the Court's behavior in the certiorari process.¹⁵⁰ While discussing how the Court may treat same-sex marriages, Sunstein stated:

The Court might want to leave that issue undecided not only because it (1) cannot reach a consensus or (2) lacks relevant information, but also because it (3) is unsure about the (legally relevant) moral commitments, (4) thinks that people have a right to decide this issue democratically, or (5) believes that a judicial ruling could face intense political opposition in a way that would be counterproductive to the way moral and political claims that it is being asked to endorse.¹⁵¹

These reasons may help to explain why the Court grants certiorari to so few cases. By not granting review, the Justices are not only limiting the judiciary's role in American life, they are "try[ing] to reduce the burdens of judgment for Supreme Court justices, to minimize the risks of error . . . , and to maximize the space for democratic deliberation about basic political and moral issues."¹⁵²

2. USE OF LAW CLERKS/THE CERT POOL

The use of law clerks and the establishment of the cert pool have long been targets for the critics of the Supreme Court. Some critics argue that the law clerks are not interested in commercial law issues and instead are directing the Justices toward the "sexier" constitutional cases.¹⁵³ Also, the critics seem to believe that the Justices may fail to see the importance of non-tax business cases when they only read the cert pool memorandum prepared by a disinterested, inexperienced law clerk.

These criticisms are highly speculative. The fact remains that without the cert pool or the help of their law clerks, the Justices would accomplish even less

¹⁴⁸ Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7-8 (1996) (arguing that minimalism is democracy-forcing and "makes sense when the Court is dealing with an issue of high complexity about which many people feel deeply and on which the nation is in flux (moral or otherwise)").

¹⁴⁹ *Id.* at 14 (categorizing Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer as minimalists).

¹⁵⁰ *See id.* at 7.

¹⁵¹ *Id.* at 20.

¹⁵² *Id.* at 99.

¹⁵³ *See Gest, supra* note 1, at 24. *See also* McAllister, *supra* note 11, at 27; Savage, *supra* note 3, at 42; and Starr, *supra* note 7, at A23.

work than they do today. If they were being used improperly, or if they caused the Court to ignore an important issue, the Justices would disband the pool and/or fire their clerks. It is hard to believe that the Justices are being outsmarted by law clerks who block business issues from coming before the Court. It is also unlikely that Justices would allow their clerks or the cert pool memorandums to make their decisions for them.

D. *Other Factors Affecting Certiorari*

1. AMICUS CURIAE PARTICIPATION

a. *Influence on the Certiorari Process*

Amicus curiae is Latin for “friend of the court.”¹⁵⁴ In most cases, private amicus participation in litigation is limited to the “raising [of] jurisdictional and other important issues overlooked by the parties, assuring the presentation of complete factual scenario, and suggesting potential implications of the court’s decision.”¹⁵⁵ Governmental bodies are not as limited in their amicus participation as private parties.¹⁵⁶ They are often called upon to offer their institutional expertise and to provide “a valuable means of determining how the court’s decision may affect the world outside its chambers.”¹⁵⁷

Under Rule 37 of the Supreme Court, a private party may file an amicus curiae brief at the certiorari stage either by consent of the litigants or by leave of the Court.¹⁵⁸ The government may file an amicus curiae brief without filing a motion or obtaining leave of the Court.¹⁵⁹ In their research of organized interests and agenda setting in the Supreme Court, Gregory A. Caldeira and John R. Wright determined that the cost of preparing an amicus curiae brief

¹⁵⁴ BLACK’S LAW DICTIONARY: POCKET EDITION 32 (1996).

¹⁵⁵ Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1258-59 (1992). See generally Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

¹⁵⁶ See Lowman, *supra* note 155, at 1261.

¹⁵⁷ *Id.* at 1261-62.

¹⁵⁸ See SUP. CT. R. 37.2(a)(b) (1990).

¹⁵⁹ “No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency’s authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.” SUP. CT. R. 37.4.

could reach as high as \$60,000.¹⁶⁰ This fact supported their hypothesis that the filing of such a brief can serve as a signal of a case's importance.¹⁶¹

At the time Caldeira and Wright wrote their article in 1988, the Supreme Court Rules stated that amicus curiae briefs were disfavored at the certiorari stage.¹⁶² The current rules, however, only disfavor a motion for leave to file an amicus curiae brief when one of the litigants has withheld consent.¹⁶³ Whether favored or disfavored, Caldeira and Wright determined that the Justices pay attention to amicus briefs in their decisions to grant or deny certiorari.¹⁶⁴ "Not only does one brief in favor of certiorari significantly improve the chances of a case being accepted, but two, three or four briefs improve the chances even more In general, the more briefs filed in favor of certiorari on any given case, the better the chances for plenary review."¹⁶⁵ Caldeira and Wright also found that "[w]hen a case involves a real conflict or when the federal government is a petitioner, the addition of just one amicus curiae brief in support of certiorari increases the likelihood of plenary review by 40%-50%."¹⁶⁶ Interestingly, briefs in opposition to certiorari "significantly increase — rather than decrease — the likelihood that the Supreme Court will grant review."¹⁶⁷

b. *The Government as Amicus*

Caldeira and Wright's research showed that amicus curiae briefs by the Solicitor General had significant impact on the certiorari process.¹⁶⁸ The persuasive effects of an amicus curiae brief filed by the government can be seen through the experience of the Securities and Exchange Commission (SEC).¹⁶⁹ The SEC works closely with the Solicitor General when filing an amicus curiae

¹⁶⁰ See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1112 (1988). For a discussion of the agenda setting function of the Supreme Court, see H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

¹⁶¹ See Caldeira & Wright, *supra* note 160, at 1112.

¹⁶² See *id.* (citing former SUP. CT. R. 36.1).

¹⁶³ See SUP. CT. R. 37.2(b).

¹⁶⁴ See Caldeira & Wright, *supra* note 160, at 1119.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1122.

¹⁶⁷ *Id.* at 1119.

¹⁶⁸ See *id.* at 1120.

¹⁶⁹ See David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167.

brief.¹⁷⁰ “The Commission rarely seeks to file a brief in the Supreme Court that is not supported by [the Solicitor General’s] office.”¹⁷¹

The SEC determines whether or not to file an amicus curiae brief if (1) the decision in the case would have an impact on the Commission’s enforcement program or put into question the scope of the federal securities laws; (2) the relationship between state and federal law is at issue; (3) the decision will have a substantial impact on private enforcement of the federal securities laws; (4) the case will provide an opportunity to guide the court to a safe, narrow holding, instead of a broad damaging one; and (5) the case will provide the Commission with the opportunity to make a needed policy statement.¹⁷²

Often, the Commission will not file an amicus curiae brief in a case that does not provide “a suitable vehicle” for the legal controversy, even if the Commission believes that the lower court decision is wrong.¹⁷³ The SEC’s selectivity may indicate to the Court the importance of the cases in which the Commission chooses to file an amicus brief.

During the 1995 term, of the nine non-tax business-related cases reviewed by the Court, only one case did not have any amicus participation. That case involved bankruptcy issues. The four other bankruptcy cases reviewed by the Court involved amicus briefs. Of the eight cases with amicus participation, only one was purely private with no participation of a governmental body. While the number of non-reviewed cases with or without amicus participation was not studied, the fact that there was amicus participation in eight of the nine non-tax business cases reviewed by the Court may be significant. These statistics seem to indicate that amici participation does influence the Court’s decisions on certiorari. Also, the fact that the filing of amicus curiae briefs is an expensive proposition, and that governmental bodies are particularly selective in the cases in which they participate, may indicate to the Justices the importance of the issues in the case. These findings, at the very least, do not contradict Caldeira and Wright’s study.¹⁷⁴

¹⁷⁰ See *id.* at 1178.

¹⁷¹ *Id.* at 1178-79.

¹⁷² *Id.* at 1176-77 (citing Address of Daniel L. Goelzer, General Counsel, United States Securities and Exchange Commission, to the American Bar Association Committee on Federal Regulation of Securities, Securities and Exchange Commission Amicus Participation in Private Securities Litigation (November 19, 1988)).

¹⁷³ See *id.* at 1177-78.

¹⁷⁴ See Caldeira & Wright, *supra* note 160.

2. INTERCIRCUIT CONFLICTS

Two of the three criteria for the granting of certiorari petitions enumerated in the Supreme Court's Rule 10.1 concern conflicts between the federal circuits or between the federal court of appeals and a state court of last resort.¹⁷⁵ Professor Arthur D. Hellman conducted an extensive study on inter-circuit conflicts.¹⁷⁶ He concluded that, "intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system."¹⁷⁷

Hellman investigated only those inter-circuit conflicts that were brought to the Supreme Court and were not granted review.¹⁷⁸ First, Hellman studied all the cases in which Justice White dissented from the denial of review in the 1988, 1989, and 1990 Terms, and every fifth case docketed in which review was denied for the 1989 Term.¹⁷⁹ Second, Hellman identified which of those certiorari petitions contained an inter-circuit conflict for further investigation into the Court's reasons for denying review.¹⁸⁰ Third, Hellman identified the type of conflict involved, its tolerability, and, in some cases, the ultimate resolution of the conflict.¹⁸¹

a. *Types of Conflicts*

Hellman considered a conflict to be waning if it was resolved by a subsequent Supreme Court decision, the circuit court precedent was "devalitized," or the conflict "although never overruled, [was] so widely rejected or so consistently ignored that a lawyer would have little hope of invoking it successfully."¹⁸²

¹⁷⁵ See SUP. CT. R. 10.

¹⁷⁶ See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995) [hereinafter Hellman, *By Precedent Unbound*]. See also, Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases of the Plenary Docket*, 44 U. PITT. L. REV. 521 (1983); Hellman, *Shrunken Docket*, *supra* note 30; Michael S. Shenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007 (1984); and Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989).

¹⁷⁷ See Hellman, *By Precedent Unbound*, *supra* note 176, at 697.

¹⁷⁸ See *id.* at 702.

¹⁷⁹ See *id.* at 705-06.

¹⁸⁰ See *id.* at 706-07.

¹⁸¹ See *id.* at 737-94. See also discussion *infra* Section II(D)(2).

¹⁸² Hellman, *By Precedent Unbound*, *supra* note 176, at 740.

Nonacquiescence involves the concern that a federal agency will have to "abandon uniformity in the administration of a statutory scheme."¹⁸³ The conflict would cause government to operate the program differently in each circuit, abandon the program altogether, or follow the requirements of one circuit throughout the entire country.¹⁸⁴ Such conflicts may cause multicircuit actors to engage in forum shopping, even though Hellman determined that it is unlikely.¹⁸⁵

b. *Tolerability*

Hellman determined that the respondent's brief in cases involving intercircuit conflicts usually contained one of the following three arguments against the Court's granting review: (1) it was too early to resolve the conflict definitively; (2) the case provided an inappropriate vehicle for resolving the conflict; or (3) the issue was not of continuing importance.¹⁸⁶ Hellman also looked at the dynamics of a conflict. "This concept embraces such considerations as the number of circuits that have passed on the issue, the age of the decisions, the trend in the more recent cases, and the possible effect of intervening Supreme Court decisions on closely related issues."¹⁸⁷

Unresolved conflicts can lead to due process and unfairness concerns; conflicting precedents between the circuits could cause individuals in separate parts of the country to be treated differently.¹⁸⁸ All conflicts, however, may be deemed tolerable if the "stakes are sufficiently low," such as procedural issues that are unlikely to cause harm to litigants or, if they come into play, would be mooted by later proceedings.¹⁸⁹

A conflict will only be considered intolerable if it saddles multicircuit actors with inconsistent obligations and forces them to choose between "disunity in operations and conformity with the law."¹⁹⁰ The determination of intolerability will "depend entirely on whether the conflict creates 'unfairness to litigants in different circuits.'"¹⁹¹ Unfairness, in turn, will depend on whether the conflict will produce different outcomes in later cases.¹⁹²

¹⁸³ *Id.* at 742.

¹⁸⁴ *See id.* at 743.

¹⁸⁵ *See id.* at 754-55.

¹⁸⁶ *See id.* at 732-33.

¹⁸⁷ *Id.* at 734.

¹⁸⁸ *See id.* at 756.

¹⁸⁹ *See id.*

¹⁹⁰ *Id.* at 772.

¹⁹¹ *Id.* at 773.

¹⁹² *See id.*

c. Do Unresolved Conflicts Really Warrant Concern?

Hellman's research indicates that it may not be a serious problem for the Supreme Court's decision to leave intercircuit conflicts unresolved. Intercircuit conflicts can be eliminated in ways other than having the Supreme Court grant review. First, conflicts left unresolved in one term can be eradicated by a Supreme Court decision in another term.¹⁹³ Second, conflicts can be resolved when "Congress, rule making bodies, or federal agencies clarify the ambiguity in the law that gives rise to the conflict."¹⁹⁴ Third, one of the conflicted circuits could overrule its precedent and eliminate the conflict.¹⁹⁵ Finally, changes in business practices, governmental policies, or social values may lessen the impact of the conflict.¹⁹⁶

While the aggregate number of intercircuit conflicts that go unresolved may have risen, for the most part,¹⁹⁷ it is important to recognize that the Court has never been able to resolve every intercircuit conflict. As Rule 10 of the Supreme Court specifies, petitions will only be granted for "compelling reasons."¹⁹⁸ To make a determination as to whether the conflicts left unresolved by the Court are intolerable, and therefore compelling, the certiorari papers of all such cases would have to be examined by someone with a certain level of expertise in the topic to assess the ramifications of the issues involved. However, it is possible to conclude that the Court is not taking certain conflict cases because it has determined that the conflicts are tolerable.

If in fact the Court is leaving intolerable conflicts unresolved, the commentators must identify specific cases and explain the significance of the issues involved. They should identify (1) who is being harmed by the conflict; (2) how individuals or corporations are being harmed by inconsistent determinations by the circuits; and (3) how individuals or corporations are being treated differently in the circuits.

V. CONCLUSION

The objective of this Comment was to analyze the criticism that the Court is not taking the right number of business cases. Commentators have claimed

¹⁹³ See *id.* at 775.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See discussion *supra* Section III(D)(2)(b) and accompanying notes 186-192. See also Hellman, *By Precedent Unbound*, *supra* note 176.

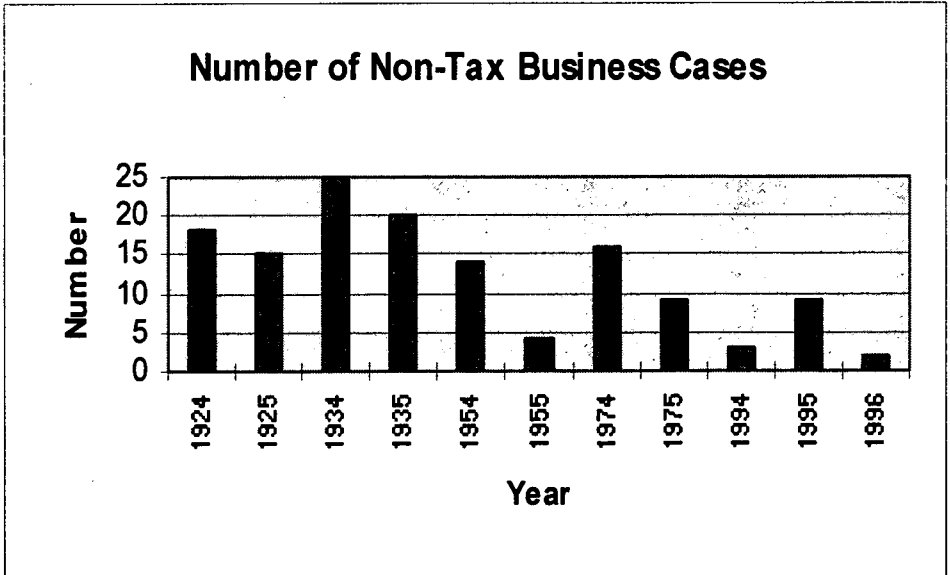
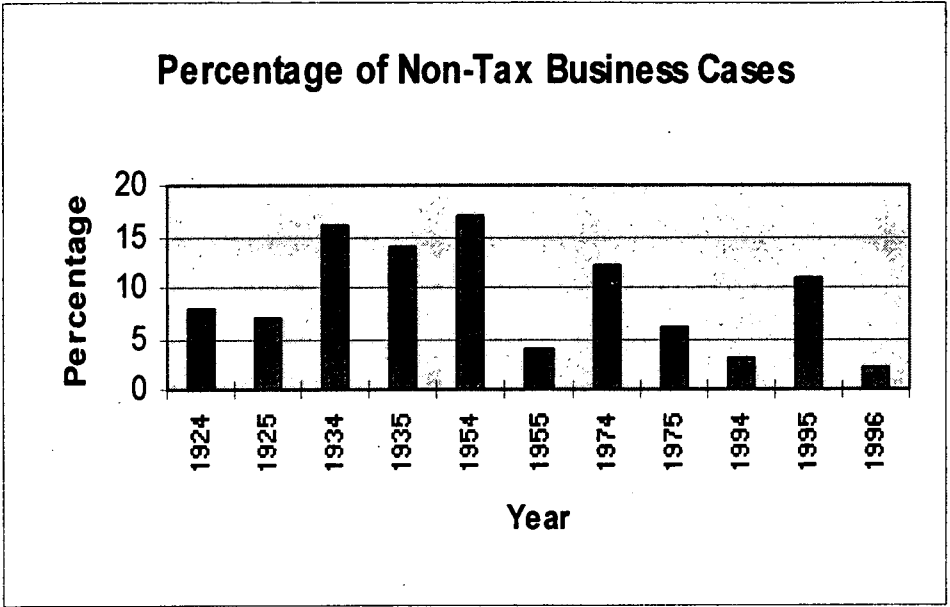
¹⁹⁸ See SUP. CT. R. 10.

that the Justices are not reviewing business cases because they are not interested in these issues or their law clerks are directing them toward sexier constitutional cases. It is true that the Court has been taking fewer business cases. This, however, does not mean that the Court is not taking the correct number of these cases. The trend in the business cases has been consistent with that of the Court's review of tax cases – another unglamorous category. Furthermore, the decline in business cases is consistent with the Court's treatment of its entire docket.

The certiorari process is influenced by numerous factors. The Justices must consider all such factors to determine whether a case meets the Court's criteria for review. The Justices cannot, however, take every eligible case. Each case must present an issue of national importance, the resolution of which will reach beyond the litigants in the case. Also, there may be a number of explanations, other than the issues presented in an individual case, for the overall reduction in the Court's docket and the decline in business cases. For instance, the Justices may be attempting to reduce their influence in society. Another possibility is that the cases before the Court are not certworthy.

The commentators have created more questions than they have answered. The criticisms are not sufficiently developed to play a useful role in the ongoing debate surrounding the Court's work. If the commentators are to be taken seriously, the debate must be focused and refined. Simply complaining that the Court is not taking the right cases is not enough.

APPENDIX A



APPENDIX B

