JUDICIAL DECISIONS AS LEGISLATION: CONGRESSIONAL OVERSIGHT OF SUPREME COURT TAX CASES, 1954–2005

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This Article offers a new understanding of the dynamic between the Supreme Court and Congress. It responds to an important literature that for several decades has misunderstood interbranch relations as continually fraught with antagonism and distrust. This unfriendly dynamic, many have argued, is evidenced by repeated congressional overrides of Supreme Court cases. While this claim is true in some circumstances, it ignores the friendly relations that exist between these two branches of government—relations that may be far more typical than scholars suspect.

This Article undertakes a comprehensive study of congressional responses to Supreme Court tax cases and makes a surprising finding: Overrides, although the main focus of the extant literature, account for just a small portion of the legislative activity responding to the Court. In fact, Congress is nearly as likely to support and affirm judicial decisionmaking through the codification of a case outcome as it is to reverse a decision through a legislative override. To investigate fully the nature of congressional oversight of Supreme Court decisionmaking, this Article undertakes both qualitative and quantitative analyses of different types of legislative review of Supreme Court decisions—examining codifications and citations, as well as overrides, in legislative debates, committees, and hearings. The result is a series of important and robust findings that challenge and build on the Court-Congress literature, identifying the legal, political, and economic factors that explain how and why legislators take notice of Supreme Court cases.

The study reveals a complex and nuanced interbranch dynamic and shows that the Justices themselves affect the legislative agenda to a greater extent than previously understood. This result challenges scholars who have questioned whether the Supreme Court should have jurisdiction over complex issues, such as those in the economic context, in which the Justices may lack sufficient training. This Article argues that scholars have little need to worry about Court decisionmaking in these areas: Not only do legislators routinely review the Court's decisions, but they also frequently confirm the outcomes as valuable contributions to national policymaking via the codification process.

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INTRODUCTION

If existing commentary is to be believed, members of Congress bully Supreme Court Justices on a routine basis. Although the Framers anticipated coequal branches of government,[1] many scholars note that legislators have come to demand a level of deference that strongly suggests congressional preferences must be prioritized over those of the Court.[2] When the Justices ignore this mandate, Congress quickly strikes back with legislation overriding the Court's decision.[3]

Though it is true that legislators hold hearings, draft override legislation, and reverse Supreme Court decisions, this characterization is, at best, an incomplete account of Court-Congress relations. In reality, Congress responds to Supreme Court cases in a myriad of ways, few of which are antagonistic. In fact, legislators are often quite *supportive* of Supreme Court opinions and frequently codify case outcomes, thereby cementing judicial views into new legislation.[4]

Moreover, much of the legislative activity that emerges in response to Court cases is neither critical nor particularly sympathetic, but rather content-neutral.[5] Members of Congress, for example, frequently look to Court opinions to glean an understanding of current judicial approaches to statutory interpretation. Legislators then rely

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[1] *See, e.g.*, Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 46–47 (1998) (noting that Constitutional Convention viewed three branches of government as coequal actors); Peter L. Strauss, *The President and Choices Not To Enforce*, LAW & CONTEMP. PROBS., Winter–Spring 2000, at 107, 119 (arguing that subordination of one branch by another is difficult to justify in government of coequal branches); *see also* U.S. CONST. arts. I, II, III (creating three distinct branches of federal government).

[2] *E.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 13–15 (1998) (modeling Court-Congress interaction in manner that requires Justices to account for congressional preferences or suffer an override); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–53 (1991) (exploring extensive number of congressional overrides and noting that Court must attend to congressional preferences in order to avoid overrides).

[3] A vast literature examines the congressional inclination to overrule Supreme Court cases. *E.g.*, JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004); CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING (Colton C. Campbell & John F. Stack, Jr., eds., 2001); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997); Eskridge, *supra* note 2; Joseph Ignagni & James Meernik, *Explaining Congressional Attempts To Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353 (1994); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991); Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996). *But see* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003) (arguing that Congress intentionally adopts ambiguous statutes in order to defer to Supreme Court on difficult issues).

[4] *See infra* Part IV.A.2.

[5] *See infra* Part IV.A.4.

on these interpretive norms to craft statutes that will withstand scrutiny down the road should they be challenged in federal court. In other contexts, legislators refer to Court cases in debates and hearings as a means to signal important and emerging issues to constituents, journalists, and other interested parties.[6] While our study indicates that proposed overrides account for just thirty-six percent of legislative responses to Supreme Court cases,[7] the extant literature on Congress-Court relations tends to focus exclusively on congressional overrides.[8]

We believe it is important to understand the full array of congressional responses to Supreme Court decisions. Since these activities are costly in terms of time and energy, legislators must believe their responses to the Court are a useful expenditure of resources and an effective means to achieve reelection, advancement in the political hierarchy, or good policymaking. Identifying all the cases and controversies that gain congressional attention and not just those that spark a negative response will improve our understanding of the role that federal courts play in legislative politics—a role that scholars have investigated but have not yet fully understood.[9]

This Article seeks to build on the important and influential body of work that has explored the Court-Congress dynamic over the course of the last century. Many noteworthy scholars have contributed significantly to our understanding of how and why Congress responds to the Supreme Court, and many have examined how this oversight impacts judicial decisionmaking. But no scholar has ever attempted a comprehensive empirical study of *all* the forms of congressional oversight of Supreme Court opinions.

Our strategy for executing this comprehensive study encompasses both quantitative and qualitative approaches for understanding Court-Congress relations. For reasons explained below, we believe it is important to focus on a single area of the law under the control of a small set of committees in Congress. To this end, we have decided to study economic issues, specifically those involving taxation. Part I.A

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6 *See infra* notes 40–44 and accompanying text.

7 *See infra* Part I.C.

8 *See supra* note 3 (citing examples of existing literature on congressional overrides of Supreme Court decisions).

9 To take just one example, theorists hypothesize that when Congress is ideologically distant from the Court, legislators are more likely to overturn a judicial decision. Virginia A. Hettinger & Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 LEGIS. STUD. Q. 5, 7–8 (2005). Although this claim may be true, it takes on a different meaning if Congress also *codifies* Court decisions in identical political circumstances. The meaning of scholarly findings, in short, may need reconsideration in light of the full range of congressional responses to Court decisions.

describes our data collection procedures, and Part I.B describes and justifies our empirical approach. Part I.C presents our results with respect to the frequency of the various types of legislative oversight. While scholars interested in interbranch dynamics have suggested that congressional oversight of the Supreme Court is relatively infrequent,[10] we find that Congress monitors judicial decisionmaking with surprising regularity: legislators discuss more than half of the tax cases decided by the Supreme Court.[11] This suggests that legislators do not take an ad hoc approach to monitoring the Supreme Court, but rather systematically review judicial decisions.

In Part II, we investigate the factors that lead legislators to spend time, energy, and resources on Supreme Court decisions. Our theory for explaining why the legislature responds to Supreme Court cases revolves around one key factor: issue salience. Issues decided by the Supreme Court, we argue, become important to legislators not because they are inherently interesting, but because they have achieved policy significance through the work of agenda entrepreneurs (including congressional experts, lobbyists, journalists, and the Justices themselves).[12] Part II also investigates factors associated with economics, politics, and legal reform that may increase the likelihood that a Supreme Court decision will be discussed in congressional debates. In Part III, we test our theories using three different statistical models to understand how these factors impact the occurrence, frequency, and speed of congressional oversight.

The last Part of the Article focuses on the substance of Congress's oversight. Part IV.A conducts a qualitative analysis of legislative oversight. In this Part, we investigate the factors that explain why Congress overrules certain cases, codifies others, and responds in a neutral manner to others. It is easy to understand congressional overrides—legislators disagree with a judicial outcome—but why would Congress codify a Court decision? After all, the Court's decisions already have the full effect of law. Our quantitative analysis in Part IV.B provides insight into this question, as well as others. For example, we find Congress is more likely to codify a Supreme Court case when the Justices issue a unanimous decision.[13] This suggests that the judicial vote operates as a signal: When a body of nine

[10] *See, e.g.*, Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) ("[M]ost Supreme Court decisions never come to the attention of Congress."). *But see* Eskridge, *supra* note 2, at 336 (noting that Congress monitors Supreme Court with surprising regularity).

[11] *See infra* Part I.C.

[12] *See infra* Part II.A.

[13] *See infra* Part IV.B.

diverse thinkers agrees on a single outcome, a similarly diverse body (i.e., the legislature) can be expected to agree as well. We obtained this insight, along with many others, because we expanded our study of Congress and the Court beyond just override activity.

Finally, in the Conclusion, we evaluate the positive and normative implications of our study. Our findings document a far more complex dynamic between Congress and the Court than has been offered heretofore in the literature. Moreover, our study demonstrates that the Justices play a critical role in setting the congressional agenda: Through their opinion writing and vote patterns, the Justices can increase to surprisingly high levels the probability of a legislative response. Although many scholars have argued that the Justices follow—or should follow—legislative preferences when interpreting statutes,[14] we find that influence also runs in the opposite direction: Legislators often follow the lead of the Justices when drafting and amending statutes. Judicial opinions can and do become legislative enactments. Finally, this Article challenges those scholars who argue that the Supreme Court is particularly incompetent when it comes to certain complex areas of the law—such as taxation—and thus should cede jurisdiction in these cases to a specialty court created by Congress.[15] Our study shows that legislators routinely review the Court's decisions in the taxation context, thereby enabling Congress to correct the Court if necessary in order to assure that the Justices do not

[14] Scholars have a range of views on the judicial role in interpreting statutes, but few argue that judges should completely ignore the preferences or intent of Congress. *See, e.g.*, Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 805 (1994) ("[According to originalists, the] judge's role as interpreter is limited to deciphering . . . commands [of Congress] and applying them to particular cases."); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1556–60 (1998) (book review) (arguing that judges should exercise humility in interpreting statutes and should act in part as agent of Congress); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 532 (1997) (book review) (stating that goal of any system of interpretation is to constrain judicial discretion).

[15] *See, e.g.*, Kirk J. Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 173 (2001) ("Tax lawyers have derided the Supreme Court, complaining that the Court 'hates tax cases' and generally bungles the cases it does hear." (quoting Erwin N. Griswold, *Is the Tax Law Going to Seed?*, 11 AM. J. TAX POL'Y 1, 7 (1994))); Joel Newman, *The Story of* Welch*: The Use (and Misuse) of the "Ordinary and Necessary" Test for Deducting Business Expenses*, *in* TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES 155, 181 (Paul L. Caron ed., 2003) (arguing that Supreme Court tax cases are needlessly confusing); *see also* Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879, 914–16 (1986) (arguing that Congress should authorize National Court of Tax Appeals to take jurisdiction over tax cases); Charles L.B. Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222, 222 ("It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court.").

bungle the difficult issues they address. More importantly, we show that Congress frequently expresses approval of the Court's decision-making in tax cases via a codification of the outcome, suggesting that legislators believe that the Justices have far more competence to render decisions than scholars typically acknowledge.[16]

I
A Description of the Court-Congress Dynamic

A. The Extant Literature Inadvertently Conceals Valuable Insights

Scholars seeking to explain Court-Congress dynamics generally analyze legislative responses to judicial decisions in a wide range of legal areas simultaneously.[17] By clustering numerous legal fields together, scholars attempt to generalize their empirical findings, and for this reason aggregation of diverse topic areas can be useful. But this methodology has drawbacks. Congress's inclination to respond to Supreme Court cases is likely to vary from issue to issue, making it problematic to use facts and circumstances from one legal context to draw conclusions about another.

The political motivation to react, for example, may differ with respect to tax law, criminal law, and employment law. Studies suggest that legislators' ideologies best explain votes on civil rights legislation, while interest groups, lobbyists, and macroeconomic factors may better explain Congress's economic policy.[18] Moreover, because Con-

[16] Of course, Congress may codify a Court outcome for a number of reasons besides the competence of the decisionmaker, such as politics or policy preferences. We do not mean to suggest that legal experts will necessarily agree with the outcome even if legislators have sanctioned it through codification.

[17] *See, e.g.*, James Meernik & Joseph Ignagni, *Congressional Attacks on Supreme Court Rulings Involving Unconstitutional State Laws*, 48 Pol. Res. Q. 43, 45–46 (1995) (examining all cases in which Supreme Court struck down state legislation during Warren, Burger, and early Rehnquist Court years); Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. Pub. L. 377, 383–91 (1965) (identifying different issue areas but aggregating cases for purposes of analysis).

[18] While scholars acknowledge the role of many factors in congressional policymaking, they tend to focus on ideology in the civil rights context and interest groups in the economic context. *See* R. Douglas Arnold, The Logic of Congressional Action 193–223 (1990) (exploring roles of economic factors and interest groups in making of tax policy); Eskridge, *supra* note 2, at 372–97 (investigating political dynamic that exists in civil rights context between Supreme Court, Congress, and President); Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 Am. Pol. Sci. Rev. 361, 366, 376 (2001) (finding that legislators vote both sincerely and strategically in order to achieve ideological goals in context of civil rights); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. Pa. L. Rev. 1, 55 (1990) ("Observers have consistently agreed that public participation in the tax legislative process is heavily skewed in favor of business groups that seek tax favors for themselves and that, through 'Schattschneiderian' logrolling, almost never oppose favors for each other."). A similar conclusion may be drawn with respect to

gress allocates jurisdiction over particular legal issues to different congressional committees, it is possible that Court-created issues get distinct treatment based solely on Congress's referral decision.[19] As Miller notes, evidence indicates that the Judiciary Committee, largely comprised of lawyers, tends to view the Supreme Court as having the final word on legal controversies and consequently views congressional overrides as appropriate only in extreme circumstances.[20] The Energy and Commerce Committee members, by contrast, view the Court as a friend or foe depending on whether their political interests are aligned with the Court's decision and do not hesitate to override these decisions when it is in their political interest to do so.[21]

To be sure, scholars have amassed data that begin to address the problem of aggregation. Henschen and Sidlow examine congressional responses in the labor and antitrust contexts and thus limit their analysis to the two relevant House and Senate committees.[22] While their study provides useful statistics on the frequency of legislative responses to Supreme Court decisions, they do not analyze why the committees respond differently to different cases beyond offering a qualitative, intuitive explanation.[23] Ignagni, Meernik, and King focus on a single committee, the Judiciary Committee, and thus appear to avoid the problems associated with grouping diverse issues together

judicial decisions in the context of civil rights cases and economic cases. *See* Nancy C. Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context,* 85 WASH. U. L. REV. (forthcoming 2007) ("Study after study confirms a strong correlation between judges' political preferences and their behavior in civil rights and liberties cases, but researchers have only rarely identified an association between politics and decisions in economic cases.").

19 *See generally* DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION (1997) (exploring how power and jurisdiction are allocated in Congress's committee system); Roger H. Davidson, Walter J. Oleszek & Thomas Kephart, *One Bill, Many Committees: Multiple Referrals in the U.S. House of Representatives*, 13 LEGIS. STUD. Q. 3, 22 tbl.7 (1988) (investigating fate of bills referred to multiple committees).

20 Mark C. Miller, *Courts, Agencies, and Congressional Committees: A Neo-Institutional Perspective*, 55 REV. POL. 471, 478 tbl.1, 479–82 (1993).

21 *Id.* at 484.

22 Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989); *see also* Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983) (exploring congressional response to Supreme Court labor and antitrust decisions).

23 Henschen & Sidlow, *supra* note 22, at 719–24 (noting that presidential agendas, interest group lobbying, individual legislators' agendas, and Supreme Court invitations to intercede may all lead to committee response to Supreme Court decisions); Henschen, *supra* note 22, at 447–54 (offering various hypotheses on what attracts legislative attention to labor and antitrust cases, including unanimity of decision, ideological conflict within legislature, and activity of interest groups, but not conducting quantitative analysis on differences in response).

for purposes of empirical analysis.[24] In fact, however, the Judiciary Committee controls a wide range of legal and political issues, including immigration, bankruptcy, antitrust, criminal law, terrorism, patents, and copyrights.[25] Ignagni, Meernik, and King thus replicate the problem of grouping diverse issues into a single study without controlling for this diversity in any way.

Eskridge has investigated the circumstances that lead legislators to respond to Supreme Court decisions[26] and, by focusing on outcomes solely in the civil rights context, his studies do not suffer from the aggregation problem. His work is grounded in positive political theory and offers important contributions to the literature on the Court-Congress dynamic, but we note that it does not contain empirical tests of the theoretical models presented.[27] We do not criticize Eskridge for this exclusion as performing these tests was not his goal, but subjecting these theories to rigorous empirical testing is necessary to understand fully the interplay between the Court and Congress. We seek to fill that gap here.

Finally, every empirical study of the Court-Congress dynamic to date focuses on congressional override activity, which is a serious impediment to a full comprehension of interbranch relations. By focusing exclusively on override proposals and their success rates, these scholars interpret all other responses to Supreme Court opinions as equivalent to no response at all. In one sense, this view is accurate: Except for overrides, all other congressional responses allow Court decisions to remain good law. Nevertheless, good reasons exist for examining the range of congressional responses that show up in legislative histories, floor debates, and congressional studies. By ignoring a substantial amount of legislative behavior, these scholars' data are incomplete, and thus their conclusions may be unrepresentative or misleading.

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[24] Joseph Ignagni, James Meernick & Kimi Lynn King, *Statutory Construction and Congressional Response*, 26 AM. POL. Q. 459, 470 (1998).

[25] *See* DAVID J. TINSLEY, COMMITTEE AND SUBCOMMITTEE ASSIGNMENTS, S. Pub. No. 108-5, at 18 (2003).

[26] Eskridge, *supra* note 2, at 391–97; William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

[27] *See* Eskridge, *supra* note 2, at 391–97 (testing theory with qualitative analysis of cases in three different eras); Eskridge, *supra* note 26, at 617–64 (same). Hettinger and Zorn investigate the public choice theories set forth by Eskridge—thus avoiding the problem of aggregation and at the same time offering a quantitative analysis. *See* Hettinger & Zorn, *supra* note 9 (studying congressional overrides of civil rights cases decided between 1967 and 1989). However, Hettinger and Zorn focus exclusively on congressional overrides and thus ignore other important ways that Congress oversees Supreme Court decisions.

While we have noted gaps and drawbacks in the extant literature, our goal here is to build and to expand upon it. By examining all aspects of the congressional oversight process, we hope to offer a more complete and nuanced description of interbranch relations.

B. A New Methodological Approach

To avoid the pitfalls of the existing literature while also building on its insights, we focus on a single substantive area of law that is under the control of a small set of congressional committees. To this end, we have decided to focus on economic issues, specifically taxation—an area of law that garners considerable attention in both the Supreme Court and in Congress,[28] and one that satisfies our jurisdiction requirement that the issue be in control of a single committee in each chamber.[29] Our rationale for focusing on taxation is linked to the fact that both Congress and the Court seem to privilege this area in the decisionmaking process.[30]

By focusing exclusively on a single area of the law, our approach avoids the confounding problems associated with aggregation. However, it may have its own drawbacks: Since congressional response patterns differ across legal areas, we cannot be sure that our findings are generalizable to all other legal contexts. Nevertheless, fully understanding the Court-Congress dynamic and the factors that help to set the legislative agenda in one important area of the law is itself quite valuable. Moreover, at a minimum, we expect that our findings will be useful for understanding similar areas of economic law, such as bankruptcy, securities regulation, and antitrust. While we provide a comprehensive study of the legislative agenda in only one area of the law, we hope to do additional work in other contexts and encourage scholars to further the debate by undertaking their own analyses of the questions we raise here.

For the purposes of this study, we examined the Supreme Court's statutory interpretation docket over the last five decades and found that economic disputes nearly always outnumbered civil rights cases

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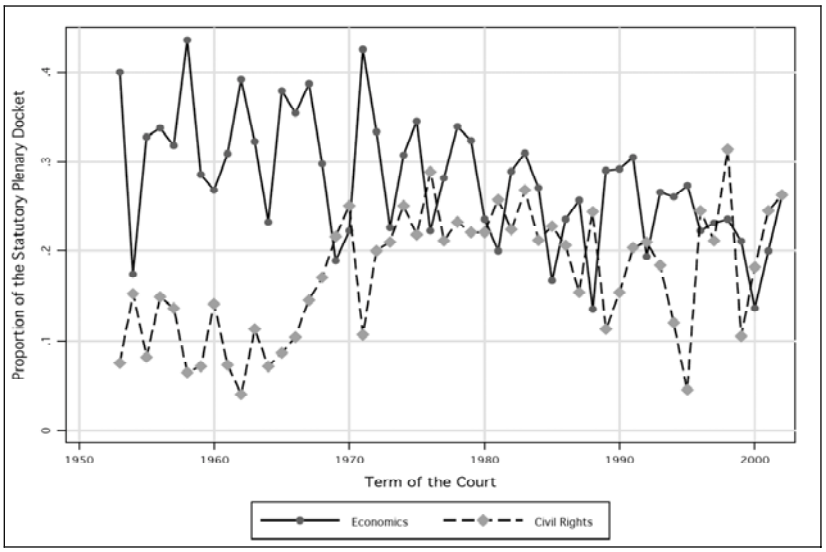
[28] *See infra* fig.2 and accompanying text (depicting significant number of tax cases on Supreme Court docket); *see also* Note, *Congressional Reversal of Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324, 1324 n.3 (1957) (noting "rapid interplay" between Court and Congress in taxation context).

[29] The Ways and Means Committee controls tax issues in the House; the Finance Committee controls taxation issues in the Senate. Nancy Staudt, *Redundant Tax and Spending Programs*, 100 Nw. U. L. REV. 1197, 1211 (2006). The House and Senate Budget Committees, with jurisdiction over the national budget in their respective chambers, are also likely to be responsive to Supreme Court tax decisions. *See infra* Part II.A.1 (discussing role of these committees in legislative oversight and agenda setting).

[30] *See infra* notes 31–34 and accompanying text.

on the judicial agenda. Figure 1 depicts comparative data from 1953 through 2002 and highlights the Court's apparent predisposition to grant certiorari to cases in the economic context: Although the Court occasionally reviewed more civil rights cases than economic cases, overall the Court has decided many more economic controversies over the course of the last half century than those involving civil rights.[31] We do not mean to suggest that civil rights controversies are not politically, economically, or culturally salient. Rather, we suggest that investigating and explaining institutional dynamics in the economic context will lead to an understanding of a large portion of the work that preoccupies the Court and thus Congress when it oversees Court decisions.

FIGURE 1: CIVIL RIGHTS AND ECONOMIC CASES AS A PROPORTION OF STATUTORY INTERPRETATION CASES, 1953–2002. N=2905.



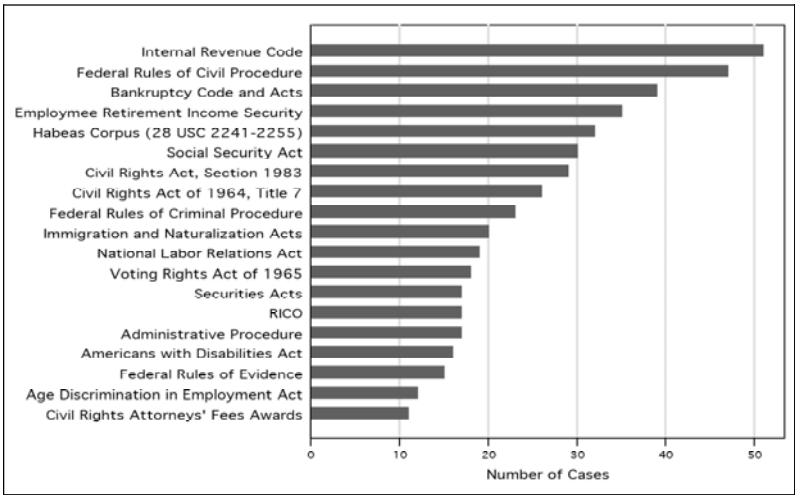
At a more specific level, we find that the Internal Revenue Code is one of the most litigated set of statutes in the Supreme Court. Disaggregating the data in Figure 1 demonstrates that the Court has granted review to a disproportionate number of tax disputes. As Figure 2 indicates, this trend shows no sign of abating: Between 1986 and 2002, the Supreme Court decided more statutory controversies involving the tax code than any other federal statute or rule.[32]

[31] The data in Figure 1 were computed from Harold J. Spaeth, The S. Sidney Ulmer Project: U.S. Supreme Court Databases, http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm (ALLCOURT database, Dec. 9, 2004 release) (last visited July 9, 2007).

[32] The data in Figure 2 is compiled from Spaeth, *supra* note 31 (ALLCOURT database, Oct. 14, 2004 release).

Notably, the other most litigated laws and rules—including the Federal Rules of Civil Procedure, the Bankruptcy Code, and the Employee Retirement Income Security Act—also involve issues outside the realm of civil rights. Accordingly, our focus on economic questions, and taxation cases in particular, may illuminate a great deal of the Court's judicial activity.

FIGURE 2: MOST LITIGATED STATUTES AND RULES DURING THE REHNQUIST COURT ERA, 1986–2002. N=1013.



The goal of this Article, however, is not to explain Supreme Court decisionmaking but rather how and why Justices' decisions end up on the legislative agenda.[33] Many scholars of Congress have noted the importance of the tax laws in legislative politics, as well as the extraordinary power that members of the tax-writing committees—the House Ways and Means and Senate Finance Committees—wield in the legislative process.[34] But do the legislators pay any attention to the Supreme Court when wielding this power? Before investigating

[33] We plan to study Supreme Court decisionmaking more extensively in future articles. For preliminary studies of Supreme Court decisionmaking in the tax context, see Staudt, Epstein & Wiedenbeck, *supra* note 18 (analyzing factors that affect Supreme Court decisionmaking in taxation cases); Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889 (2004) (examining factors that explain Supreme Court's decision to grant certiorari in large number of tax cases) [hereinafter Staudt, *Agenda Setting*]; Nancy C. Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstädt & Ryan J. Vander Wielen, *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909 (2005) (examining rationales used by Court in deciding tax cases).

[34] *See, e.g.*, STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 91, 104 (2d ed. 1990) (identifying tax-writing committees as among most powerful committees in Congress).

this question, we first describe our data collection procedures and our preliminary findings.

C. The Frequency and Type of Congressional Oversight: Descriptive Statistics

For purposes of our investigation, we collected all 279 Supreme Court tax cases decided between 1954 and 2005 (i.e., between the 1953 and 2004 Terms).[35] We then collected every legislative response to the tax cases decided in this time period.[36] The evidence confirms what scholars have found elsewhere: Supreme Court cases routinely gain the attention of the legislators. Of the 279 Supreme Court tax cases cases decided since 1954, 54% have been discussed by name by legis-

[35] We focused on this time period for two reasons. First, the basic structure of the tax code has remained relatively stable during this period. *See generally* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 1–9 (2d ed. 2004) (reviewing history of tax regimes in United States and finding basic tax structure has remained unchanged since World War II). Second, the electronic databases made available through Westlaw and Lexis include in-depth documentation of congressional activities in the tax context going back to 1954, but coverage is erratic prior to that time.

For our data collection process, we first searched for any Supreme Court case that mentioned taxation. We then reviewed each case produced by the search, retaining only those cases that involved an interpretation of a federal tax statute (for example, we excluded state tax cases and cases that addressed non-statutory issues such as standing). Our unit of analysis is the case citation, and we found 279 cases. If we use docket number as our unit of analysis, the figure increases to 554, as many cases are consolidated. We included only orally argued cases that resulted in a per curiam judgment or an opinion of the Court.

To reproduce our search, go to the Supreme Court library on Lexis and use the following search terms: (federal w/s tax!) or (excise w/s tax!) or (estate w/s tax!) or (user w/5 fee) or (user w/s tax!) or (tax! w/s fraud) or (irc) or (i.r.c.) or (stamp w/s tax!) or (income w/ s tax!) or (internal w/s revenue) or (tax! w/s lien) or (tax! w/s code) or (tax! w/s evad!) or (tax! w/s evasion) or (corporate w/s tax!) or (payroll w/s tax!) or (employment w/s tax!) or (social w/s security) or (26 usc) or (26 u.s.c.) or (tax! w/s refund) or (tax! w/s deficiency) or (unemployment w/s tax!) or (gift w/s tax!) or (fica w/s tax!) or (f.i.c.a. w/s tax!).

[36] We accomplished this by a Lexis search of House and Senate documents using the following Lexis libraries: House and Senate Documents; Congressional Record and Full-Text Bills; Congressional Rules and Parliamentary Procedure; Committee Prints; Committee Reports; Congressional Record, All Congresses Combined; US-CIS Legislative Histories; CIS/Historical Index; and Tax Legislative Histories, Combined. While not all of the databases date back to 1954, the Tax Legislative History database does, and we were able to find all our documents in this database (although many were replicated in the other databases). We searched for any reference to a Supreme Court tax case (either by name or citation, checking for misspelled entries, or by subject matter) and included a congressional response in our database if the case was explicitly referenced by name or cite. We collected only the hearings, debates, reports, speeches, legislative proposals, and so forth that referred to the specific tax case, and excluded any documents that discussed the issue in the case but did not refer to a particular Court decision. Although this approach is underinclusive in the sense that it nearly guarantees that we overlooked legislative responses to some Court decisions, it also assures that our database contains only the instances in which legislators *intended* to discuss and respond to the Supreme Court.

lators in legislative hearings, floor debates, committee reports, studies, and so on.[37] These oversight activities took place over the course of fifty-one years, with individual legislators and committees from both the House and the Senate participating in the oversight process. There were a total of 742 references to the cases: 292 (39%) surfaced in Joint Committee on Taxation reports;[38] 232 (31%) from individual Senators or Senate committees; 177 (24%) from individual House members or House committees; and 41 (6%) in Conference Committee reports. Once Congress noted a case, it responded differently in different contexts: Legislators proposed an override for 20% of the cases, sought to codify 15% of them, and held hearings on or cited to an additional 32% of the cases.[39] Table 1 depicts the form and frequency of responses generated by the cases.

As Table 1 indicates, legislators seek to change the law in 36% of the cases they review by proposing override legislation. But they also use cases for "position-taking" purposes that have no immediate relationship to actual legislative action: Forty-eight percent of the responses were for purposes other than overrides or codification. For example, *Arkansas Best Corp. v. Commissioner*[40] triggered a negative

[37] These Court-Congress interactions have emerged when taxpayers believe Congress has imposed an unconstitutional economic burden, such as the customs tax litigated in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998), *cited in* STAFF OF J. COMM. ON TAXATION, 104TH CONG., PRESENT LAW AND BACKGROUND AND PRESENT LAW RELATING TO FUNDING MECHANISMS OF THE "E-RATE" TELECOMMUNICATIONS PROGRAM 12–13 (Comm. Print 1998). Quite often, however, the cases that stir activity involve narrow and technical tax issues. *See, e.g.*, United States v. Fior D'Italia, Inc., 536 U.S. 238 (2002) (involving proper method for assessing taxes on employee tips), *cited in* 148 CONG. REC. 12,630 (2002); Gitlitz v. Comm'r, 531 U.S. 206 (2001) (involving correct method for determining basis in S Corporation stock), *cited in* 147 CONG. REC. 14075 (2001) (statement of Rep. Shaw); O'Gilvie v. United States, 66 F.3d 1550 (10th Cir. 1995) (involving taxation exclusion governing punitive damages received in tort suits), *aff'd*, 519 U.S. 79 (1996), *cited in* STAFF OF J. COMM. ON TAXATION, 104TH CONG., DESCRIPTION OF CHAIRMAN'S MARK OF THE SMALL BUSINESS JOB PROTECTION ACT 61 n.11 (Comm. Print 1996). All these issues involve statutes adopted by Congress, interpreted by the Supreme Court (or, in the *O'Gilvie* case, by a circuit court and affirmed by the Supreme Court), and then reconsidered in legislative hearings, debates, or reports.

[38] Congress established the Joint Committee on Taxation under the Revenue Act of 1926, Pub. L. No. 69-20, § 1203, 44 Stat. 9, 127–28 (codified as amended at I.R.C. §§ 8001–05, 8021–23). Ten legislators sit on the Committee: five members from the Senate Committee on Finance (three majority and two minority), and five members from the House Committee on Ways and Means (three majority and two minority). I.R.C. § 8002 (2000). The Committee's statutorily prescribed duties include investigating and reporting on (1) the operation and effects of internal revenue taxes and the administration of such taxes, and (2) measures and methods for the simplification of such taxes. § 8022.

[39] These numbers sum to greater than 54% because several of the cases were subject to multiple responses. In fact, for some cases legislators proposed *both* a codification and an override. For a discussion of the substance of legislative oversight, see *infra* Part IV.

[40] 485 U.S. 212 (1988).

TABLE 1: CONGRESSIONAL RESPONSES TO SUPREME COURT TAX CASES, 1954–2004. N=279.

CONGRESSIONAL RESPONSE	FREQUENCY
Cases that Did Not Trigger a Response	127 (46%)
Cases that Did Trigger a Response	152 (54%)
Type of Response:	
1. Override Proposal (23 succeeded) (8%)	55 (20%)
2. Codification Proposal (19 succeeded) (7%)	41 (15%)
3. Positive Citation	52 (19%)
4. Negative Citation	22 (8%)
5. Cited for Purposes of Understanding Court's Approach to Statutory Interpretation	10 (4%)
6. Used in Nomination Proceeding	4 (1%)

response when Senator Bob Dole critiqued the case on the Senate floor for its possible negative impact on American farmers.[41] Though Dole argued the case was wrongly decided,[42] he never actually proposed an override. In another context, legislators repeatedly criticized Justice Rehnquist's dissent in *Bob Jones University v. United States*[43] but only to argue against his promotion from Associate Justice to Chief Justice of the Supreme Court.[44] No legislators sought to codify the majority opinion to undermine any possible legal effects of Justice Rehnquist's dissent.

Codification and override proposals are undoubtedly important for understanding the Supreme Court's role in the development of the law, but it is also important to understand other types of legislative responses to the Court. Legislative oversight is costly in terms of time, energy, and resources. Consequently, knowing why and how Congress responds to judicial decisions aids our understanding of the legislative agenda and the Court's role in setting this agenda.

41 138 CONG. REC. 28,738, 28,738–39 (1992) (statement of Sen. Dole).

42 *See id. (*describing potentially "devastating" consequences for farmers if *Arkansas Best* is given broad reading).

43 461 U.S. 574, 612–23 (1983) (Rehnquist, J., dissenting).

44 *See, e.g.*, 132 CONG. REC. 22,795, 22,798 (1986) (statement of Sen. Biden) (citing Rehnquist's dissent in *Bob Jones University* as "a disturbing example of his insensitivity" during debate on Rehnquist's nomination for Chief Justice).

Importantly, we have no reason to believe that these findings are unique to legislative views on taxation cases. In fact, given the complexity of taxation, we expect that legislators are, if anything, more responsive to cases in areas of the law that they and their constituents understand more readily than tax. We expect that comprehensive studies in other legal areas would also show that Congress responds to Supreme Court cases in ways that go beyond overrides and codifications.

Finally, we note that the data presented in Table 1 are both more narrow and more expansive than those offered in the existing literature on Court-Congress interactions. Our study is narrow because, with the exception of Hettinger and Zorn,[45] we are the only scholars to examine empirically and model congressional responses in a single legal area. Our study is more expansive because it highlights all forms of congressional responses, including "position-taking" activities, codification, and override efforts. Our narrow focus enables us to describe and explain congressional activities with more precision than that seen in the current literature. And the expansive feature of our study highlights what must by now be obvious: The existing literature's focus on overrides leads scholars to ignore a substantial amount of congressional activity. Indeed, Table 1 indicates that scholars studying Court-Congress relations in the economic context may disregard more than 70% of congressional responses to the Court by looking solely at overrides. This striking figure highlights a serious limitation of current empirical studies—a limitation that we think should be remedied.

II

SUPREME COURT CASES ON THE LEGISLATIVE AGENDA: THEORIES AND HYPOTHESES

Policy issues must gain traction before serious debate will take place in Congress. If an issue or problem fails to surface on the legislative agenda, the existing state of affairs—i.e., the law as set by the Supreme Court—remains the status quo. Once the matter begins to attract attention, however, legislators will have increased opportunities to take positions and propose policy reforms that advance their political aims.

[45] Hettinger & Zorn, *supra* note 9, at 9–23 (conducting empirical analysis of congressional overrides in civil rights context).

In this Part, we seek to explain why some but not all cases appear on the legislative agenda.[46] We proceed by generating hypotheses about the various factors which may influence whether an issue emerges as salient—hypotheses we will test in later sections. We limit our exploration to the factors that explain (1) why a case appears on the agenda as a general matter, (2) why some cases attract sustained attention over many years while others are subject to more perfunctory comment in the congressional record, and (3) why some cases surface quickly—sometimes within days of the Court's decision—while other cases do not attract attention for years. Because we are interested in these three different features of congressional oversight—occurrence, frequency, and speed—we have created three different statistical models.

Before we present our findings, we briefly present our theory of oversight. Our hypotheses for explaining why the legislature responds to Supreme Court cases revolve around the idea of issue salience. Issues decided by the Supreme Court likely become important to legislators not because they are inherently interesting, but because they achieve significance through the work of agenda entrepreneurs, or because of unique economic, political, and legal circumstances.

Existing studies suggest that a variety of forces—including the activities of individual legislators, media coverage, lobbying efforts, and social and economic crises—may affect the type of issue that becomes worthy of legislative notice and comment.[47] Although much of the literature focuses on the congressional agenda as a general matter,[48] we expect that many of the same factors explain how and why Supreme Court tax opinions grab the attention of Congress.

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[46] Later in the Article, *see infra* Part IV, we explore the substance of the legislative oversight—ranging from simply referring to the case in floor debates and hearings to attempting to impact the law substantively through codifications or overrides—and the type of legal reform that emerges in response to the case outcome.

[47] *See, e.g.*, ARNOLD, *supra* note 18 (investigating factors that influence legislative agenda); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995) (same); George C. Edwards III & B. Dan Wood, *Who Influences Whom?: The President, Congress, and the Media*, 93 AM. POL. SCI. REV. 327 (1999) (investigating impact of President on legislative agenda).

[48] *See supra* note 47 (citing sources exploring congressional agenda setting generally). Various scholars interested in the oversight process, however, have offered specific hypotheses as to why Supreme Court decisions become salient in the Capitol. *See, e.g.*, Henschen & Sidlow, *supra* note 22, at 719–21 (exploring role of President, interest groups, and media in placing Supreme Court cases on legislative agenda); Ignagni et al., *supra* note 24, at 465–70 (hypothesizing that political actors, ideological differences between branches of government, public opinion, and interest groups increase salience of Supreme Court decisions in congressional debates); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 444

A. Agenda Entrepreneurs

1. Legislators: Members of the Tax and Budget Committees

Legislators recognize that discussion and debate of important policy problems in the halls of Congress can increase media coverage and heighten constituent satisfaction. This reality means legislators will compete to place issues within their area of expertise on the legislative agenda, which in turn enables them to advance their policy goals and reap the political rewards associated with increased national attention.[49] With respect to Supreme Court tax decisions, we expect that the agenda entrepreneurs in Congress will be members of the tax and budget committees.[50]

The House and Senate have a total of thirty-five standing committees, but only five have expertise, jurisdiction, and control over tax and budget issues.[51] The House Ways and Means Committee, the Senate Finance Committee, and the Joint Committee on Taxation are responsible for holding hearings, submitting legal reports and summaries to Congress on tax issues, and drafting and amending the tax code.[52] These three committees, like all the other committees in Congress, seek to place their issues at the center of national debate[53] and are surely aware that Supreme Court cases can impact legislative decisions and the bargains that are codified in statutes. For this reason, we expect that these three committees will be particularly attentive to Supreme Court tax cases and will be more likely to respond to them

tbl.1 (1992) (hypothesizing that case-related factors such as unanimous decisions and modes of statutory analysis influence legislative action).

[49] *See* KINGDON, *supra* note 47, at 38–40 (discussing legislative incentives and noting that "[p]ublicity is essential" and that members of Congress try "to carve out a part of the policy turf and become a person to be reckoned with in that area"); *see also* Jack L. Walker, *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 BRIT. J. POL. SCI. 423, 430–32 (1977) (discussing factors that influence agenda setting).

[50] Given that tax lawmaking impacts taxpayers across the nation, nearly all legislators—regardless of committee assignment—will have incentives to comment on Supreme Court tax cases when the Court's outcome has a notable impact on their constituents. But we theorize that members of the tax and budget committees will be far more likely to evaluate Supreme Court tax decisions than other members of Congress and will seek to make the issues salient even when they do not greatly affect their constituents.

[51] *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 58–59 (4th ed. 2002) (describing jurisdiction of House Ways and Means Committee, Senate Finance Committee, and Joint Committee on Taxation over tax legislation); Staudt, *supra* note 29, at 1206–07 (describing authority of House and Senate Budget Committees to revise taxation and spending levels to comport with budgetary goals).

[52] GRAETZ & SCHENK, *supra* note 51, at 58–59.

[53] *See* KING, *supra* note 19, at 1–9 (stating that committees fight to retain politically salient issues and to expand committee jurisdiction); KINGDON, *supra* note 47, at 38–39 (describing agenda setting as means for members of Congress to gain public's attention); Staudt, *supra* note 29, at 1214–16 (exploring importance of committee jurisdictions in political maneuvering and noting that legislators fight to protect jurisdictional borders).

during debates and hearings and when proposing tax reform. We also hypothesize that two additional committees—the House Budget Committee and the Senate Budget Committee, which together have authority to establish and enforce the national budget—will pay close attention to Supreme Court tax decisions. Budgetary goals are closely linked to the revenue raised through taxes and spent through tax expenditures,[54] and the Budget Committee members also face the reality that Supreme Court decisions can have a sizeable effect on budgetary policies—either through pro-government outcomes[55] that create unexpected revenues, or pro-taxpayer outcomes that create revenue losses.[56]

Our data demonstrate that the tax and budget committee members are indeed more likely to monitor Supreme Court activity. Members of these committees were responsible for 81% (540/664) of the comments made on tax cases in the legislative histories, documents, and reports we analyzed.[57] The House tax and budget committees authored 21% of all the comments, the Senate tax and budget committees authored 18%, and the Joint Committee on Taxation authored the remaining 42% of all the remarks and comments made by the three committees. A preliminary analysis of the correlation between these actors and oversight of Supreme Court tax outcomes suggests that tax and budget committee members operate as agenda entrepreneurs when it comes to Supreme Court tax cases.[58]

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[54] The term "tax expenditure" is generally attributed to Stanley Surrey, who defined the concept in relation to "structural provisions" of the Internal Revenue Code. *See* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 3 (1985). A structural provision is an aspect of the Code necessary to implement a normal tax, such as the definition of net income. *Id.* A tax expenditure, by contrast, is a special preference that is designed to favor a particular firm, person, or industry, which departs from the normal income tax provisions. *Id.* Since these special preferences result in decreased tax revenues, they are a form of government spending. *Id.*

[55] We use the term "pro-government outcome" to mean a case in which the Court held for the government, and "pro-taxpayer outcome" a case in which the Court held for the taxpayer.

[56] For example, *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993), involved a newspaper that sought to deduct as depreciation the value of customer lists that it obtained in a merger. *Id.* at 549–50. The government objected, arguing that the taxpayer sought to deduct millions of dollars when Congress and the Treasury did not intend such a maneuver. *See* Brief for the United States at 9–11, *Newark*, 507 U.S. 546 (No. 91-1135), 1992 WL 541266. The Supreme Court found in favor of the newspaper, holding that such a deduction was allowable under § 167 of the Internal Revenue Code. *Newark*, 507 U.S. at 570.

[57] In some cases, we were unable to identify the committee responsible for the report, and therefore have excluded some of the responses from this count.

[58] In our statistical models in Part III, we do not include membership on the tax and budget committees as an independent variable used to explain why Congress comments on certain cases and not others. Excluding this independent variable from our analysis is nec-

2. Interest Groups

Interest groups play an important role in the development of the legislative agenda. As many scholars have noted, these groups, when organized and cohesive, can increase the salience of an issue by providing legislators with information, data, and credible arguments for reform.[59] In this way, interest groups act as agenda entrepreneurs, regularly drawing attention to their issues and problems, including the judicial decisions rendered by the Supreme Court. Interest groups harmed by a case's outcome will seek a legislative override, whereas those advantaged by the decision will seek codification of the ruling in order to cement the outcome or to broaden its effect.

Although it is feasible to identify the individuals and groups that appear before Congress as witnesses in hearings or in some other formal role, we are not able to identify reliably the range of interested parties that contact legislators through unofficial channels. However, a proxy for such lobbying efforts may exist. The cases that reach the Supreme Court tend to affect a wide range of taxpayers beyond the named litigants. This leads interested parties to file amicus briefs in order to advocate their positions. Individuals and groups willing to spend time, energy, and resources filing these briefs are likely to lobby legislators after the Justices render a decision in the controversy.[60] Accordingly, when interest groups get involved in the issue, we hypothesize that these groups (or related groups with similar interests) will seek congressional oversight, and that the likelihood, speed, and frequency of legislative responses will increase.

During the period of our study, individuals and groups filed amicus briefs in 42% of all Supreme Court tax cases. Some controversies generated a single brief (generally on behalf of the taxpayer),

essary because we cannot use a variable to explain Congress's behavior unless it is present both when members of Congress act *and* when they do not act. But, of course, we cannot observe committee membership status when no comments were made. We do not have this problem with other variables, like media coverage and lobbying, that occur both when Congress responds to a case and when it does not respond.

[59] *See, e.g.*, Eskridge, *supra* note 2, at 361–63 (discussing importance of interest groups in bringing judicial decisions to Congress's attention); *see also* Bryan D. Jones, Frank R. Baumgartner & Jeffrey C. Talbert, *The Destruction of Issue Monopolies in Congress*, 87 Am. Pol. Sci. Rev. 657, 664–65 (1993) (noting that congressional committees tend to hold hearings that are favorable to interest groups they support).

[60] Scholars interested in the Court-Congress dynamic have often looked to amicus briefs as a measure of interest group pressure on both the Court and Congress. *See* Hettinger & Zorn, *supra* note 9, at 12–13 (using number of amicus briefs as proxy for level of interest group pressure on Congress); Ignagni et al., *supra* note 24, at 469–70 (same); *see also* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1109–11 (1988) (exploring influence of interest groups on Supreme Court certiorari decisions via amicus brief filings).

while others involved more than twenty briefs with hundreds of signatories. For example, in *St. Martin Evangelical Lutheran Church v. South Dakota*,[61] in which the Court held that religious schools are exempt from certain federal unemployment taxes,[62] seven religious organizations filed briefs on behalf of the taxpayers.[63] Other cases, such as *United Dominion Industries, Inc. v. United States*[64] and *United States v. Cleveland Indians Baseball Co.*,[65] involved just one amicus brief filing.[66] A slight majority of the cases (58%) had no amicus filings.

In order to test our prediction that amicus filings in the Supreme Court increase legislative activity subsequent to the decision, we created three measures: (1) a discrete variable equal to the number of amicus briefs filed on behalf of the taxpayer in each case, (2) a dichotomous variable indicating whether amicus briefs were filed or not, and (3) a dichotomous variable indicating whether briefs were filed on behalf of the taxpayer or the government.[67] Together, these variables enable us to assess the impact of both brief filing and increasing numbers of interest groups on legislative oversight as well as the impact of increasing numbers of interest groups on the process. As we note below, the number of briefs filed turns out to be less important than the fact that a brief was filed. Moreover, our data indicate that pro-taxpayer brief-writers are more active in obtaining legislative oversight of Supreme Court cases than those supporting the government.

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61 451 U.S. 772 (1981).

62 *Id.* at 780–81.

63 *Id.* at 773–74 n.*. For other examples of cases that generated a large response by amici, see *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 370 (1998), where the question of the constitutionality of the Harbor Maintenance Tax generated twelve amicus briefs by corporate organizations on behalf of the taxpayer, *id.* at 362 n.*, and *Newark Morning Ledger v. United States*, 507 U.S. 546, 570 (1993), a case considering whether taxpayers could depreciate the value of newspaper customer lists and in which sixteen amicus briefs were filed with the Court, *id.* at 548 n.*.

64 532 U.S. 822 (2001).

65 532 U.S. 200 (2001).

66 *United Dominion Industries, Inc.*, 532 U.S. at 824 n.*; *Cleveland Indians Baseball, Co.*, 532 U.S. at 204 n.*. *See* Brief for the National Ass'n of Manufacturers and the Manufacturers Alliance/MAPI Inc. as Amici Curiae Supporting Petitioner, *United Dominion Industries, Inc.*, 532 U.S. 822 (No. 00-157), 2001 WL 27578; Brief for the Major League Baseball Players Ass'n as Amicus Curiae Supporting Respondent, *Cleveland Indians Baseball, Co.*, 532 U.S. 200 (No. 00-203), 2001 WL 41024.

67 A dichotomous variable, often referred to as a "dummy" variable, only takes on two values (e.g., amici either filed briefs or they did not), while a discrete variable can take on a finite number of values (e.g., one, two, or ten amicus briefs may be filed in a given case). For a useful discussion of these and other basic statistical concepts, see generally ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES (3d ed. 1997).

3. Journalists

Although legislators and interest groups often seek to place issues on the congressional agenda for their own political and economic purposes, outside factors can also contribute to issue salience. Media coverage, for example, can serve an agenda-setting function in Congress, and several studies have noted that legislators respond to issues made germane through articles in newspapers and magazines.[68] While it is debatable whether the public opinion attached to salient issues can actually influence policy outcomes in the long run, few question politicians' strong inclination to respond in some fashion to the leading issues of the day reported in the national media.[69]

While the Justices often consider Supreme Court tax cases "boring,"[70] the news media apparently feels differently: We found that at least 52% of the cases in our database were subject to coverage in a prominent newspaper.[71] For example, the *New York Times* reported on *South Carolina v. Baker*[72] the day after the Court rendered its decision in the case holding that Congress had the power to

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[68] *See, e.g.*, KINGDON, *supra* note 47, at 57–61 (arguing that "media attention to an issue affects legislators' attention," though noting that effect may be less than anticipated); Frank R. Baumgartner et al., *Media Attention and Congressional Agendas*, *in* DO THE MEDIA GOVERN?: POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 349, 350 (Shanto Iyengar & Richard Reeves eds., 1997) (finding that media attention and congressional attention are "interrelated").

[69] Scholars have long argued that legislators are extremely attentive to constituent viewpoints due to the legislators' strong desire to be reelected, and empirical studies find that it is the media that shapes the views of the voters. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974) (arguing that members of Congress are single-minded seekers of reelection); Adam J. Berinsky & Donald R. Kinder, *Making Sense of Issues Through Media Frames: Understanding the Kosovo Crisis*, 68 J. POL. 640, 653–54 (2006) (arguing that presentation of information in media reports affects individual understanding and opinions of government actions); *see also* KINGDON, *supra* note 47, at 57–61 (discussing role of media in setting congressional agenda but noting it may be less than expected); Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–81 (2000) (exploring media coverage as useful measure of issue salience for elite political actors).

[70] *See* Neil M. Richards, *The Supreme Court Justice and "Boring" Cases*, 4 GREEN BAG 2D 401, 401–07 (2001) (citing evidence that many Justices find tax cases boring); Staudt, *Agenda Setting*, *supra* note 33, at 889–90, 890 n.4 (citing memorandum in Blackmun papers indicating that Justices view tax cases as "crud" with issues that "put law clerks to sleep").

[71] We collected data on the media coverage in the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, and *Chicago Tribune* within five days of the decision date. We focus on these four newspapers because they each serve large markets and their stories tend to be picked up by newspapers in smaller markets. Although we expect that newsworthy decisions often will appear in the pages of the newspapers within one day of the Court's decision, we allow for a five-day delay to ensure that we capture all the coverage.

[72] 485 U.S. 505 (1988).

tax state and local bonds.[73] While the statutory provision at issue in the case had the potential to affect very few bondholders, the *New York Times* suggested that the decision was of "potentially major importance to state and local governments" and noted that "[i]n the credit markets, prices of municipal bonds fell immediately after word of the Court decision [although] they recovered as market experts pointed out that the ruling did nothing to alter statutes already on the books."[74] The case received extensive media coverage across the nation and led many state and local governments to worry that the Justices' decision would "cast a pall" over their ability to raise capital.[75]

The decision in *Baker*, perhaps in part due to media coverage, triggered various legislative responses. Members of Congress criticized the decision, arguing that it put "State and local governments at the mercy of the political processes of Congress,"[76] and various states urged a constitutional amendment that would eliminate the power to tax state and local bonds.[77] Although the constitutional amendment failed to gain support, both the House and Senate adopted resolutions guaranteeing that they would not support a new tax on state and local bonds.[78] Since 1988, when the Supreme Court decided *Baker*, Congress has discussed the case nearly every year in committee or on the floor and has introduced twenty-one different resolutions promising not to tax state and local bonds. Whether these resolutions have any practical legal significance is not clear, but given their frequency, it would seem that legislators believe the resolutions are important for "position-taking" purposes.

Not all cases receiving media coverage spark the level of congressional response received by *Baker*, but many cases discussed in the media are subject to at least some level of commentary in Congress down the road. In *United States v. Bisceglia*,[79] for example, the Court

[73] Stuart Taylor, Jr., *Congress Can Tax Municipal Bonds, High Court Rules*, N.Y. TIMES, Apr. 21, 1988, at A1.

[74] *Id.*

[75] *Id.*

[76] 134 CONG. REC. S11672, S11672 (daily ed. Aug. 11, 1988) (statement of Sen. Roth).

[77] *See, e.g.*, 134 CONG. REC. 14,023, 14,023–24 (1988) (quoting Delaware resolution supporting constitutional amendment to reverse *South Carolina v. Baker*).

[78] *See, e.g.*, S. Con. Res. 18, 101st Cong., 135 CONG. REC. 3780, 3780 (1989) ("*Resolved*, by the Senate . . . that it is the sense of Congress that Federal laws regarding the taxation of State and local government bonds should not be changed in order to increase Federal revenues."); H.R. Con. Res. 42, 101st Cong., 135 CONG. REC. 14,571, 14,571 (1989) ("*Resolved by the House of Representatives (the Senate concurring)*, That we hereby memorialize the Congress of the United States to take steps to safeguard the tax-free status of state and local government bonds . . . .").

[79] 420 U.S. 141 (1975).

held that the IRS could compel banks to make private individuals' records available for inspection through "John Doe" summons.[80] *Bisceglia* received prominent news coverage in the *New York Times* the day after the Court issued its opinion,[81] but the congressional response was minimal. Members of Congress did comment on the decision but only for a brief period of time.[82] Even so, unlike *Baker*, which produced nonbinding resolutions but no formal amendments to the tax statute, Congress *did* modify the law in response to *Bisceglia*.[83] This difference suggests that the intensity of the oversight is not necessarily correlated to actual policy changes.

For purposes of this Article, we measure salience by the coverage a case receives in four major national newspapers—the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, and *Chicago Tribune*—within one to five days of the decision.[84] In hypothesizing a correlation between media coverage and legislative responses to Supreme Court tax cases, we are not suggesting that legislators (or their staff) necessarily read the newspapers and then proceed to discuss the issue on the chamber floor or to respond with a bill overriding, codifying, or amending the Court's holding. Instead, we expect that media coverage contributes to the salience of the issue in public debates and among constituents and thus will correlate with legislators' inclination to respond to the judicial decision.

4. Supreme Court Justices

In addition to legislators, interest groups, and journalists, the Justices themselves may act as agenda entrepreneurs. In a surprising number of cases, the Justices have attempted to attract Congress's attention through language in their opinions that explicitly invites a legislative response. Justices writing for the majority often do this by

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[80] *Id.* at 144–50 (holding that IRS has authority under I.R.C. §§ 7601–02 to issue "John Doe" summons to banks or other depositories to discover identity of person whose bank transactions suggest liability for unpaid taxes).

[81] Warren Weaver, Jr., *High Court Grants I.R.S. Wide Access to Bank Files*, N.Y. TIMES, Feb. 20, 1975, at A1.

[82] *E.g.*, H.R. REP. NO. 94-658, at 306, 311 (1975) (citing to *Bisceglia* case), *as reprinted in* 1976 U.S.C.C.A.N. 2897, 3202, 3207.

[83] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1520, 1699–1703 (codified as amended in scattered sections of 26 U.S.C.) (modifying third-party summons rules applicable to banks and other parties).

[84] Specifically, we created a dichotomous variable and coded it as 1 if coverage occurred and as 0 if not. As expected, the *Wall Street Journal*'s coverage was far more extensive than that found in the other newspapers: Our data indicates that the *Wall Street Journal* published articles on 38% of the cases decided between 1954 and 2004, the *Los Angeles Times* reported on 15%, the *Chicago Tribune* reported on 12%, and the *New York Times* reported on 8%.

pointing to the drawbacks or limitations of the opinion and then inviting members of Congress to remedy the perceived problem. In *United States v. Byrum*,[85] for example, the Court considered whether an owner of stock who transferred his shares to his children but retained substantial voting rights should be forced to include the property in his estate upon death.[86] The Court ruled against the government in the controversy by following the "generally accepted" view of the tax statute.[87] Justice Powell, writing for the majority, argued that the Court should follow established rules but suggested that Congress should reconsider the outcome:

> When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned.[88]

Congress responded to this invitation with the "anti-*Byrum* rule," which reversed the outcome through legislation.[89]

Calls for legislative review are also made by Justices in dissent. In *Dickman v. Commissioner*,[90] for example, the Court ruled for the government and imposed a tax on the imputed income from an interest-free, intrafamily loan.[91] Justices Powell and Rehnquist, in dissent, called for a legislative response to the majority opinion,[92] which they argued had overstepped the bounds of judicial authority and created an "ill-advised and inequitable" rule of taxation.[93] Congress responded to *Dickman* by codifying and expanding the result—giving the government an even bigger win than it had obtained in court.[94]

Scholars such as Eskridge have noted that the Justices are likely to request congressional action for institutional reasons—they believe Congress is the appropriate body to make major policy decisions in

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[85] 408 U.S. 125 (1972).

[86] *Id*. at 126–31.

[87] *Id.* at 135–44.

[88] *Id.* at 135.

[89] *See* 26 U.S.C. § 2036 (2000) (stating that retention of voting shares in controlled corporation constitutes retention of enjoyment for tax purposes and thus is included in value of estate).

[90] 465 U.S. 330 (1984).

[91] *Id.* at 331–33, 344–45.

[92] *See id.* at 353 (Powell, J., dissenting) ("[The issues of the case involve] delicate issues of policy that should be addressed in the legislative forum."); *see also id.* at 345 (majority opinion) ("The Court's decision today rejects a longstanding principle of taxation, and creates in its stead a new and anomalous rule of law. Such action is best left to Congress.").

[93] *Id*. at 353 (Powell, J., dissenting).

[94] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 172, 98 Stat. 494, 699–703 (codifying *Dickman* decision to allow taxation of benefits obtained from gift loan with below-market interest terms).

certain legal contexts.[95] This is especially true in circumstances in which the Justices believe that a long-standing interpretation of existing statutes should be modified or changed completely. In fact, the language and context of both *Byrum* and *Dickman* suggest this is precisely what led the Justices to draw legislative attention to the cases. This interpretation of judicial motive, however, is not universally accepted. Spiller and Tiller argue that the Court's invitation in a case may not reflect deference to Congress but rather a strategic maneuver that allows the Justices to achieve simultaneously their preferred position on two different policy dimensions.[96] A Justice may prefer, for example, to adhere to a particular interpretive approach in the statutory context (e.g., plain meaning), but adopting this approach could lead to an undesirable policy outcome (e.g., the government prevails in a tax case in which the Justice prefers a pro-taxpayer outcome). To achieve both desired outcomes, Spiller and Tiller suggest that the Justice will decide the case using his or her preferred canons of interpretation and, at the same time, invite a congressional override.[97]

We do not express an opinion as to why the Court invites legislative responses,[98] but we do hypothesize that when the Justices publicly call for congressional action, the request will increase the likelihood that the case will appear on the legislative agenda.[99]

A second way that the Justices may heighten the salience of a case is to render an opinion with a divided vote. When Justices dissent, they signal that a genuine legal controversy remains, making some form of legislative response desirable to assure a clear or final outcome. A unanimous decision, by contrast, suggests little or no dispute, which may also be an important signal to Congress. Unanimity in decisionmaking by a relatively heterogeneous body such as the Supreme Court suggests that, regardless of one's political or policy

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[95] Eskridge, *supra* note 2, at 388–89.

[96] Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 507–19; *see also* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999) (exploring various rationales for judicial invitations for review).

[97] Spiller & Tiller, *supra* note 96, at 512–14.

[98] We do, however, find this to be an interesting and important feature of the oversight process and plan to investigate the rationales underlying judicial invitations to review in future works.

[99] To measure this effect, we created a dichotomous variable to test our hypothesis that invitations increased the probability of congressional oversight. A case with a judicial invitation (in any opinion) is coded as 1 and all other cases as 0. Of the 279 decisions the Court rendered between 1954 and 2005, the Justices invited legislative oversight 31 times. We identified judicial invitations for congressional review by reading each Court opinion.

viewpoint, only one sensible interpretation of the statute exists. For purposes of finality and clarity, Congress may wish to codify such a dominant interpretation. We pick up on this point below when we explore the substance of congressional responses, but for now we note that reasons exist to suspect that both divided and unanimous decisions can grab the attention of Congress.[100]

In the period of our study, the Court was unanimous in 109 (39%) of the tax cases it decided. Because we expect that both unanimous and divided votes will get the attention of Congress at the preliminary stages of congressional activity (and thus that neither will correlate strongly with oversight), we created a dichotomous variable equal to 1 if the decision was unanimous and 0 if divided. This allows us to investigate our hypothesis and to examine whether the vote tally has any impact on legislators' inclination to comment on a case—a view many scholars have advanced in the past.[101] In Part IV, we will examine the impact of divided and unanimous votes on the substance of the legislative oversight.

B. Economic Crises

Political economists have argued that national economic problems tend to increase the salience of fiscal matters in Congress.[102] Although unemployment, inflation, budget deficits, and GDP growth may or may not impact the content of legislative action, experts agree that these forces move tax issues onto the legislative agenda—i.e., they act as "legislative vehicles" that motivate reforms and initiatives.[103] Indeed, the tax-writing committees often choose titles for their tax bills that reference the economic problem to be addressed,

[100] *See* Hettinger & Zorn, *supra* note 9, at 14 (hypothesizing that Supreme Court voting patterns play role in oversight process).

[101] Eskridge, Solimine and Walker, and Hettinger and Zorn investigate statutory decisionmaking and find that a unanimous Court is more likely to avoid subsequent legislative overrides than a divided Court. Eskridge, *supra* note 2, at 346–51; Hettinger & Zorn, *supra* note 9, at 22; Solimine & Walker, *supra* note 48, at 447.

[102] *See, e.g.*, KINGDON, *supra* note 47, at 105–09 (noting that changes in state of economy both promote and constrain placement of budgetary issues on legislative agenda); James M. Verdier, *The President, Congress, and Tax Reform: Patterns over Three Decades*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 117 (1988) (noting that economic forces have helped place tax reform on legislative agenda but may not influence substance of reforms).

[103] Verdier, *supra* note 102, at 117.

such as the Economic Recovery Tax Act of 1981[104] or the Balanced Budget and Emergency Deficit Control Act of 1985.[105]

Why would economic factors that make tax issues salient as a general matter lead members of Congress to focus specifically on Supreme Court tax cases? Our theory revolves both around data that suggest that the Court grants certiorari to tax cases that raise issues of national importance and around empirical studies that show that the Justices believe that issues that have major revenue implications for the federal fisc are important.[106] We hypothesize that decisions impacting federal revenue intake will take on increased importance in legislative debates during periods of economic crisis. Of course, this theory would also suggest that policy changes emanating from the Treasury or from other federal courts will also get heightened attention, but this Article focuses on just one vehicle of change: Supreme Court tax cases.

Although we expect that tax cases will be more likely to show up on the legislative agenda during times of perceived economic crisis, we do not expect legislators to pay particular attention to either pro-government or pro-taxpayer outcomes during these crises. As Verdier has noted, legislators often have differing views on how best to respond to an economic problem, and even when a consensus emerges in one era, it could easily change in the next. In the 1950s, for example, Congress preferred a balanced budget to tax cuts that might stimulate a weak economy, whereas legislators in the 1960s and 1970s used a recession as a justification for a range of investment and business tax incentives.[107] By the early 1980s, however, Congress began to worry about the increasing size of the federal budget deficit and enacted bills aimed at reducing its size.[108] Tax issues were on the agenda at every turn, but differences in policy perspectives led to changing responses.

Legislators may have strategic reasons to comment on tax cases generally but not necessarily on those favoring either the government

104 Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981) (codified as amended in scattered sections of 26 U.S.C.).

105 Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as amended in scattered sections of 2, 15, 26 & 42 U.S.C.).

106 *See* Staudt, *Agenda Setting*, *supra* note 33, at 911–14 (reviewing Supreme Court certiorari memoranda and noting that amount of money at issue helps to determine importance of case); *see also* SUP. CT. R. 10 (outlining standards for making certiorari decisions and indicating that case must have important and national implications).

107 Verdier, *supra* note 102, at 117–19; *see also* STAFF OF J. ECON. COMM., 108TH CONG., CONSTANT CHANGE: A HISTORY OF FEDERAL TAXES 1–6 (Comm. Print 2003) (discussing divergent approaches to taxation and economic stimulation).

108 Verdier, *supra* note 102, at 118.

or the taxpayer, even when there is a consensus as to the appropriate tax remedy for the economic problem at hand. Legislators may prefer pro-government decisions when the deficit is high, for example, but they may fear reprisals by the interest groups who will lose tax preferences. If it is the Court that makes the politically difficult decision, then the legislators are able to gain the policy advantages of the pro-government decision while avoiding political responsibility for the tax increase. Indeed, legislators may critique the pro-government decision simply to convey to interest groups and constituents that they are paying attention to their concerns, while in fact they have no intention at all to propose an override. This may have been Senator Dole's strategy when he spoke out against *Arkansas Best Corp. v. Commissioner*[109]—a case that closed a loophole long criticized by tax experts and policy analysts.[110] *Arkansas Best* arguably helped to reduce the budget deficit, but it also had the potential to seriously harm agricultural interests in farm states such as Kansas.[111] By speaking out against the pro-government decision, Dole—who represented Kansas and chaired the Senate Finance Committee—signaled to his constituents that he cared about their interests, even if he had no plans to propose substantive legislation that would reverse the decision. In short, we expect economic factors to influence the level of attention that Supreme Court cases draw in Congress, but not the direction of the commentary.

To test the correlation between economic factors and case salience, we collected data on the level of unemployment, inflation, the federal budget deficit as a percentage of GDP, and GDP growth. The measures are all denominated in real terms (fiscal year 2000 values).

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[109] 485 U.S. 212 (1988). *See supra* notes 40–42 (discussing Senator Dole's response to *Arkansas Best*).

[110] *See* Allen J. Klein & D. Bruce Hendrick, *Taxation of Business Hedges: An Analysis of the New Regulations*, 46 TAX EXECUTIVE 484–85 (1994) (noting that Supreme Court's decision in *Arkansas Best* addressed problems created in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955), which provided opportunities for taxpayers to "game" system). *But see* J. DWIGHT EVANS, A CRITICAL ANALYSIS OF TAXATION OF BUSINESS HEDGING AND THE CASE FOR COMPREHENSIVE CONGRESSIONAL LEGISLATION 1–13 (Tax Foundation Background Paper No. 7) (1994), *available at* http://www.taxfoundation.org/publications/show/593.html (critiquing Supreme Court's decision in *Arkansas Best* as creating uncertainty).

[111] 138 CONG. REC. 28,738, 28,738 (1992) (statement of Sen. Dole) ("[T]he Supreme Court's decision in Arkansas Best Corp. versus Commissioner has caused serious disruptions in the ability of farmers, ranchers, and other businesses, both in agriculture and elsewhere in our economy, to use hedging transactions to reduce the risks of doing business.").

C. Political and Ideological Differences

Much of the literature on Court-Congress dynamics considers the ideological position of each branch of government for purposes of understanding and predicting congressional responses to Supreme Court cases. Theorists hypothesize that as the political distance between Congress and the Court increases, the probability of oversight will also increase. This theory is grounded in empirical data showing that (1) Justices decide cases in a manner that furthers their own political and ideological preferences,[112] and (2) legislators respond to salient events in a manner that promotes their own political agenda.[113] These findings imply that a conservative Court will be subject to increased oversight from an ideologically liberal legislature and vice versa.[114]

To test our hypothesis further, we rely on the legislative "common space scores" generated by Poole and Rosenthal[115] as well as the judicial "common space scores" generated by Epstein, Martin,

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[112] *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 1–12 (2002) (presenting argument that Justices are ideologically driven in decisionmaking process); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Political Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 33 (1997) (noting that model of Justices deciding cases based on personal preferences "has found strong support in the empirical literature"); Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1347–50 (2005) (finding that Justices make decisions according to their own preferences regardless of conflicting congressional viewpoints); *see also* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999) (examining extent to which precedent influences Supreme Court decisions and concluding that justices are "rarely influenced by *stare decisis*," but instead decide according to their preferences).

[113] *See generally* Hettinger & Zorn, *supra* note 9, at 7 ("Existing separation-of-powers models predict that when Congress is unhappy with a decision of the Court, it will always act to overturn the offending decision."); Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987) (exploring legislative decisionmaking and noting role of committees in achieving legislators' political preferences).

[114] Although we hypothesize that political preferences will play a role in legislative oversight of the Supreme Court, we also expect that capturing this dynamic will be a difficult task. *See generally* Staudt, Epstein & Wiedenbeck, *supra* note 33 (exploring role of judicial ideology in deciding tax cases, but noting that while patterns emerge, politics is just one of several possible explanatory factors for such patterns).

[115] For a discussion of these scores, see generally KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL-CALL VOTING (1997), and Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POL. SCI. 954 (1998). To review the actual data, see Keith T. Poole, Estimating a Basic Space from a Set of Issue Scales, http://voteview.com/basic.htm (under heading "Common Space Scores: Congresses 75–109") (last visited July 10, 2007) [hereinafter Poole, Estimating a Basic Space].

Segal, and Westerland.[116] These scores scale legislators and Justices along an ideological continuum and thus serve as a measure of political preferences. Because the scores for both the Court and Congress are on the same scale,[117] we can directly compare the ideologies of these two bodies. To investigate our hypothesis, we compared the preferences of the median member of the Court to (1) the median member of each chamber of Congress, (2) the median member of the party in control of each chamber, and (3) the median member of the tax-writing committee in each chamber. We use these three different congressional medians to account for the divergent theories of congressional power found in the political science literature.[118] Because chamber majorities, the political party in control of each chamber, and the tax-writing committees all wield significant power at different times, we investigate each group separately.[119]

The "common space scores" for both Congress and the Court are bounded below by -1 and above by 1, with the lower scores indicating a more liberal ideology. We calculated the distance between the median member of each body and the median member of the Court and then used this measure to determine whether the legislators and Justices were politically aligned or divided at the time when the Court rendered each relevant decision and when Congress acted in response to the Court. Although theoretically our political distance measure could be as great as 2 (when Congress and the Court would have political preferences located at the opposite ends of the continuum) or as small as 0 (when their preferences are perfectly aligned), we do not observe either extreme: The maximum distance of the divide in our

116 Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007).

117 *See id.* at 306 (noting that central goal in developing judicial common space scores was to make them comparable to congressional scores of Poole and Rosenthal).

118 *See, e.g.*, GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 77–124 (1993) (arguing that party in control of chamber is key decisionmaking body); KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 262–64 (1991) (claiming that "legislative choices in salient policy domains" are chamber median choices); Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149, 158–65 (1994) (describing modern political science theories of congressional decisionmaking power); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; Or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143–55 (1988) (developing model with committees as key decisionmaking body and arguing that Congress appears to function similarly).

119 For a discussion of the three competing models of power in the congressional committee system—the chamber-dominated, party-dominated, and independent-committee models—see generally FOREST MALTZMAN, COMPETING PRINCIPALS: COMMITTEES, PARTIES, AND THE ORGANIZATION OF CONGRESS 9–32 (1997).

data set is equal to 0.7160[120] and the minimum is equal to 0.000095.[121] The average distance for each group (i.e., each chamber of Congress, the majority parties, and the tax committees vis-à-vis the Court) lies between 0.13 and 0.29. For purposes of comparison and for understanding these scores, consider that the ideological distance that existed between the House and the Supreme Court median in 2004 was 0.254 and the distance between the Senate and Supreme Court median was 0.095. At this time, all three institutions were fairly conservative; the voting records of the median member of the House (Jim Walsh, Republican of New York) and the median member of the Senate (Alan Specter, Republican of Pennsylvania) indicate both were slightly more conservative than the median member of the Supreme Court (Justice Sandra Day O'Connor).[122]

D. Periods of Major Legal Reform

We have suggested that the salience of Supreme Court decisions operates as a catalyst to legislative action: Legislators who dislike an outcome are apt to critique it and propose an override, those who approve of it will work to cement the decision into statutory law via codification, and others will comment purely for position-taking purposes. But it is also possible that the causal arrow works in exactly the opposite direction—i.e., when legislative initiatives gain prominence, members of Congress are likely to investigate existing law for purposes of drafting new statutes or debating its merits. Put differently, movements for reform within Congress may provoke increased interest in Supreme Court decisions.

Our database suggests as much. Consider a 1995 initiative that called for a tax on individuals who relinquished their American citizenship.[123] In debates and hearings addressing the proposal, members of Congress relied on the Supreme Court's definition of income to justify the new statute. Taxing expatriates was legally permissible, it

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120 This is the distance between the Senate majority party in 2003 and Supreme Court in 1969. This distance is relevant because a Court decision rendered in 1969 could be reviewed and acted upon by Congress in 2003 (or any other year post-1969).

121 This is the distance between the House Ways and Means Committee in 2004 and the Supreme Court in 1956.

122 *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 313 (2007) (comparing median House and Senate members with Supreme Court median for 1953–2000); Poole, Estimating a Basic Space, *supra* note 115 (providing Common Space scores for House and Senate for 1937–2002).

123 *See* STAFF OF J. COMM. ON TAXATION, 104TH CONG., BACKGROUND AND ISSUES RELATING TO TAXATION OF U.S. CITIZENS WHO RELINQUISH CITIZENSHIP 3–8 (Comm. Print 1995) (describing proposal in H.R. 831, § 5, 104th Cong. (1995) to impose expanded expatriation tax).

was argued, because the Justices had adopted an expansive definition of "taxable income" in cases such as *Commissioner v. Glenshaw Glass Co.* and *General American Investors Co. v. Commissioner*.[124] Similarly, when considering various presidential budget proposals, the Joint Committee on Taxation issued reports noting that the proposals would have no impact on existing Supreme Court precedents such as *Commissioner v. P.G. Lake, Inc.* and *Commissioner v. Gillette Motor Transport*.[125] And when Congress was in the midst of enacting major tax reforms in 1986, committees issued numerous reports and studies of existing law, which included references to relevant Supreme Court cases.[126]

To investigate the effect of preexisting reform proposals on legislators' inclination to comment on Supreme Court tax cases, we identified seven historically important and notable pieces of legislation in the tax and budget context adopted between the years 1954 and 2004. We expect that when Congress undertakes fundamental reform, it would assess the existing state of the law more rigorously, and thus legislative review of Supreme Court cases will increase. The major tax statutes we include in our study are the Revenue Act of 1964,[127] the Tax Reform Act of 1969,[128] the Economic Recovery Tax Act of 1981,[129] and the Tax Reform Act of 1986.[130] The budget statutes we include are the Congressional Budget and Impoundment Control Act

[124] STAFF OF J. COMM. ON TAXATION, *supra* note 123, at 14–17, 21–30 (citing *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), and *General American Investors Co. v. Commissioner*, 348 U.S. 434 (1955), among other cases, to argue that taxation on unrealized income through expatriation tax is constitutional).

[125] STAFF OF J. COMM. ON TAXATION, 105TH CONG., DESCRIPTION AND ANALYSIS OF CERTAIN REVENUE-RAISING PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 1998 BUDGET PROPOSAL 33 (Comm. Print 1997) (citing Comm'r v. P.G. Lake, Inc., 356 U.S. 260 (1958), and Comm'r v. Gillette Motor Transp., Inc., 364 U.S. 130 (1960)).

[126] *See, e.g.*, STAFF OF J. COMM. ON TAXATION, 99TH CONG., DESCRIPTION OF BILLS RELATING TO THE TAX TREATMENT OF MORTGAGE RELATED AND OTHER ASSET BACKED SECURITIES (S. 1959 AND S. 1978) AND ENVIRONMENTAL ZONES (S. 1839) 9 (Comm. Print 1986) (citing Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134 (1974); United States v. Midland-Ross Corp., 381 U.S. 54 (1965)); S. REP. NO. 99-313 (1986) (citing Comm'r v. Idaho Power Co., 418 U.S. 1 (1974)), *as reprinted in* 1986 U.S.C.C.A.N. 4075.

[127] Pub. L. No. 88-272, 78 Stat. 19 (1964) (codified as amended in scattered sections of 26 U.S.C.).

[128] Pub. L. No. 91-172, 83 Stat. 487 (1969) (codified as amended in scattered sections of 26 U.S.C.).

[129] Pub. L. No. 97-34, 95 Stat. 172 (1981) (codified as amended in scattered sections of 26 U.S.C.).

[130] Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C.).

of 1974,[131] the Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as the Gramm-Rudman-Hollings Act),[132] and the Budget Enforcement Act of 1990 (also known as "PAYGO").[133] We hypothesize that for two years prior to the adoption of these reforms,[134] Supreme Court cases will gain increased notice and attention in Congress. Once the legislation is adopted, interest in the cases—and the number of citations to them in committee reports and hearings—will decrease.[135]

To test our hypotheses, we created two variables. The first is a dichotomous variable that accounts for years during which the major tax bills were under consideration—specifically, the years 1962–64, 1967–69, 1979–81, and 1984–86. The second variable accounts for the major budget bills and includes the years 1972–74, 1982–84, and 1988–2002. Because there is no data overlap between the tax and budget bills, we can assess the impact of tax versus budgetary lawmaking on the citation of Supreme Court cases. We expect generally

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131 Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended in scattered sections of 2 U.S.C.).

132 Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended in scattered sections of 2, 15, 26 & 42 U.S.C.).

133 Pub. L. No. 101-508, 104 Stat. 1388-573 (1990) (codified as amended in scattered sections of 2, 15, 31 & 42 U.S.C.).

134 We use a two-year window because it accounts for the two-year election cycles of the House of Representatives.

135 A possible exception to this decline in attention involves the Budget Enforcement Act of 1990. This law, extended through 2002, mandated revenue-neutral legislation: Legislators could pass new tax expenditures only if they were offset by revenue increases. *See* Budget Enforcement Act of 1990, Pub. L. No. 101-508, §§ 13001–13401, 104 Stat. 1388-573, 1388-573 to -628 (1990) (codified as amended in scattered sections of 2, 15, 31 & 42 U.S.C.) (enacting "pay-as-you-go" policy); Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 686 (2007) (describing PAYGO rules and noting their 2002 repeal). We believe Supreme Court cases will take on increased importance during this era because of their potential to affect the revenue implications of existing statutory enactments. For example, *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993), involved a newspaper's attempt to amortize the cost of customer lists. *Id.* at 550. The government argued against the amortization, noting that if the Justices allowed the taxpayer to prevail, the taxpayers would be able to reduce their taxable income by several millions of dollars when neither Congress nor the Treasury intended such a deduction. Brief of the United States, *supra* note 56, at 11. When the Court held for the taxpayer, an existing provision in the tax code immediately cost the government much more than anticipated by the budget analysts in Congress. Because of these fiscal implications, overriding the outcome would effectively implement a tax increase—thus making it feasible to adopt new expenditures while still abiding by the revenue-neutral mandate of the Budget Enforcement Act. Not surprisingly, various legislators argued for a reversal of *Newark Morning Ledger*. *See, e.g.*, 137 CONG. REC. 1917, 1917 (1991) (statement of Rep. Donnelly) (advocating overturning *Newark Morning Ledger*). Accordingly, we hypothesize that the Budget Enforcement Act of 1990 will lead to increased attention to Supreme Court decisions between 1988 and 2002 (time period from Congress's first consideration of legislation until legislation's expiration).

increased activity during all these years and less activity in the twenty-three years when no major legislation was under consideration.

In summary, the theories of legislative behavior discussed in this Part yield several primary hypotheses as to how various factors influence the legislative response to Supreme Court tax cases. We expect tax cases to get on the legislative agenda through the work of agenda entrepreneurs: tax and budget committee members in Congress, interest groups, journalists, and the Justices themselves. We also expect that economic crises and major legal reform will increase the probability that legislators will comment on Supreme Court tax cases. With regard to political differences between the Court and Congress, we expect that as the ideological distance between Congress and the Court increases, oversight will also increase. We conducted preliminary analyses of the data and found correlations between many of these factors and congressional oversight of the tax cases. Below, we assess the impact of these factors in fully specified statistical models, which examine three different features of oversight: its occurrence, frequency, and speed.

III
THE OCCURRENCE, FREQUENCY, AND TIMING OF CONGRESSIONAL OVERSIGHT

In this Part, we examine how the variables described above—agenda entrepreneurs, economic factors, political differences, and periods of legal reform—affect congressional oversight of Supreme Court tax cases. In Part III.A, we investigate the variables that trigger congressional oversight generally, and we seek to identify factors that impact the frequency of this oversight. In Part III.B, we explore the speed with which oversight takes place.

A. The General and Count Models

As noted above, Congress commented on 54% of all the tax cases decided by the Supreme Court between 1954 and 2004.[136] We first seek to understand why legislators comment on certain cases but leave others undisturbed in the legislative process.[137] Next, we explain why some cases generate only a single comment in Congress, while others

[136] *See supra* Table 1.

[137] The dependent variable (i.e., the action that we seek to explain) is the occurrence of congressional oversight; we coded cases receiving oversight as 1 and cases that Congress did not address as 0. Because we have a dichotomous dependent variable, we use a logit model for testing the relationship between our explanatory variables and oversight of Supreme Court cases. For a useful discussion of logit models, see J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 34–113 (1997).

lead to extensive debate and controversy over the course of several decades.[138] We use two different models to investigate the occurrence and frequency of legislative monitoring. Our explanatory variables are the same in both models, and all focus on the role of agenda entrepreneurs, specifically lobbyists, journalists, and the Justices. For now, we must ignore the agenda entrepreneurs in Congress (the tax and budget committee members) because, in examining the factors that impact the legislative decision to respond to or to ignore a Court case, the independent variable must be present both when Congress responds and when it does not.[139] We also set aside the variables associated with economic crises, political ideology, and legal reform—all of which we pick up in the next Section using a model that allows us to investigate these time-varying factors.[140]

Our findings for both the general oversight and the frequency of oversight are presented in Table 2 and highlight the role of lobbyists and the Justices as agenda-setters in the legislative process. Our findings indicate that lobbyists and Justices signal emerging legal issues to legislators and that legislators are attentive to both groups. Specifically, our general model demonstrates that when the Justices invite oversight of their own decisions, legislators are much more likely to comment on those cases. Our count model, which allows us to investigate why certain cases are subject to repeated oversight, also highlights the important role of the Justices. We find a statistically significant and positive relationship between judicial invitations and congressional activity with respect to both the occurrence and the frequency of oversight. Lobbying activities are also associated with over-

[138] Cases such as *Commissioner v. Lo Bue*, 351 U.S. 243 (1956), and *Cheek v. United States*, 498 U.S. 192 (1991), for example, sparked just one comment. In contrast, *Bob Jones University v. United States*, 461 U.S. 574 (1983), a case that permitted the Internal Revenue Service to deny charitable status to educational institutions with racially biased policies, *id.* at 605, led to fifty-seven legislative responses, and *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), which upheld a law denying charitable status to lobbying organizations, *id.* at 550–51, generated more than forty mentions in the legislative history. The extent of the commentary, of course, does not necessarily lead to subsequent congressional action. *See supra* notes 72–83 and accompanying text (giving example of case with extensive commentary which did not lead to codification or override legislation).

To explain the difference in oversight activity, we use a negative binomial regression model. We chose this model over the Poisson model due to over-dispersion of the data. See LONG, *supra* note 137, at 217–49, for a useful discussion of various count models and for an explanation of the statistical advantages of the negative binomial regression model. The dependent variable in this model is the number of congressional responses to each individual case. This variable is discrete and ranges from 0 to 57 congressional references.

[139] *See supra* note 58 (explaining this limitation). We examine the role of the legislators in Part IV.B, *infra*.

[140] *See infra* Part III.B.

sight at statistically significant levels, but only in the count model measuring the number of responses to individual cases.

Our models show that neither media coverage nor the judicial vote significantly affects the occurrence or frequency of oversight. With respect to the media, we interpret this finding as suggesting that journalists do not make an issue salient in legislative debates; put differently, journalists and members of Congress seem to have different notions of what makes an issue important in the taxation context. The unanimity of a decision does not impact oversight in this model, but it does play a role in the *type* of oversight that Congress exercises. We discuss this finding in more detail in other models below.[141]

TABLE 2: CONGRESSIONAL REVIEW OF SUPREME COURT CASES.
Statistical significance at the .01 level is marked with an asterisk and robust standard errors are in parentheses.

EXPLANATORY VARIABLES	GENERAL (LOGIT) MODEL FINDINGS	COUNT MODEL FINDINGS
Lobbyists	.404 (.267)	.665* (.211)
Journalists	.313 (.265)	.353 (.207)
Justices: Invitation for Review	1.740* (.557)	.994* (.308)
Justices: Unanimous Decision	.106 (.259)	.181 (.217)
Constant	–.403 (.223)	.305 (.116)
Alpha	——	2.445* (.298)

Table 2 presents raw coefficients and robust standard errors and shows important correlations, but these statistics may not by themselves convey the substantive impact of each variable on the oversight process. Accordingly, we translate this information into probabilities to provide greater detail on the effect of the agenda-setters on congressional activities.[142] We saw that, on average, each case has a 54%

[141] *See infra* Part IV.B.

[142] To estimate these probabilities we rely on the software Clarify. We determined the average probability of oversight by setting all the variables to their means. *See* Michael Tomz, Jason Wittenberg & Gary King, Clarify: Software for Interpreting and Presenting Statistical Results 6 (June 1, 2001), http://gking.harvard.edu/clarify/clarify.pdf *(*"[Clarify] allows researchers to calculate virtually any quantity that would shed light on a particular problem, and provides a number of Stata procedures to do this easily."). *See generally* Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000) (describing uses and benefits of Clarify software).

chance of being subject to some kind of congressional oversight.[143] If the Justices write an opinion that invites legislative review of the case, the probability of oversight increases to 83%—an increase in the probability of legislative activity of nearly 30%! We interpret this statistic as showing that inter-branch dialogue is both possible and effective in the context of national economic issues. If all the agenda entrepreneurs get involved (i.e., lobbyists, journalists, and the Justices) and the decision is unanimous,[144] the probability of oversight increases to 88%, suggesting that it is the Justices who have the greatest impact on the legislators' decisions to respond.

With regard to the frequency of oversight, our data indicate—as we would expect—that legislators are far more likely to comment only once on a case than they are to comment fifty or more times over the course of the oversight process. If the legislators do comment, the probability of a single comment is 15%; the probability of ten or more comments is 5%; the probability of thirty or more comments is 0.06%; and the likelihood of a case receiving fifty comments in Congress is 0.001%. The maximum number of comments in our data set is 57 citations and the average is 3.1.

The count model presented in Table 2 explores the frequency of oversight and indicates that the rate of congressional commentary increases when private actors get involved and when the Justices issue invitations for review of the Court opinion; their impact, however, is not constant. When we examine the substantive impact of these players, we find that lobbyists and Justices have a greater impact on legislative oversight as the frequency of oversight increases. In other words, the probability that legislators would comment one time is 15% and this likelihood does not appreciably increase when private groups lobby or the Justices request oversight. However, lobbyists and the Justices appear to have more of an impact when the level of oversight is already intense. For example, the probability that legislators will comment ten or more times on a case is 5%, but if lobbyists and Justices get involved, the likelihood of oversight increases to 28%; similarly, Justices and lobbyists coan increase the likelihood of 30 or more comments from 0.06% to 5%. These numbers are statistically significant, but we expect that more is going on in the process than we can identify in our quantitative analyses when it comes to the number of times that legislators refer to a case.

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143 *See supra* Table 1.

144 While the journalists and the judicial vote count do not have a statistically significant impact on legislative activity, it is nonetheless useful to examine the total effects of all the variables, given that they all increase oversight.

Accordingly, we conducted a qualitative analysis of the oversight process and found that many of the cases subjected to intense oversight were also the subject of codification and override proposals and not merely commentary for purposes of position-taking or understanding the Court's approach to statutory interpretation. This suggests that the frequency of commentary is linked to the specific outcome of the case and to statutory reform down the road.[145] We offer additional qualitative analysis of the substance of the oversight and comment further on legislative enactments in Part IV.

B. The Duration Model

We now turn from examining the variables that influence the occurrence and frequency of oversight to those that affect the length of time between when the Court announces its decision and when congressional oversight takes place. This duration period is often very short: If legislators respond to a case at all, they tend to do so fairly quickly after the Justices render their decision. In fact, our data indicate that legislators typically respond to the Supreme Court within five years of the Court's decision.[146] Some cases, however, are left undisturbed for thirty years and then, for reasons not fully explored in the extant literature, surface on the legislative agenda.[147] In this Section, we seek to understand and explain why legislators take notice of certain Supreme Court tax cases soon after the Justices render the decision, while others are ignored for decades.

To explore this question, we use a duration model, which enables us to investigate factors that influence the length of time that a case lies without being commented upon by legislators.[148] The variable we

[145] To investigate this finding further, we created a model that has a dichotomous dependent variable (coded as 1 if Congress adopted legal reform in response to the Supreme Court case, and 0 if no reform was associated with the response) and an explanatory variable equal to the number of reviews each case received in the oversight process. We estimated this simple bivariate logit model and found that as the legislative references to a case increased, the likelihood of a legislative enactment also increased at statistically significant levels. As far as substantive impact, on average a case that is commented upon in Congress has a 16% chance of being overridden, modified, or codified, but when the frequency of oversight is at the maximum, the probability increases to 91%. To estimate these probabilities we again used the Clarify software.

[146] *See* Eskridge, *supra* note 2, at 345 (finding that two-thirds of overrides occur within five years of Supreme Court's decision).

[147] Recently, Hettinger and Zorn examined the duration period between a Supreme Court decision and congressional responses, but they limited their analysis to override activity. Hettinger & Zorn, *supra* note 9, at 9. We discuss how our findings differ in the text accompanying notes 159–60, *infra*.

[148] *See* Judith D. Singer & John B. Willet, *It's About Time: Using Discrete-Time Survival Analysis To Study Duration and the Timing of Events*, 18 J. EDUC. STAT. 155, 155–57 (1993) (describing how discrete-time survival analysis provides useful framework for stud-

seek to explain is the speed of oversight,[149] and our explanatory variables include agenda-setters (lobbyists, journalists, and the Justices) as well as the economic, political, and legal factors discussed in Part II. We generated three different models corresponding to three distinct political measures: (1) the ideological distance between each congressional chamber and the Court, (2) the distance between each majority party of each congressional chamber and the Court, and (3) the distance between the tax-writing committees in each chamber and the Court.[150]

Table 3 below presents our findings with regard to the independent variables discussed above. Because we are interested in the timing of oversight, we included fifty-one time-period indicators in the model, but we exclude these variables for purposes of presentation.[151] Our models produce interesting and robust results. In all contexts, we find that Congress speeds up its response to Supreme Court tax cases when lobbyists are involved and when the Justices invite a response. These findings are consistent with the general and count models we explored above and confirm our theory that lobbyists and Justices play an important and powerful role in setting the congressional agenda. On average, a case has a 3% chance of being noticed and commented upon by Congress in the year the decision is rendered, but if lobbyists and judicial invitations are present, this probability increases to 9%.[152] Despite the strong impact of judicial invitations for review, we did not find any significant relationship between unanimity on the Court and legislative review. This result, though con-

ying event occurrence over time). Following Singer and Willet, we replicated each observation (i.e., each case) in our database until the point at which Congress commented upon the case. Accordingly, cases that were subject to oversight within a year of the decision show up in the data set just once, but cases that lie thirty years before oversight took place show up thirty times. By using this method, we can account for time-varying factors such as politics, economic factors, and legal reform.

149 To measure the speed of oversight, we use fifty-one "period-dummies," which allow us to assess the probability of a congressional response in each year after the Court decides the case. Each period-dummy represents a year in which a case could be reviewed. Thus a Supreme Court case decided in the first year of our study had a total of fifty-one different periods in which it could be subject to oversight. Cases decided later were subject to oversight in a smaller number of periods—a case decided in 1995, for example, has only ten different periods in which it was subject to oversight. The model has fifty-one periods for the fifty-one years in our study, 1954–2004.

150 See *supra* notes 112–22 and accompanying text for discussion of the three political models.

151 The time periods—as represented by period-dummies, *see supra* note 149—did not achieve statistical significance in any of our models, indicating that there was no time period in which Congress was particularly likely to act on a Supreme Court case.

152 We used the Clarify software to determine probabilities.

trary to our hypotheses, is consistent with our earlier findings in the general and count models.[153]

Our findings do not reveal a significant association between media coverage and congressional activity. This suggests that journalists are not setting the congressional agenda as we hypothesized they would. Although we find this result somewhat surprising given the media's ability to affect constituent-voter views and legislators' attention to these views,[154] it does suggest that journalists' impact (if any) does not directly affect the events that transpire on the legislative floor, in hearings and debates, and so forth. Moreover, our findings are completely consistent with the views of scholars such as Kingdon, who has questioned the media's ability to set the legislative agenda.[155]

With regard to the economic factors, our model yielded strong and interesting empirical results. We assessed the effect of unemployment, inflation, deficit as a percentage of the GDP, and the rate of GDP growth (all standardized to fiscal year 2000 values). Two indicators of national economic well-being—the level of the federal deficit and the rate of GDP growth—are both highly correlated with legislative oversight. Our models indicate that high levels of deficit spending[156] and low GDP growth rates increase the likelihood that legislators will oversee Supreme Court decisionmaking in the tax context. In fact, when the deficit is at the highest and GDP growth is at the lowest within the range of values realized in our sample, the probability that Congress will comment on a case within a year of the decision's publication is 50%—a notable increase from the average of 3%. Although high deficits and a low GDP growth rate (both possible indicators of a weak economy) speed up oversight, we found that high inflation does not correlate with congressional activity and that high unemployment rates actually decrease legislative attention to judicial opinions. Given that high levels of deficit spending tend to decrease unemployment rates, however, we are not surprised that our data indicate that the two variables move in the same direction. Our findings are robust across all the models and are virtually identical whether we include one-year, three-year, or five-year time lags and

153 *See supra* Table 2.

154 *See supra* note 69 and accompanying text (citing to sources discussing media's influence on Congress).

155 *See* KINGDON, *supra* note 47, at 57–61 (discussing influence of media and noting that their impact is "less-than-anticipated").

156 The "Deficit to GDP Ratio" variable was coded as the deficit level in real numbers divided by the GDP in real numbers. Since the deficit is a negative number while the GDP is positive, this independent variable is always negative, and so an increase in the variable indicates decreasing deficits.

irrespective of whether the taxpayer wins or loses in the Supreme Court.

The political and ideological differences between Congress and the Court did not have the relationship we expected. We hypothesized that as the ideological difference between the Court and Congress grew wider, oversight would increase. We compared the Court's ideology to the median ideology in the House and Senate, the median of the majority party in each chamber, and the median of the tax-writing committees in each chamber, and did not find that political differences had much explanatory power. In fact, we found no correlation between House-Court ideological differences and the speed of oversight. The correlations we found in the Senate suggested that as senators became more closely aligned to the Court, they were more likely to exercise oversight—a result contrary to our hypotheses. Although the relationship between the Senate and the Court may suggest that legislators respond to politically friendly Justices—as some scholars have argued[157]—we hesitate to give much weight to this finding. First, our results are not robust across all three models, and second, our political measures may not successfully capture the views of the individuals who comment on the cases.[158]

Finally, we find that legal reform has no impact on legislative activity. We expected that legislators would comment more readily on tax cases when tax reform was on the agenda or when they were constrained by strict budgetary rules but found no such correlation. This suggests that legal reform and legal rules do not independently motivate congressional review of Court decisions. Rather, the economy, lobbyists, and the Justices themselves spark legislative interest in the Supreme Court tax cases.

When present together, the significant factors—judicial invitations, lobbyists, and economic indicators—can have a dramatic effect on the speed of legislative oversight. On average, the likelihood of a congressional response to a case in the first year after decision is 3%. But if lobbyists are involved, the Justices issue an invitation for over-

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157 Spiller & Tiller, *supra* note 96, at 503–05 (suggesting that Justices, in some circumstances, may take advantage of politically aligned Congress by inviting legislative overrides).

158 Our political variables capture the ideological position of the median member in each chamber, chamber majority party, or committee, not the ideology of the legislator making comments. This means the distance measure, while capturing the political relationship between Congress and the Court generally, may not be an accurate description of the distance between the political views of the individual legislators making comments on the floor and the Supreme Court. For example, the House as a whole may be very conservative, but if the member making the comment is left-leaning, our measures will not accurately depict the circumstances in which the Court-Congress dialogue takes place.

TABLE 3: SPEED OF CONGRESSIONAL REVIEW OF SUPREME COURT TAX CASES.
Statistical significance at the .01 level is indicated with an asterisk and robust standard errors are found in parentheses.

EXPLANATORY VARIABLES	DURATION MODEL FINDINGS		
	Chamber Politics	Majority Party Politics	Tax Committee Politics
AGENDA ENTREPRENEURS			
Lobbyists	.513* (.205)	.494* (.206)	.516* (.204)
Journalists	.182 (.191)	.230 (.194)	.146 (.190)
Justices: Invitation for Review	.837* (.281)	.798* (.295)	.797* (.272)
Justices: Unanimous Decision	.023 (.198)	.003 (.198)	.025 (.199)
ECONOMIC ENVIRONMENT			
Unemployment	–.582* (.066)	–.569* (.069)	–.603* (.071)
Inflation	–.487 (4.925)	–1.182 (5.261)	–2.121 (5.315)
Deficit to GDP Ratio	–.373* (.062)	–.350* (.065)	–.397* (.067)
GDP Growth	–18.811* (3.457)	–18.587* (3.538)	–17.343* (3.699)
INTER-BRANCH POLITICS			
House-Court Politics	.193 (1.368)	——	——
Senate-Court Politics	–4.267* (1.611)	——	——
House Majority–Court Politics	——	–1.439 (1.123)	——
Senate Majority–Court Politics	——	.176 (1.181)	——
House Ways & Means Committee–Court Politics	——	——	.464 (1.204)
Senate Finance Committee–Court Politics	——	——	–4.410* (1.279)
LEGAL REFORM			
Tax Reform on Agenda	.428 (.340)	.384 (.342)	.393 (.356)
Budget Constraints Exist	–.214 (.271)	–.249 (.273)	–.280 (.293)
Time-Period Controls	——	——	——

sight, the deficit is at its highest, and GDP growth is at its lowest, there is an 85% probability that the legislators will act on the case immediately. These four factors thus produce a twenty-seven-fold increase in the likelihood of legislative oversight.

Our findings are both similar to and different from the existing studies in the literature. Regarding judicial invitations for review and lobbying activity, our findings are consistent with an emerging con-

sensus that lobbyists and judicial invitations play an important role in the oversight process.[159] The extant literature focuses on legislative overrides, however, so our results are broader in the sense that they apply to a wider range of legislative activity. Existing studies also suggest that unanimous decisions will *decrease* the likelihood that Congress will react,[160] but our study shows no such correlation. A possible explanation for this difference is that unanimous decisions are positively correlated with legislative codifications of Supreme Court decisions but negatively associated with overrides. No prior study of which we are aware has explored the significance of economic and legal-reform variables on congressional responses to Court decisions, so a comparison is impossible. With regard to the political variables, the empirical literature is mixed on the importance of ideology and legislative oversight,[161] and our study confirms the findings that suggest no such correlation exists.

To offer further analysis and comparison, we now turn to the substance of the oversight that occurs and the types of reform that legislators adopt in response to Supreme Court cases.

IV
THE SUBSTANCE AND DIRECTION OF CONGRESSIONAL OVERSIGHT

In this Part, we turn from the factors that lead Congress to discuss Supreme Court cases to the actual substance of the oversight when it occurs. As noted above, Congress responded to 54% of Supreme Court tax cases decided during the years 1954–2004. The majority of the responses (67%) were positive, negative, or mixed in nature, and the remaining 33% were neither particularly critical nor particularly favorable toward the Court's outcome.[162] In the qualitative analysis below, we note that when legislators reveal preferences with regard to

[159] *See* Eskridge, *supra* note 2, at 359–63, 388–89 (arguing that lobbyists and judicial invitations play key roles in legislative oversight); Hettinger & Zorn, *supra* note 9, at 21–22 (finding that interest groups, as measured by amici, have "a large positive influence on the probability of an override"); Ignagni et al., *supra* note 24, at 474 tbl.1, 478 (finding judicial invitations for review increase likelihood of congressional response).

[160] *E.g.*, Hettinger & Zorn, *supra* note 9, at 14, 22 (finding that Congress is less likely to override unanimous decisions). *But see id.* at 14 (listing studies that have reached opposite conclusions as to whether unanimous decision have such effect).

[161] *See* Hettinger & Zorn, *supra* note 9, at 7–9 (noting that, although much of theoretical literature predicts political factors will play key role in legislative oversight process, existing empirical studies have not produced robust findings).

[162] Our analysis in this Section differs from that in Table 1 in two aspects that should be noted. First, for the purposes of Table 1, we counted Supreme Court decisions that joined two separate cases as distinct tax cases. This enabled us to observe congressional responses to different taxpayers even though the Justices joined the claims when issuing a decision.

a specific case, they tend to include proposals to codify, override, or modify the outcome—roughly one-half of which lead to substantive legal reform down the road. Impartial responses, by contrast, generally do not include legislative initiatives but rather summarize and report on the Court's decision and its impact on the tax code. After exploring the cases subject to different legislative responses, we next conduct a quantitative analysis of the factors that are correlated with each type of response.

A. A Qualitative Analysis of Four Categories of Oversight

1. Negative Responses and Overrides

The current literature investigating legislative oversight of Supreme Court cases focuses mainly on legislative activity that is unfavorable to Supreme Court decisionmaking.[163] In our data set, Congress responded in a negative manner to 26% (38/148)[164] of the cases; 90% of these negative responses included a proposal to override or substantially modify the outcome, and close to 50% of the proposals actually led to new legislation.

Sixteen cases led to an actual override or modification, including well-known cases such as *United States v. Grosso*,[165] *United States v. Davis*,[166] *Malat v. Riddell*,[167] *Commissioner v. Soliman*,[168] and *Gitlitz v. Commissioner*.[169] Eighteen cases led to override proposals that

In this Part, we do not count these cases separately, so the number of observations falls from 152 to 148.

Secondly, in Table 1 we characterized all congressional responses that were not negative in nature as "positive responses." In this context, we disaggregate neutral and positive responses for purposes of both qualitative and quantitative analysis.

163 *See supra* notes 17–21 and accompanying text.

164 Throughout this discussion, our numbers will differ from those presented in Table I, *supra.* This discrepancy is in part due to the fact that we analyze 148 cases in this Part rather than the 152 total cases discussed in Table 1, as we treat jointly decided cases as a single unit of analysis in this Section. Further, we perform the analysis at the case level in this Section as opposed to tallying the total number of responses: With respect to the number of override proposals, for example, because many cases were subject to multiple override proposals, we examine only 38 instances of such proposals rather than the 55 mentioned in Table 1, *supra*. *See also supra* note 162 (noting other aspects in which our analysis in this Section differs from that in Table 1).

165 390 U.S. 62 (1968).

166 397 U.S. 301 (1970).

167 383 U.S. 569 (1966).

168 506 U.S. 168 (1993).

169 531 U.S. 206 (2001). The additional cases subject to overriding legislation were: *Commissioner v. Lundy*, 516 U.S. 235 (1996); *United States v. American College of Physicians*, 475 U.S. 834 (1986); *Commissioner v. Engle*, 464 U.S. 206 (1984); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978); *Commissioner v. Standard Life & Accident Insurance Co.*, 433 U.S. 148 (1977); *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Haynes v. United States*, 390 U.S. 85 (1968); *Braunstein v. Commissioner*, 374 U.S. 65

died in committee or were excised from the legislation during conference proceedings.[170] In four cases that did not lead to an override proposal but were nonetheless criticized, the Court's decision addressed broad legal issues and problems. For example, the Senate Finance Committee cited *Berra v. United States*[171] to argue that the Supreme Court had contributed to confusion in criminal tax law by failing to create clear distinctions between felonies and misdemeanors;[172] Senator Laxalt pointed to *Colonnade Catering Corp. v. United States*[173] in raising concerns about the IRS and warrantless IRS inspections of documents;[174] and Senators Gorton and Domenici cited *United States v. Hemme*[175] and *United States v. Carlton*[176] when arguing the unfairness of retroactive taxation.[177] These four cases prompted exclusively negative responses—legislators who thought it worthwhile to address the Court's decisions were apparently united in the view that they were problematic.

To our surprise, our qualitative analysis did not produce case-related factors unique to Court opinions that received uniformly critical responses in Congress. The cases involved a range of different taxpayers (such as corporations, individuals, and estates),[178] both pro-

(1963); *Commissioner v. Lester*, 366 U.S. 299 (1961); *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960); and *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

170 Legislators proposed overrides that did not succeed in the following cases: *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002); *United Dominion Industries, Inc. v. United States*, 532 U.S. 822 (2001); *United States v. Brockamp*, 519 U.S. 347 (1997); *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991); *Colonial American Life Insurance Co. v. Commissioner*, 491 U.S. 244 (1989); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Diedrich v. Commissioner*, 457 U.S. 191 (1982); *Jewett v. Commissioner*, 455 U.S. 305 (1982); *Central Tablet Manufacturing Co. v. United States*, 417 U.S. 673 (1974); *Marchetti v. United States*, 390 U.S. 39 (1968); *Northeastern Pennsylvania National Bank & Trust Co. v. United States*, 387 U.S. 213 (1967); *United States v. Equitable Life Assurance Society*, 384 U.S. 323 (1966); *United States v. Catto*, 384 U.S. 102 (1966); *United States v. Pioneer American Insurance Co.*, 374 U.S. 84 (1963); *Lisbon Shops, Inc. v. Koehler*, 353 U.S. 382 (1957); *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957); *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955); and *United States v. Acri*, 348 U.S. 211 (1955).

171 351 U.S. 131 (1956).

172 S. REP. NO. 86-1910, at 20–21 (1960) (citing *Berra* in discussion of false and fraudulent claims for deductions).

173 397 U.S. 72 (1970).

174 132 CONG. REC. 13,836, 13,836 (1986) (statement of Sen. Laxalt).

175 476 U.S. 558 (1986).

176 512 U.S. 26 (1994).

177 139 CONG. REC. 19,751, 19,757 (1993) (statement of Sen. Gorton); 139 CONG. REC. 26,003, 26,003 (1993) (statement of Sen. Domenici).

178 Twelve of the thirty-eight cases (32%) involved the corporate income tax, fifteen cases (39%) involved the individual income tax, and the remaining eleven cases (29%) involved a variety of other code provisions, including the gift and estate tax, charitable organizations, and so forth.

government and pro-taxpayer outcomes,[179] and both unanimous and divided opinions.[180] Amici curiae participated in some but not all of the cases,[181] the Justices invited a congressional response in some cases but not most,[182] and the media reported on a little more than half of the cases.[183]

2. Positive Responses and Codifications

One of the least discussed features of congressional oversight involves legislators' inclination to respond positively to judicial decisionmaking. Twenty-two percent of the responses (33/148) were wholly favorable: 94% of these responses involved a legislative initiative to codify the case, and 51% of these proposals succeeded in Congress.[184]

At first cut, it might seem strange that Congress would spend time and energy implementing code provisions that mirror Supreme Court outcomes.[185] After all, the Court's precedent applies nationwide, so legislators need not cement a case outcome into statutory law to ensure that their constituents benefit from the ruling. In fact, we found that Congress rarely "rubber-stamps" Supreme Court decisions into statutory law; codification often occurs in the context of a larger reform effort. When Congress passed legislation governing lease transactions in 1983, for example, it referred positively to the outcome of *Frank Lyon Co. v. United States*,[186] a 1978 case which addressed

[179] Taxpayers prevailed in fifteen (39%) of the tax cases subject to a negative review.

[180] The Court issued a unanimous decision in twelve (32%) of the cases subject to negative review.

[181] Amici curiae filed briefs in fourteen (37%) of the cases subject to negative review.

[182] The Justices invited a congressional response to five (13%) of the cases.

[183] The media reported on twenty-three (61%) of the decisions subject to a negative review.

[184] For an explanation of why the numbers in this section differ slightly from those presented in Table 1, see *supra* note 164.

[185] From a normative perspective, scholars challenge congressional codification proposals as a waste of time. *See, e.g.*, Adam Harris Kurland, Tinkering with the Federal Rules of Evidence (Dec. 1, 2000), http://www.law.umich.edu/thayer/kurtink.htm (arguing that codification of Supreme Court decisions, at least in context of Federal Rules of Evidence, is "a wholly empty and unnecessary gesture"). Interest groups, however, often argue for codification in an effort to solidify an outcome. The Cato Institute, for example, recently argued for the codification of the Supreme Court's ruling in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), which holds that "employers have an undisputed right to hire permanent replacement workers for striking workers in economic strikes." CHARLES W. BAIRD, CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 108TH CONGRESS 345 (2003), *available at* http://www.cato.org/pubs/handbook/hb108/hb108-34.pdf.

[186] 435 U.S. 561 (1978).

such leasing transactions.[187] When members of Congress debated possible legislative remedies to the tax shelter problem in 2002, they referred again to *Frank Lyon* as well as to *Knetsch v. United States*[188] and other earlier cases helpful in closing tax loopholes.[189] In other circumstances, Congress sought to expand the Supreme Court outcome beyond the facts of the case.[190] Legislators, for example, sought to extend the results of *Harris v. Commissioner*, *United States v. Midland-Ross Corp.*, *United States v. Correll*, and *United States v. Goodyear Tire & Rubber Co.* to a number of other related scenarios that the Court had not addressed.[191] Finally, in situations in which Congress does codify a case in a "rubber-stamp" fashion, the legislative histories suggest that the Court opinion created some confusion on the issue in question.[192]

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[187] *See* STAFF OF J. COMM. ON TAXATION, 97TH CONG., ANALYSIS OF SAFE-HARBOR LEASING 6–7 (Comm. Print 1982) (describing state of law under *Lyons*).

[188] 364 U.S. 361 (1960).

[189] *See* STAFF OF J. COMM. ON TAXATION, 107TH CONG., BACKGROUND AND PRESENT LAW RELATING TO TAX SHELTERS 5, 8, 25–27 (Comm. Print 2002) (referring to several cases including *Frank Lyon*, 435 U.S. 561; Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134 (1974); Knetsch v. United States, 364 U.S. 361 (1960); Comm'r v. Hansen, 360 U.S. 446 (1959)).

[190] Cases that were expanded include: *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Fausner v. Commissioner*, 413 U.S. 838 (1973); *United States v. Chicago, Burlington & Quincy Railroad*, 412 U.S. 401 (1973); *Donaldson v. United States*, 400 U.S. 517 (1971); *Woodward v. Commissioner*, 397 U.S. 572 (1970); *United States v. Hilton Hotels Corp.*, 397 U.S. 580 (1970); *United States v. Correll*, 389 U.S. 299 (1967); *United States v. Midland-Ross Corp.*, 381 U.S. 54 (1965); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *United States v. Scovil*, 438 U.S. 218 (1955); *United States v. City of New Britain*, 347 U.S. 81 (1954); and *Harris v. Commissioner*, 340 U.S. 106 (1950).

[191] *See, e.g.*, H.R. REP. NO. 98-432, at 203 (1983) (discussing and expanding *Harris*); S. REP. NO. 97-144, at 166 (1981) (expanding *Midland-Ross*), *as reprinted in* 1981 U.S.C.C.A.N. 105, 264; H.R. REP. NO. 97-201, at 265–68 (1981) (expanding *Correll*); STAFF OF J. COMM. ON TAXATION, 103D CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY AND PROPOSED PROTOCOL BETWEEN THE UNITED STATES AND THE KINGDOM OF THE NETHERLANDS 92–93 (Comm. Print 1993) (discussing proposed treaty which would employ accounting principles of *Goodyear Tire & Rubber Co.*).

[192] Cases that allegedly caused confusion were: *Commissioner v. Schleier*, 515 U.S. 323 (1995); *United States v. Williams*, 514 U.S. 527 (1995); *Bufferd v. Commissioner*, 506 U.S. 523 (1993); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *Commissioner v. Lincoln Savings & Loan Ass'n*, 403 U.S. 345 (1971); *Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958); and *Commissioner v. Lo Bue*, 351 U.S. 243 (1956).

In two cases, *O'Gilvie v. United States*, 519 U.S. 79 (1996), and *Laing v. United States*, 423 U.S. 161 (1976), legislators had begun tax reform efforts in response to an appellate court decision, and when the Court decided the case in a way that aligned with legislative preferences the outcome was codified. Finally, not every positive response entailed a legislative initiative. In two cases, members of Congress referred to cases to signal that they believed the Justices got the law exactly right. *See* 132 CONG. REC. 13,836, 13,836 (1986)

Understanding the nature of the codification efforts, however, does not provide insight into the types of cases that Congress is likely to spend time and energy commending and codifying. Like our analysis of the cases that Congress disfavors, we found that the judicial decisions that receive wholly positive attention are a heterogeneous group: They involve a range of different taxpayers[193] and both pro-government and pro-taxpayer outcomes,[194] amici curiae are present in some but not all of the cases,[195] judicial invitations for a congressional response are neither notably few nor numerous,[196] and journalists reported on most but not all the cases.[197] One factor, however, stands out as unique in our qualitative analysis: the number of unanimous decisions subject to codification efforts. When we examine the data in the aggregate, it is clear that Congress gives far more attention to Supreme Court decisions with divided votes.[198] When we disaggregate the data, we again find that the legislators spend quite a bit more time focusing on divided decisions with one key exception—the cluster of cases subject to positive reinforcement. Legislators respond positively to slightly more than 50% (17/33) of the unanimously decided cases but are less likely to respond in all the other circumstances.[199] This suggests that unanimous decisions may operate as a signal to Congress—when a heterogeneous group of decisionmakers share a view on an important legal issue, legislators (also with diverse viewpoints) are likely to agree with that outcome. If the issue is salient, then we predict that unanimous decisions will garner increased and positive attention in Congress.

3. Mixed Responses and Combinations of Overrides and Codifications

Legislators, as might be expected, do not always express a unified view on Supreme Court cases. Nineteen percent (28/148) of the cases

(statement of Sen. Laxalt) (sanctioning result in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)); STAFF OF J. COMM. ON TAXATION, 101ST CONG., TAX RULES RELATING TO PUERTO RICO UNDER PRESENT LAW AND UNDER STATEHOOD, INDEPENDENCE, AND ENHANCED COMMONWEALTH STATUS 37–39 (Comm. Print 1989) (approving of result in United States v. Ptasynski, 462 U.S. 74 (1983)).

193 Fifteen of the thirty-three cases (45%) involved the corporate income tax, ten cases (30%) involved the individual income tax, and the remaining eight cases (24%) involved a variety of other provisions.

194 The taxpayer prevailed in eleven (33%) of the cases.

195 Amici curiae filed briefs in twelve of the cases (36%).

196 Justices invited congressional review in four (12%) of the cases.

197 The media covered twenty (61%) of the cases.

198 Congress responded to 148 cases, and in ninety-three of these cases the Justices reached a divided vote.

199 *See supra* note 180 and *infra* notes 207 & 228.

subject to oversight sparked both negative and positive responses in Congress; 93% of these comments included a legislative proposal to override or codify (or both) the Court's outcome, and 50% of the proposals led to actual legal reform.

Often the conflicting responses arose in a predictable fashion. Minority members of the Ways and Means Committee or the Senate Finance Committee, for example, would register formal opposition to a proposal to override or codify a case.[200] At times the sequence would be reversed: Favorable comments on a case would be followed by critical comments regarding the outcome. The House Ways and Means Committee, for example, commented approvingly on *Arkansas Best Corp. v. Commissioner*,[201] but these comments were shortly followed by Senator Dole's critical comments on the outcome.[202] More interesting are the cases that engender competing proposals in the House and the Senate. For example, *Dickman v. Commissioner*,[203] which involved the taxation of imputed income associated with intrafamily loans,[204] sparked both a House proposal to codify the outcome[205] and rival proposals in the Senate to override it.[206]

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[200] *See, e.g.*, EVERETT MCKINLEY DIRKSEN & GEORGE A. SMATHERS, STATUS OF TAXES AND TAX LIENS IN BANKRUPTCY PROCEEDINGS, S. REP. NO. 89-1159, at 22 (1966) (including Senate Finance Committee minority's objections to legislative proposal on grounds that it would "contradict the holding of the Supreme Court in *United States v. Speers*") (citing United States v. Speers, 382 U.S. 266 (1965)).

[201] H.R. REP. 100-795, at 569–70 (1988) (citing Ark. Best Corp. v. Comm'r, 485 U.S. 212 (1988)).

[202] 138 CONG. REC. 28,738, 28,738 (1992) (statement of Sen. Dole) (describing potentially "devastating" consequences for farmers if *Arkansas Best* is given broad reading). Legislators proposed codification after critical comments to several cases: *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *United States v. Lee*, 455 U.S. 252 (1982); and *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979).

[203] 465 U.S. 330 (1984).

[204] *See supra* notes 90–94 and accompanying text (discussing *Dickman*).

[205] H.R. REP. NO. 98-861, at 1011–12 (1984) (Conf. Rep.).

[206] *Gift Tax Relief Legislation: Hearing Before the Subcomm. on Estate and Gift Taxation and the Subcomm. on Taxation and Debt Mgt. of the S. Comm. on Finance*, 98th Cong. 10 (1984) (summarizing proposals to overrule or to limit *Dickman*). In other contexts, legislators would argue for one approach initially, and then later for a different approach. Several cases sparked this type of mixed response: *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993); *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79 (1992); *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974); *United States v. Byrum*, 408 U.S. 125 (1972); *Bingler v. Johnson*, 394 U.S. 741 (1969); *Commissioner v. Brown*, 380 U.S. 563 (1965); *United States v. Powell*, 379 U.S. 48 (1964); *Commarano v. United States*, 358 U.S. 498 (1959); and *Peurifoy v. Commissioner*, 358 U.S. 59 (1958). In other contexts, legislators argued that the case should be construed narrowly or broadly for purposes of later legislation, such as in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). Finally, legislators would at times simultaneously overrule some aspects of a case while codifying other aspects, such as in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), and *Commissioner v. Hansen*, 360 U.S. 446 (1959). Other cases that engendered mixed responses include: *Arkansas Best Corp. v. Commissioner*, 485 U.S.

A qualitative analysis of the cases that receive mixed responses suggests two notable differences between these cases and those that receive wholly positive or negative reactions. First, a majority of the Court cases subject to mixed responses were not unanimous,[207] suggesting that dissension in the Court may be useful for predicting dissent and discord in Congress. Second, a majority of the cases subject to conflicting views in Congress involved lobbyists.[208] This suggests that interested parties, after the Court has rendered a decision, next go to Congress and attempt to obtain a codification or override. If the issue is salient and conflicting views exist, numerous and competing comments and proposals will likely emerge in Congress. Our qualitative analysis does not suggest that the other variables—the identity of the taxpayer, the identity of the winning party, the number of judicial invitations for a congressional response, and the media coverage—are unique with respect to controversial cases.[209]

4. Impartial Responses and Neutral Legislative Enactments

The final category of responses is the collection of neutral or impartial reactions to the Supreme Court tax cases. At 33% (49/148) of all responses, this is the largest grouping and generally includes summaries of the law presented in hearings and reports. Only 18% of these responses included a legislative proposal,[210] and 33% of the proposals led to a statutory reform.

The fact that so few of the impartial responses involved legislative reform proposals immediately sets this category of congressional reactions apart from all the others discussed above. It suggests strongly that legislators undertake a constant review of the tax law as it emerges from the Court: These reactions are not for purposes of position-taking, but to understand the nature of the law itself. We expect this type of constant, objective oversight to be linked to the existence of the Joint Committee on Taxation, a committee comprised of both

212 (1988); *United States v. American Bar Endowment*, 477 U.S. 105 (1986); *Dickman v. Commissioner*, 465 U.S. 330 (1984); *United States v. Lee*, 455 U.S. 252 (1982); *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979); *United States v. Speers*, 382 U.S. 266 (1965); *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958); *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955); and *United States v. California Eastern Line, Inc.*, 348 U.S. 351 (1955).

207 Fifteen of the twenty-eight cases (54%) subject to a mixed review were decided by a divided vote of the Supreme Court.

208 Amici curiae filed briefs in fourteen (50%) of the cases subject to a mixed review.

209 Of the cases subject to a mixed response, our data indicate that ten cases (36%) involved the corporate income tax, and six cases (21%) involved the individual income tax; the Justices invited review of six cases (21%); and the media reported on ten cases (36%).

210 These were not override or codification initiatives, but were instead intended to address statutory provisions affected by the outcome.

House and Senate members. Congress created the Joint Committee on Taxation in 1926 and authorized it to "investigate" and "report" on the existing state of the tax law, but Congress did not allocate legislative drafting powers to the committee members.[211] The majority of the neutral comments on the Supreme Court cases emerged in reports issued by the Joint Tax Committee; indeed, 39% (292/742) of all the legislative responses in the database originated in the Joint Committee Reports. These facts suggest that the Joint Committee frequently reports to Congress on the state of the tax law as mandated by statute, discussing Supreme Court case law as part of the record.[212]

That the Joint Committee on Taxation is actively reporting on the state of the law does not mean that all the neutral responses come from this Committee. For example, Senator Strom Thurmond referred to, among others, *Holland v. United States*,[213] *Sansone v. United States*,[214] and *United States v. Bishop*[215] for purposes of defining "willfulness" in impeachment proceedings,[216] and legislators referred to *General American Investors v. Commissioner*,[217] *Commissioner v. Acker*,[218] and *James v. United States*[219] in order to under-

211 *See* Revenue Act of 1926, Pub. L. No. 69-20, § 1203, 44 Stat. 9, 127–28 (codified as amended at I.R.C. §§ 8001–8005, 8021–8023) (creating Joint Committee on Taxation and not including legislative drafting among its "duties"). For a discussion of the responsibilities of the Joint Committee on Taxation, see *supra* notes 52–53 and accompanying text.

212 For example, the Joint Committee reported on presidential budget proposals and cited cases such as *Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260 (1958), and *Commissioner v. Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960), noting that the proposals would not change these cases' outcomes. STAFF OF J. COMM. ON TAXATION, 105TH CONG., DESCRIPTION AND ANALYSIS OF CERTAIN REVENUE-RAISING PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 1998 BUDGET PROPOSAL 31 (Comm. Print 1997).

213 348 U.S. 121 (1954).

214 380 U.S. 343 (1965).

215 412 U.S. 346 (1973).

216 132 CONG. REC. 27,757, 27,757–58, 27,764 (1986) (statement of Sen. Thurmond). Legislators also made neutral comments on *Drye v. United States*, 528 U.S. 49 (1999); *United States v. Irvine*, 511 U.S. 224 (1994); *Freytag v. Commissioner*, 501 U.S. 868 (1991); *United States v. Centennial Savings Bank*, 499 U.S. 573 (1991); *United States v. Stuart*, 489 U.S. 353 (1989); *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9 (1987); *Commissioner v. Asphalt Products Co.*, 482 U.S. 117 (1987); *Commissioner v. Groetzinger*, 480 U.S. 23 (1987); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984); *Commissioner v. Tufts*, 461 U.S. 300 (1983); *United States v. Rodgers*, 461 U.S. 677 (1983); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979); *Massachusetts v. United States*, 435 U.S. 444 (1978); *United States v. Consumer Life Insurance Co.*, 430 U.S. 725 (1977); *Commissioner v. First Security Bank of Utah*, 405 U.S. 394 (1972); *United States v. Mitchell*, 403 U.S. 190 (1971); *Leary v. United States*, 395 U.S. 6 (1969); *Commissioner v. Gordon*, 391 U.S. 83 (1968); *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967); *Reisman v. Caplin*, 375 U.S. 440 (1964); *Aquilino v. United States*, 363 U.S. 509 (1960); and *Commissioner v. Stern*, 357 U.S. 39 (1958).

217 348 U.S. 434 (1955).

218 361 U.S. 87 (1959).

219 366 U.S. 213 (1961).

stand the Court's approach to statutory interpretation when drafting legislation in tax and nontax contexts.[220] Lastly, a small portion of the impartial responses emerged from legislators proposing a modification of the law in a manner that did not suggest Congress was either particularly critical or particularly approving of the Court's decision. For example, Congress cited cases such as *Haynes v. United States*[221] and *United States v. Bisceglia*[222] when advocating a change in the law to avoid confusion on an issue different but related to that decided by the Justices,[223] and it cited *United States v. Dalm*[224] when advocating a change in the law to address an issue the Justices left undecided.[225] In response to *United States v. United States Shoe Corp.*,[226] Congress reformed the law in a manner that followed the Justices' instructions found in the opinion and so assured that a customs tax satisfied constitutional mandates.[227]

With regard to judicial invitations to override, divided opinions, and media attention, the impartial responses do not stand out in any unique way.[228] The main distinction our qualitative analysis yields is that very few legislative proposals are linked to the impartial comments, which suggests that the comments are driven by the Joint Committee's mandate to issue periodic reports and summaries on the state

220 STAFF OF J. COMM. ON TAXATION, 104TH CONG., BACKGROUND AND ISSUES RELATING TO TAXATION OF U.S. CITIZENS WHO RELINQUISH CITIZENSHIP 22–23 (Comm. Print 1995) (citing *Gen. Am. Inv. Co.* and *James*); 138 CONG. REC. 6133, 6137 (1992) (statement of Sen. Pressler) (quoting Letter from American Law Division to Sen. Larry Pressler (Mar. 10, 1992)) (citing *Acker* to understand Court's approach to statutory construction). The following cases also sparked comments involving statutory interpretation: *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Commissioner v. Clark*, 489 U.S. 726 (1989); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979); *Slodov v. United States*, 436 U.S. 238 (1978); *Ivan Allen Co. v. United States*, 422 U.S. 617 (1975); *Gurley v. Rhoden*, 421 U.S. 200 (1975); and *American Automobile Ass'n v. United States*, 367 U.S. 687 (1961).

221 390 U.S. 85 (1968).

222 420 U.S. 141 (1975).

223 S. REP. NO. 94-938, at 368 (1976) (citing *Bisceglia*); S. REP. NO. 90-1501, at 52 (1968) (discussing proposed § 5861 and noting that statutory language was intended to reconcile with *Haynes*).

224 494 U.S. 596 (1990).

225 145 CONG. REC. 19,707, 19,707 (1999) (noting that House Bill resolves issue that Justices left undecided in *Dalm*).

226 523 U.S. 360 (1998).

227 *See* STAFF OF J. COMM. ON TAXATION, 108TH CONG., DESCRIPTION OF "HIGHWAY REAUTHORIZATION AND EXCISE TAX SIMPLIFICATION ACT OF 2004" (Comm. Print 2004) (discussing *U.S. Shoe Corp.* and legislative response).

228 The Justices invited congressional review in 9 of the 49 cases (18%); they rendered a unanimous decision in 21 (43%) of the cases; the media covered 28 (57%) of the decisions that sparked a neutral response in Congress; 15 (31%) were corporate cases and 21 (43%) were individual tax cases.

of the law—and not by a desire to initiate policy change or gain favor with constituents through position-taking.

B. A Quantitative Analysis of the Substance of Congressional Responses

Our qualitative analysis suggested a number of interesting correlations, but to test whether these relationships are statistically significant, we conduct a quantitative analysis of our data set. In this Section, we use two models to investigate the impact of the various factors on the probability of a negative, positive, mixed, or impartial response to a Supreme Court tax case. Our models grow out of our qualitative analysis of the cases presented in the previous Section.

To investigate the factors that impact the substance of oversight and legislative reform initiatives, we use the explanatory variables discussed in Part II: the agenda entrepreneurs (tax and budget committee members, lobbyists, journalists, and the Justices), economic variables, and political factors. Because we are trying to explain the substance of the oversight, our dependent variable is the category of oversight and legal reform—that is, whether the response is positive, negative, mixed, or neutral. This type of statistical analysis requires a more complicated model than the three models we presented in Part III.[229] Due to this complexity, we present the raw coefficients and robust standard errors only in footnotes and set forth only the probabilities that we generated from our statistical models in the text.[230]

The next Section investigates the factors that explain the four different congressional responses generally. In Part IV.B.2, we turn to the variables that correlate with Congress's decision to enact a new law either codifying or overriding the Supreme Court decision. To aid our discussion, we highlight in the tables below notable features of our findings that have a significant impact on congressional activity. For

[229] Because our dependent variable is discrete and has four different values (the four different categories of oversight), we used a multinomial logit model. For a useful discussion of this type of model, see LONG, *supra* note 137, at 148–86. A formal presentation of our findings would have involved the coefficients and robust standard errors for three of our categories, using a fourth category as the baseline or comparison group. *Id.* at 149. Accordingly, even our relatively simple model would force us to present 3 different dependent variables, and 27 different independent variables. If we wanted to present every possible comparison, we would need to estimate the model four different times, leading to 12 dependent variables and 108 independent variables—an incomprehensible amount of data. *See id.* at 149 (noting that "the sheer number of comparisons can be overwhelming" in multinomial logit models).

[230] *See id.* at 164–68 (suggesting that empiricists present results of multinomial logit models as probabilities for easier interpretation). We use the software Clarify to estimate our probabilities.

purposes of understanding our discussion and findings, it is important to recognize that we seek to understand the factors that explain the different *types* of congressional responses and thus examine only cases to which Congress actually responded. In Section III above, we sought to explain the factors that influence congressional inclination to respond—in any fashion—to the case. Thus certain case factors, such as the judicial vote (unanimous or divided), might be relevant for understanding *how* Congress responds but not relevant for understanding *if* Congress responds. In short, our findings in this Section address questions very different from those examined above, and dissimilar findings should not be viewed as inconsistent with those we presented in Section III for this reason.

1. Explaining Four Different Types of Congressional Responses Generally

Table 4 presents our findings with respect to the four categories of congressional responses. We present our results in the form of probabilities calculated from the raw coefficients;[231] this means that

[231] The raw coefficients that generated the probabilities are presented in Table 4A below. In reading the table, it is important to understand that the findings depend on the specification of the model and, in particular, the baseline group used for comparison. We adopted the conventional approach of using the largest group as the baseline outcome (here, the group of neutral responses), but if we had chosen any other group we would have achieved statistical significance not represented here. For example, using positive responses for the baseline group from which to compare all other groups, we find that lobbyists and journalists have a strong and statistically significant impact on the probability that Congress will respond in a mixed fashion to the Supreme Court cases.

TABLE 4A: TYPES OF CONGRESSIONAL RESPONSES TO SUPREME COURT CASES. Statistical significance at .05 level marked with an asterisk and standard errors are found in parentheses. Baseline for comparison purposes: neutral response.

EXPLANATORY VARIABLE	MULTINOMIAL LOGIT MODEL: DIFFERENT TYPES OF LEGISLATIVE RESPONSES		
	Negative Response	Positive Response	Mixed Response
Lobbyists	–.787 (.493)	–.825 (.510)	1.1272 (.654)
Journalists	.481 (503)	.556 (.521)	–1.285 (.641)
Justices: Invitation for Review	–.566 (.647)	–.513 (.680)	.623 (.705)
Justices: Unanimous Decision	–.451 (.474)	.452 (.474)	–.483 (.609)
Joint Committee on Taxation	–1.172* (.469)	–.976* (.498)	–1.232 (.661)
Constant	.447 (.464)	–.158 (.500)	–651 (.619)

the tables below depict how each variable affects the likelihood of congressional oversight that emerges in the negative, positive, mixed, or neutral form. The table rows show the type of response generated by the Supreme Court opinion, and the columns indicate the particular variable of interest under study. To establish a baseline for comparison purposes, we first present the average level of oversight in each category. To calculate these probabilities, we set all the variables to their mean values. These baseline numbers are depicted in column two and show that, under average conditions, we can expect negative comments 28% of the time, positive comments 24% of the time, a mixed collection of comments 11% of the time, and neutral comments with respect to 37% of the cases. The individual cells in the table indicate how the various factors alter this baseline. A negative probability indicates that a variable decreases the likelihood of a particular type of congressional response, while a positive probability indicates an increased likelihood.

Our results on the impact of the various agenda entrepreneurs—including the Joint Committee on Taxation members, lobbyists, journalists, and the Justices themselves—reveal that each of these groups has a unique impact on legislative oversight. As column 3 indicates, neutral responses are highly correlated with the activities of the Joint Committee: Its involvement increases the likelihood of neutral commentary by 17%. This finding confirms that the Committee faithfully undertakes its statutory obligation to report regularly to Congress on the state of the tax law.

Column 4 indicates that lobbyists decrease the likelihood of a solely negative or positive response but *increase* the probability that a case will receive mixed and conflicting comments in congressional debates and hearings. This finding suggests that interested actors—both those that support and those that oppose the Court's decision—attempt to convince legislators to codify the case or to override it. The extant literature has long suggested that lobbying activities are correlated with negative congressional activity,[232] but our study indicates that lobbyists can also spark a *positive* response to Supreme Court cases. This finding fits with a more general theory of lobbying found in the social science literature: When one party goes to Con-

[232] *See, e.g.*, Eskridge, *supra* note 2, at 359–63, 388–89 (arguing that lobbyists and judicial invitations play key roles in legislative overrides); Hettinger & Zorn, *supra* note 9, at 21–22 (finding that interest groups, as measured by amici, have "a large positive influence on the probability of an override").

gress to advocate a particular outcome, an opposing party is likely to show up in order to advocate the opposite position.[233]

With respect to the role of journalists, column 5 indicates that media coverage is negatively correlated with neutral commentary but has a slightly positive effect on the likelihood of purely positive or negative oversight. This suggests that the Joint Committee is not driven by media concerns and primarily focuses on its substantive goal of offering comprehensive reports and summaries on the various cases to Congress.

We now turn to the activities of the Justices themselves. As depicted in column 6, judicial invitations have a surprising impact on the nature of the oversight. The invitations decrease the likelihood of unidirectional oversight but increase the likelihood of mixed and neutral responses. Like lobbying activities, the judicial invitations spark responses by legislators; these responses are not unidirectional (wholly positive or negative) but come from both sides of the aisle as both legislators who support *and* legislators who oppose the Court's decision speak out on the legal issues. Interestingly, the Court garners the attention of the Joint Committee on Taxation and its work on summarizing the law. Apparently when the Justices ask for review, members of Congress respond with a wide range of commentary. This confirms our findings above indicating that when the Justices speak directly to Congress, Congress listens.

One of the most intriguing findings of this part of our study is the role of unanimous decisions in sparking solely positive feedback. Unanimous decisions increase the likelihood of positive and neutral responses but decrease the likelihood of all other types of responses. This finding suggests that when the Court is able to reach a consensus, legislators take notice and tend to agree with the Court's decision, or at least they do not disagree. Scholars have debated the impact of unanimous decisions on override activity and have reached mixed results with regard to the role unanimity plays in congressional decisionmaking.[234] Our expanded study, however, confirms that the vote count on cases matters to Congress but only in a context neglected in

233 *See generally* David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25, 41 (1994) (exploring interest group lobbying strategies and noting increased lobbying of legislators predisposed to favor group in question when opposition begins to lobby).

234 *See, e.g.*, Henschen, *supra* note 22, at 447–48 (finding that unanimity decreased likelihood of congressional reaction in antitrust cases but not in labor cases); Hettinger & Zorn, *supra* note 9, at 14, 22 (finding that Congress is less likely to override unanimous decisions); Solimine & Walker, *supra* note 48, at 447 (finding that unanimous decisions are less likely to be overridden but that differences with split decisions were "not striking").

the current literature—the cases that spark a positive or neutral response.

TABLE 4: PROBABILITY OF DIFFERENT TYPES OF RESPONSES TO SUPREME COURT TAX CASES.

TYPE OF RESPONSE (N=148)	MULTINOMIAL LOGIT MODEL FINDINGS: IMPACT OF INDEPENDENT VARIABLES ON PROBABILITY OF RESPONSE TYPE					
	Probabilities with All Variables Held at Mean	Impact of Joint Tax Committee	Impact of Lobbying	Impact of Media Coverage	Impact of Judicial Invitation for Review	Impact of Unanimous Decision
Negative (N=38)	28%	–11%	–8%	+3%	–8%	–6%
Positive (N=33)	24%	–6%	–7%	+4%	–6%	+7%
Mixed (N=28)	11%	–4%	+11%	–5%	+8%	–3%
Neutral (N=49)	37%	+17%	+3%	–4%	+4%	+5%

We also examined the impact of the economic, legal, and political variables discussed in Part II (though we have excluded them from our presentation in Table 4 for simplicity). In Part III, we found that when all the different responses were aggregated into one group, economics was strongly correlated with congressional oversight of Supreme Court cases. But in this analysis, where we disaggregate the different forms of oversight, we find no statistically significant relationship. This suggests that economic factors affect the legislators' propensity to respond to a tax case but not the direction of the response. This is consistent with the theory that legislators will attend to fiscal issues in periods of economic crises but will not necessarily agree on how the problems should be addressed.

2. Explaining Different Types of Actual Statutory Enactments

We now turn from the type of congressional response that Supreme Court tax cases generated to the type of legislative reform that emerged after the publication of the judicial opinions. Table 5 presents our statistical findings on the types of legal reforms enacted,

given in the form of probabilities just as in Table 4.[235] Overall, Congress adopted 47 legislative reforms in response to Supreme Court tax cases since 1954. When we hold all of the variables to their means, we would predict an override in 52% of the cases, codification in 35% of the cases, and a neutral response in 11% of the cases.[236] As these numbers suggest, our model predicts that on average there is a greater probability that Congress will adopt legislation modifying or overriding a Court decision than legislation that codifies or impacts the outcome in a neutral fashion.

Before we present our findings, however, we should note again that because we have a relatively small number of observations (47) and no more than 23 observations in each individual group, we must view the results as preliminary. More robust statistical findings will emerge only as Congress engages in additional override and codification activity; as these events transpire, we will incorporate the information into our data set and over time we will have more confidence in our findings. Nevertheless, our results are the best estimates we

[235] The raw coefficients that generated the probabilities we present in the text are found in Table 5A below. In this model, we again selected the largest group to serve as the baseline (overrides). Because we have so few observations in each category, however, we again remind readers to view these findings as our current best estimates, which are certainly subject to change as Congress provides more data for analytic purposes. For example, the coefficients associated with mixed responses in Table 5A are grounded on just two cases.

TABLE 5A: TYPES OF CONGRESSIONAL RESPONSES TO SUPREME COURT CASES. Statistical significance at .05 level marked with an asterisk and standard errors are found in parentheses. Baseline for comparison purposes: negative enactment.

EXPLANATORY VARIABLE	MULTINOMIAL LOGIT MODEL: DIFFERENT TYPES OF RESPONSES		
	Neutral Response	Positive Response	Mixed Response
Lobbyists	–.759 (1.151)	.087 (.771)	20.489* (1.642)
Journalists	–.429 (1.403)	–.830 (.850)	Too few observations to estimate
Justices: Invitation for Review	–.572 (1.277)	–1.667 (1.180)	Too few observations to estimate
Justices: Unanimous Decision	.189 (1.044)	.157 (.702)	–75.700* (1.692)
Constant	–1.527 (1.303)	.449 (.756)	–.585 (1.212)

[236] We do not include an analysis of the mixed responses because only two of our cases were subject to this type of response. When we estimate the probability of such a response, it is literally 0%, irrespective of whether we hold our variables to the mean or at their maximum.

have to date, and, as noted above, no other team of scholars has attempted this type of analysis. Because scholars have failed to examine congressional responses other than those that override the Supreme Court, they could not undertake a comparative analysis of overrides, codifications, and neutral responses, as we do here.

When it comes to actual legislative enactments, our results differ from those presented above with respect to whether and how quickly Congress responds to Supreme Court cases[237] and the specific type of response each case garners.[238] When it comes to the factors that explain why certain cases are codified, overruled, or acted upon in a neutral way, we continue to find that the various agenda entrepreneurs (lobbyists, journalists, and Justices) impact outcomes. Lobbyists slightly increase the likelihood of a neutral response but decrease the likelihood of an override and appear to have no impact on codification decisions. Journalists also have slight impact, increasing the probability of an override but decreasing the probability of a codification. Interestingly, when it comes to judicial behavior, an invitation notably increases the likelihood of an override but decreases the probability of a codification. And as discussed above, unanimous decisions are positively correlated with codifications and negatively correlated with overrides. Thus, our findings continue to suggest that entrepreneurs succeed in getting legislative attention, legislative proposals, and even legislative enactments, but that the groups appear to be successful in different venues.

The fact that our variables of interest have generally small substantive impacts and generally do not achieve statistical significance,[239] however, raises an important question: What legal, political, or economic factors *do* explain these legislative activities? Put differently, Table 5 offers intriguing findings but does not offer a clear-cut explanation for why overrides emerge or what other factors may explain codification decisions. In short, our findings suggest that variables outside of the model—and thus necessarily included in the error term—must be impacting the final legislative decision to accept or reject a proposed bill addressing a particular Supreme Court case. Given that legislative decisions are the product of numerous committees, subcommittees, votes, bargains, veto threats, and so forth,[240] and

[237] *Compare supra* Table 4 *with infra* Table 5.

[238] *Compare supra* Table 4A *with infra* Table 5A.

[239] *See supra* note 235 (giving coefficients and robust standard errors for this model).

[240] *See* KING, *supra* note 19, at 137–97 (exploring shared jurisdictions between congressional committees); CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER (2000) (exploring impact of veto bargaining on legislative outcomes); Staudt, *supra* note 29 (examining strengths and weaknesss of arguments that

given the small size of our sample, we are not altogether surprised by the inconclusive nature of our findings. Indeed, we expect it will be difficult—perhaps impossible—to pin down the precise factors that explain congressional decisions when it comes to the final vote on a bill due to the infrequent nature of such decisions and the range of variables that influence legislative enactment decisions.

Our findings, however, do highlight an intriguing dimension of the Court-Congress dynamic: The numerous legislative responses appear to be an important component of position-taking activities. Our data suggest that members of Congress are eager to respond to the important issues of the day and to react to the pleas of interest groups and to the Justices themselves. The monitoring activities and the quick responses are the predictable part of the process; the specific factors that explain the final legislative enactments, however, are blurred and perhaps somewhat unpredictable.

TABLE 5: PROBABILITY OF DIFFERENT TYPES OF LEGISLATIVE REFORM IN RESPONSE TO SUPREME COURT TAX CASES.

LEGAL REFORM ADOPTED (N=47)	MULTINOMIAL LOGIT MODEL FINDINGS: IMPACT OF INDEPENDENT VARIABLES ON PROBABILITY OF REFORM				
	Probabilities with All Variables Held at Mean	Impact of Lobbying	Impact of Media Coverage	Impact of Judicial Invitation for Review	Impact of Unanimous Decision
Override/Modification of Case (N=23)	52%	–5%	+4%	+17%	–4%
Codification/Expansion of Case (N=19)	35%	0%	–4%	–22%	+2%
Neutral Response to Case (N=5)	11%	+5%	0%	+5%	+2%

3. Summary of Findings on Substantive Activity

Our qualitative and quantitative analyses of congressional responses to Supreme Court decisions highlight new correlations not

current system, in which many congressional committees and bureaucracies have jurisdiction over certain policy decisions, should be replaced with hierarchical "integrated" approach); Weingast & Marshall, *supra* note 118, at 143–55 (stating that legislators bargain to achieve preferred outcomes).

fully considered in the extant literature. We find that when the Justices invite Congress to review a decision, and when lobbyists participate in the process, Congress is likely to produce both positive *and* negative responses—not just negative responses and overrides, as the existing literature suggests. Moreover, scholars have long debated whether a unanimous decision has any impact on the congressional decision to react. We find that when the Court unanimously issues a decision, Congress is more likely to respond positively both as a general matter and to codify the outcome. We find that judicial invitations for congressional review are positively associated with override activity as well as with media coverage but negatively associated with lobbying.

Conclusion: Positive and Normative Implications

Although the extant literature is filled with important contributions to the study of interbranch relations, scholars to date have mainly focused on a single aspect of the Court-Congress interaction: congressional overrides of Supreme Court cases.[241] Congressional decisions to overturn a Supreme Court decision certainly express a strong opinion on the merits of the judicial decision—but members of Congress are not limited to expressions of disapproval. They can also send positive and neutral signals, or signals not in the form of formal legislation. For purposes of this study, we collected and analyzed the full array of congressional responses to Supreme Court tax cases over the course of a fifty-year period and made surprising findings that advance our understanding of both Congress and the Court.

Most importantly, we demonstrate that the Court-Congress dynamic is not unidimensional but rather nuanced and varied. The existing literature implies when Congress responds to the Court, it does so in a hostile manner. To be sure, judicial decisions often spark a negative response in Congress, but nearly as often the cases lead to supportive and positive responses, like codification legislation.[242] We also find that legislators comment on Court cases for position-taking purposes in an effort to signal to constituents and other interested parties that they are attending to salient matters. These position-taking comments surface in hearings and debates where legislators express strong views on a particular case but never actually submit a legislative initiative that would override, codify, or affect the case's outcome in any meaningful manner.[243]

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[241] *See supra* Part I.A.

[242] *See supra* note 39 and accompanying text.

[243] *See supra* notes 40–45 and accompanying text.

Additionally, our study provides an important challenge to the scholars who have argued that the Supreme Court is particularly incompetent when it comes to certain areas of the law, such as those involving economic issues.[244] Some commentators have strenuously argued that since the Justices have no training in technical areas such as taxation, they are not well positioned to decide issues of national importance in these areas. Indeed, some have argued that Congress should "rescue federal taxation" from the Supreme Court by creating a specialty court.[245] Our study suggests that these arguments may go too far. Since we find that legislators routinely review the Court's decisions, there exists an additional check to ensure that the Justices do not bungle the difficult cases they decide. Further, congressional responses to the Supreme Court tax cases suggest that the tax bar underestimates the capability of the Supreme Court: As Congress frequently expresses approval of the Court's decisionmaking via a codification of the outcome, it would seem that the Justices may have greater competence in this area of the law than is typically acknowledged.

Not only do our findings present a rich and varied picture of interbranch dynamics, they also indicate that the Justices play a key role in setting the legislative agenda. It is easy to see that when Congress adopts a controversial statute, it effectively sets the judicial agenda in that controversies under the new statute will make their way into federal courts; indeed, many scholars have noted that statutory controversies seem to have saturated the federal docket.[246] Our study demonstrates that agenda-setting can also work in the opposite direction for two reasons. First, when the Justices grant certiorari they privilege an issue in national debates and increase the likelihood that legislators will attend to it. Second, when the Justices issue a request for legislative review of their opinion, they greatly increase the probability that legislators will focus on a specific case in a speedy fashion. This request nearly guarantees that legislators will review the opinion in legislative debates and hearings soon after the opinion is rendered. In short, while many commentators view the Court as following the legislature's lead when it comes to statutory interpretation, it is often the case that Congress takes its direction from the Justices.

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244 *See supra* note 15 and accompanying text.

245 *See* Lowndes, *supra* note 15, at 222–23 (stating that arguments for creating new specialty court are overwhelming).

246 *See, e.g.*, Edward Heath, Essay, *How Federal Judges Use Legislative History*, 25 J. LEGIS. 95, 97 (1997) ("The number of statutes has increased tremendously since the New Deal. As a result, issues of statutory interpretation saturate federal court dockets.").