Agenda Setting on the Warren Court

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The paper that follows is one of a series of papers I have written regarding agenda setting on the Warren Court. The papers on Warren Court agenda setting follow the pattern and topics of those I wrote on the Vinson Court's agenda setting. As each paper was completed updates and corrections sometimes changed a few of the specific numbers presented in papers that came earlier in the series. Even so, the general results for each paper did not change. The papers for the Vinson Court were eventually combined into a book titled, *Supreme Court Agenda Setting: The Vinson Court* (available on Amazon.com). The papers for the Warren Court will also be combined in a book to be titled *Supreme Court Agenda Setting: The Warren Court*. It will be available on Amazon.com in the summer of 2023. The book will use the final numbers after all the corrections and updates.

Agenda Setting on the Warren Court
Paper 2: Certiorari and Appeal on the Warren Court Agenda

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Abstract

Agenda setting of the United States Supreme Court is a matter of continuing interest to judicial scholars. Most studies of agenda setting focus on the Court's exercise of its certiorari jurisdiction. The assumption is that cases on appeal (as opposed to certiorari) are obligatory, which means that factors affecting the discretionary decisions on certiorari petitions would not be in play. This assumption, that cases on appeal are treated differently than those on certiorari, has not been tested. The purpose of this study is to take some initial steps in a determination of whether, and to what extent, the Court treats cases on appeal and certiorari differently in terms of the review decision, decision on the merits, and whether the Court summarily disposed of the case. The 16 terms of the Warren Court's appellate docket provide an interesting period of the Court's caseload for examination. Results show that although there are clear differences in the treatment of the two types of cases, there still may not be sufficient justification for the exclusion of appeals from studies of the Court's agenda setting.

Agenda Setting on the Warren Court
Paper 2: Certiorari and Appeal on the Warren Court Agenda

This is the second in a series of papers examining agenda setting on the Warren Court (1953-1968 Terms). This series of papers will follow the structure and topics contained in the series of papers I wrote examining agenda setting on the Vinson Court (1946-1952 Terms). As such, certain elements of the Vinson Court papers will be repeated in the corresponding papers for the Warren Court. The papers for the Vinson Court were eventually combined in a book titled, *Supreme Court Agenda Setting: The Vinson Court 1946 to 1952 Terms*, which is available in electronic form from Amazon.com.

The examinations here are largely empirical, but with a general grounding in familiar aspects of behavioral judicial politics. Like the papers for the Vinson Court, the papers for the Warren Court are intended to stand on their own, but will eventually be combined into book form. One reason for maintaining the same approach in this series of papers is that it will allow for easier comparisons between the two periods, which is one difference this series of papers will have from those of the Vinson Court.

Theoretical Considerations

Agenda setting on the United States Supreme Court has been a matter of interest to judicial scholars and Court watchers for over 50 years. Political histories such as Rodell's *Nine Men* (1955) touch on the topic in general terms or in relation to specific cases and situations. Schubert's "The Certiorari Game" (1959) began a long line of studies exploring aspects of why some petitions for writs of certiorari are granted review and others not. Seminal articles by Tanenhaus, et al. (1963) and Ulmer, et al. (1972) continued to define the parameters of the Court's "cert" decisions. In a book-length treatment, Provine (1980) built on these earlier works.

Taking a slightly different approach, rather than sampling the data Caldeira and Wright (1988) focused attention on all of the Court's certiorari decisions for a single term. Palmer (1990) added to our knowledge of the Court's agenda setting by compiling information on the justices' conference votes during the Vinson Court era (1946-1952 Terms). Although Perry (1991) also used sampled data of the Court's certiorari decisions, his main contribution was an analysis of dozens of interviews with the justices and the clerks who served them during the 1976 to 1980 Terms. Epstein and Knight (1998) addressed agenda setting in their more comprehensive analysis of judicial decision making. Baum (2022) noted a study of aspects of the Court's certiorari decision making (Black and Boyd (2012)) and Caldeira and Wright (2009) expanded their earlier study by adding two additional terms of data.

These studies are but a small fraction of those examining various aspects of the Court's agenda setting. Perry (1991), in particular, provides a comprehensive examination of the many earlier scholarly studies of Supreme Court agenda setting. I do not wish to give short shrift to this literature, and particularly more recent work, but my focus here is on a specific aspect of the Court's agenda setting that is largely untouched by these prior studies.

One thing that most of these studies have in common is a focus on whether the Court (by which, of course, I mean the collective decision of the justices) decides to grant the petitions for writs of certiorari filed before it each term. Left out of these analyses are the cases that come before the Court on appeal (e.g., Tanenhaus. et al., 1963). At this point a digression is in order.

Readers here are likely well aware that although we generally speak of cases being "appealed" to the Court, cases actually reach the Court's docket via two primary methods: petitions for writs of certiorari and appeals, where "appeal" is used in a more technical sense. Like Perry (1991), I do not wish to delve too deeply into the intricacies of jurisdiction or the

jurisprudential differences between certiorari and appeal, but how those two types of cases are treated—by the Court and by judicial scholars—is central to the question being examined here. Perry provides a relatively concise overview of jurisdiction in his Chapter 2 and Appendix (1991). For those seeking a more technical description Perry suggests Stern and Gressman's *Supreme Court Practice* (1978)[1]

The fundamental question addressed by most studies of the Court's agenda setting is why the Court takes some cases and not others. In terms of the Court's agenda setting, the essential difference between appeals and certiorari is that the decision to grant a certiorari petition (i.e., grant review or not) is discretionary, whereas the decision to grant review for an appeal is not.[2] To the extent that reviewing cases via certiorari is discretionary, the underlying assumption is that the justices then have a free hand in deciding whether to grant review. As such, these cases are ripe for analysis of the factors that go into the justices' decision to accept or reject certiorari cases. Conversely, the assumed lack of discretion in cases on appeal suggests no decision making calculus worthy of examination. Again, questions regarding the Court's jurisdiction and handling of certiorari petitions and appeals can be very complex, as indicated—at the very least—by the number of pages devoted to the topics in Stern and Gressman (1950). From a

[1] Perry cites to Stern and Gressman's 5th edition, presumably because that was the edition that was released during the midpoint (1978) of the terms he studied (1976-1980). As this study focuses on the Warren Court (1953-1968 Terms), I will rely more heavily on the fourth edition of Stern and Gressman's work, published in 1969, as an indicator of then-contemporaneous Court practice. As a point of information, the current edition, authored by Stephen M. Shapiro et al., is the 11th, which was released in 2019.

[2] The discretionary nature of decisions on certiorari petitions is reflected in the meaning of a denial of certiorari. The basic understanding of the meaning of a denial of certiorari is simply that the Court chose not to hear the case. Justice Frankfurter stated this position most forcefully in his opinion respecting the denial of certiorari in *Maryland v. Baltimore Radio Show* (1950) when he said that such a denial "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court . . ." (338 US 912 at 917). Perry thinks Frankfurter overstates his point (1991, 38) and directs the reader to an article by Linzer (1979) suggesting that more can be read into such denials. Even so, Perry also suggests that the best summary of the point may have been by Justice Jackson in his opinion concurring in the result in *Brown v. Allen* (1953). Although Jackson notes that the Court was not necessarily of "one mind" on the exact meaning of a denial of certiorari he says, "I agree that, as stare decisis, denial of certiorari should be given no significance whatever" (344 US 443 at 543).

Political Science perspective, however, the discretionary aspect of certiorari petitions seems to make them worthy of study and appeals not.[3]

Although it seems reasonable to assume that cases on appeal are fundamentally different and should therefore be excluded from studies of the Court's agenda setting, there are two possible problems with such an assumption. First, because it is an assumption it has not been thoroughly tested. It may very well be that cases on appeal are fundamentally different (thus causing them to be on appeal rather than cert) or that they are not different, but are treated differently by the justices given the mechanism by which they reached the Court.[4] One could argue, of course, that it does not really matter whether the cases on certiorari and appeal are really different if the Court treats them so. Although there is some reasonableness to that argument from a purely agenda setting perspective, it brings us to the second problem, which is that the Court's review of cases on appeal is not quite so simple. Although the Court summarily disposes of many appeals (often via a very short per curiam: "Judgment affirmed.") it also denies review to many appeals (often "for the want of a substantial federal question"). Thus, despite the supposed mandatory nature of appeals, the Court is nonetheless able to limit the number of such cases in which it reaches a decision on the merits, summarily or otherwise.[5]

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[3] Terming the review decision on a petition for a writ of certiorari "discretionary" is a way of saying that the Court is not bound in a legal way to take such a case, as they would be for an appeal. As a result, judicial scholars (whether behavioralists, neo-institutionalists, or others who do not adhere to a strictly legal model of judicial decision making) have long sought the factors that were thought to influence the Court's agenda setting. Although the question under examination here is largely empirical, it has significant implications for studies based on behavioral or neo-institutional models to the extent they excluded examination of cases on appeal out of hand.

[4] Stern and Gressman deal extensively with the Supreme Court's jurisdiction from federal and state courts (1969, chapters 2 and 4, respectively). They note that the Court's jurisdiction over the lower federal courts via certiorari is "extremely comprehensive" (1969, 26). In contrast, the Court's jurisdiction over the lower federal courts via appeal is much more limited (1969, 30-34). The Court's jurisdiction over decisions by the state courts is more limited and the controlling statute (28 USC 1257) specifies the circumstances by which a state case may come to the Court by appeal and certiorari. Stern and Gressman note that the choice between certiorari and appeal is not trivial, but in some instances either method may be proper and the appellant may choose between the two (1969, 89-92).

[5] Those familiar with current jurisdictional requirements will know that in 1988 Congress made a fundamental change in the Court's jurisdiction. In large measure, the Court's mandatory jurisdiction in appeals was removed, essentially making the Court's agenda discretionary. Ultimately, it will be interesting to see whether this change

Palmer, in his thorough examination of the conference votes of the justices of the Vinson Court, addresses this point directly:

> There were important similarities and differences between certs and appeals. The differences had diminished before Vinson's chief justiceship and continued to narrow during and after his tenure because the pressures of a growing case load forced the Court to treat appeals, which were part of its obligatory jurisdiction, in a manner similar to how it treated certs, which were part of its discretionary jurisdiction (1990, 77).

Palmer's observation throws into question the legitimacy of simply assuming appeals are treated differently, for the Vinson Court and beyond, and, as a result, whether they have been properly excluded from studies of the Court's agenda setting. Thus, the primary goal of this study is to conduct an empirical examination of the cases coming to the Court via certiorari versus those before the Court on appeal.[6]

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affected the Court's treatment of cases on appeal, both of themselves and in relation to certiorari cases. Of course, to know whether a change occurred we need to know how such cases were treated prior to that change. The focus here on the Warren Court provides a middle point by which we can potentially track trends from the Vinson through Burger Courts before determining whether the legislative change near the beginning of the Rehnquist Court made a difference.

[6] Although I suggest this to be an empirical examination, it is not theory-free. As previously noted, prior studies of the Court's agenda setting have proceeded under some form of a theory or model that views the justices as decision makers who are not bound (or at least not completely bound) by legal constraints. The exclusion of cases on appeal was based on the untested assumption that because they were part of the Court's "obligatory jurisdiction" the factors at work in the Court's discretionary certiorari decisions would not apply.

Data

Data for this study were drawn from an ongoing database project involving all cases on the Supreme Court's appellate docket. Data are complete for the Warren Court (1953 through 1968 Terms) and provide a relatively lengthy period in which to examine the Court's docket.

Information on the cases was drawn from several sources including the *United States Law Week*, various reporters for the state and federal courts, LEXIS (now called NexisUNI), and other online sources. Every case that received an appellate docket number during the 1953-1968 Terms is included in the dataset. This results in 15,862 cases. Unlike the examinations of the Vinson Court, not included in this number are any cases filed before the 1953 Term that were held over and received a 1953 Term or later docket number.[7] Included in this number are 308 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.[8]

Although the total number of cases in the dataset is 15,858, the number in the analysis and tables that follow will vary based on particular aspects of the cases. For example, a comparison of cases coming before the Court on a petition for a writ of certiorari and those on appeal will not include the four cases coming by way of certification. In addition, the 148 cases dismissed on a

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[7] Prior to the 1971 Term held over cases were renumbered at the start of each term and there was no two-digit term indicator. For example, *Brown v. Board of Education* was initially filed during the Court's 1951 Term and given the docket number 436. It was held over to the 1952 Term with the new docket number 8, and again for the 1953 Term with the docket number 1.

[8] Through the Vinson and Warren Courts, cases originating on the miscellaneous docket (sometimes referred to as the "pauper's docket") that were granted review were usually moved to the appellate docket (sometimes referred to as the "paid docket") and given a new docket number. The Expanded United States Supreme Court Judicial Database, Harold J. Spaeth principal investigator, lists 191 cases with a miscellaneous docket number (with an "M" in the DOCKET field, meaning they were not transferred to the appellate docket) during the 1953-1968 Terms. There are also three cases from the Miscellaneous Docket after the numbering changed. Of these 194 cases, 133 were granted some form of review (usually a short per curiam vacating or reversing), but are not included here. On the other hand, this dataset includes 107 cases initially filed on the appellate docket for which the Court granted *in forma pauperis* status to one of the parties (45 of which were granted review). (For this study I made use of an older version of the Supreme Court Database before it was moved online, which, as of this writing, can be viewed at http://scdb.wustl.edu.)

motion by the petitioner before the Court's review decision will generally not be included in examining the Court's disposition of cases. Along similar lines, the other four cases dismissed by rule will also be excluded from most examinations. On the other hand, cases in which the petitioner's motion to dismiss occurred after the Court granted review will be included in some instances. With these exceptions in mind, the text and tables will not explain variations in the number of cases included for each examination.

Does the Court Treat Cases on Appeal Differently?

Again, the untested assumption of prior studies was that cases on appeal are sufficiently different (or are treated so by the Court) that they should be excluded from examinations of the Court's agenda setting. This is effectively a rejection of the null hypothesis that cases on appeal are not particularly different (or treated so by the Court) from cases on certiorari. To examine whether the rejection of this null hypothesis has been appropriate I will examine six aspects of the Court's treatment of cases on certiorari and appeal.

Acceptance Rates of Cases on Certiorari and Appeal

The fundamental question in this examination is whether the Court accepts cases on appeal at a higher rate than those on certiorari. The assumption has been that it does, based largely on the conventional understanding that cases on appeal are part of the Court's obligatory jurisdiction and those on certiorari are discretionary. Table 1 presents the Warren Court's acceptance rates for these two types of cases.

TABLE 1 ABOUT HERE

From Table 1 we see that during the Warren Court certiorari cases made up 87.9% of its appellate docket (13,801 of 15,702 cases).[9] The Court granted review to 15.1% of the certiorari cases. In sharp contrast, the Court granted review to 998 of the 1,901 cases on appeal (52.5%). Overall, the Court granted review to 19.7% of the cases on its appellate docket.

The overall grant rate seems a bit high given perceptions of the Court's grant rate being near five percent, even for the cases on the appellate docket (e.g., Segal and Spaeth 2002, 250). Of course, as Segal and Spaeth noted (2002, 249-252), far more cases were filed in later terms than was the case during the Vinson and Warren eras. A dramatic increase in filings before the Court occurred during the last few years of the Warren Court period. As noted by Hagle (2018, 17), the number of cases on the Vinson Court's appellate docket remained quite stable following the 1946 Term (which was the last year the unpaid cases were on the appellate docket; see Palmer 1990, 7). The number of cases on the docket for the final six terms of the Vinson Court ranged from a low of 780 in the 1950 Term to a high of 879 in the 1948 Term.

Like the Vinson Court, the number of cases on the Warren Court's docket remained relatively stable during its middle terms. The number of cases filed grew from 690 for the 1953 Term to 1,004 for the 1956 Term. The number then stayed around 900 to 1,000 through the 1962 Term. The number of cases filed during the 1963 Term was 1,028 and steadily grew for the next five terms reaching a high of 1,343 for the 1968 Term. Of course, the examination here, as it was for the Vinson Court, is focused on possible differences in the Court's disposition of cases before it on certiorari and appeal, as opposed to changes in the overall size of the docket.

The difference in the acceptance rates for cases on certiorari and appeal proves to be statistically significant. Although the underlying reason for treating these cases differently suggests that we could have expected cases on appeal to have a higher acceptance rate, the

[9] As a reminder, cases from the Court's original and miscellaneous dockets are not included in this examination.

difference between the two types of cases reaches the $p < .001$ level of significance even when using a more rigorous two-tailed test. Despite the significance of this difference, an acceptance rate of 52.5% still means that the Court rejected 47.5% of the appeals, which is contrary to the basic notion that appeals are treated differently because the Court was obliged to accept them.

Before turning to the question of whether there are differences in how the Court disposed of cases on certiorari and appeal, it is worth examining whether there was a difference in certiorari and appeal acceptance rates for federal versus state cases. Conventional wisdom suggests that the Court may be more likely to accept cases from the federal courts. To the extent this is true, it may be due to the justices' view of the role of the Court in relation to the federal and state courts. More specifically, the Court may be more inclined to review cases involving federal statutes, which are more likely to come through the federal courts.

TABLE 2 ABOUT HERE

Table 2 presents the results of breaking out the Warren Court's review decisions based on whether the lower court was a federal or state court. The first thing to note from Table 2 is that cases coming from federal courts account for 72.8% (11,437 of 15,702) of the Court's appellate docket. This imbalance is entirely accounted for by cases on certiorari. The number of appeals from the state courts is 994, which is a bit larger than the number from the federal courts (907). In sharp contrast, the number of federal cases before the Court on certiorari is over three times the number coming from the state courts (3,271 versus 10,530). Although the explanation for this imbalance in the certiorari cases is beyond the scope of this paper, it is certainly worth being aware of this difference.

The more important question for this table is whether there are differences in how the court treated cases coming from the federal versus state courts. For cases on certiorari we can see that

the Court was a bit more likely to take certiorari cases from the federal courts rather than the state courts (15.3% versus 14.6%). It is not shown in the table, but this difference is not statistically significant even given the large number of cases being compared. What is remarkable is the very large difference in the acceptance rates for federal cases on appeal and those from the state courts (89.2% versus 19.0%). This result is consistent with conventional wisdom and from an institutional perspective suggests that the Warren Court monitored federal courts more closely than state courts.

Disposition of Cases on Certiorari and Appeal

Aside from mere acceptance rates, how the Court disposed of the cases it accepted for review will provide insight into whether there was a fundamental difference between cases on certiorari and appeal.

TABLE 3 ABOUT HERE

To begin a consideration of these differences, Table 3 contains data on the Warren Court's disposition on the merits of cases it accepted for review. The Court affirmed 541 of the 2,067 certiorari cases it accepted for review for an affirmance rate of 26.2%. In contrast, the Court affirmed 524 of the 992 cases on appeal for an affirmance rate of 52.8%. Overall, the Court affirmed 34.8% (1,065 of 3,059) of the cases it accepted for review.

That the overall affirmance rate is below 50% is not particularly surprising given the general understanding that the Court often takes cases to reverse them. This is often referred to as an error correction strategy (e.g., Segal and Spaeth 2002, 98)[10]. Although we can expect the reversal rate to vary based on the issue area, Provine notes that the "Court's pattern has been to reverse about two-thirds of the cases it decides on the merits" (1990, 41). Thus, an affirmance

[10] A fundamental assumption of an error correction strategy is that the Court exercises discretion over its agenda.

rate of 34.8% is close to that one-third. Of course, Provine was only examining the certiorari cases, so the 26.2% affirmance rate for certiorari cases is about seven points lower than the rough estimate of one-third.[11]

Regardless of whether the affirmance rate for certiorari cases seems a bit low, it is clear that the affirmance rate for appeals was well above what would be expected were the Court using any type of error correction strategy in disposing of them. Aside from the affirmance rate for appeals being over 50%, the difference from the certiorari cases proves to be statistically significant at the $p < .001$ level.

As with affirmance rates, it is worth examining whether the Court treated cases from the federal and state courts differently in terms of the disposition on the merits. Table 4 contains the results from separating the Warren Court's disposition on the merits of cases coming from federal and state courts.

TABLE 4 ABOUT HERE

There are some differences in Table 4 from the results in Table 3. The affirmance rate for certiorari cases coming from the state courts just shy of 10 percentage points lower than those coming from the federal courts (18.5% versus 28.4%). In addition, the affirmance rate for cases on appeal also varied substantially with the rate for federal cases at 58.8% but those for state cases only 26.8%. The difference between cases on certiorari and appeal with the federal courts is still highly significant at $p < .001$. On the other hand, although the affirmance rate for state cases on appeal was still over eight points above that for certiorari cases, the difference is only significant at the $p < .05$ level.

[11] Baum (2022, 96) indicates that the Court "overturns the lower court altogether or in part in more than two-thirds of its decisions." Following this approach, "reversed" in the text and tables includes those cases reversed or vacated in whole or part.

Summary Dispositions of Cases on Certiorari and Appeal

Once again, the underlying notion for the different treatment by the Court of cases on appeal is based on the presumption of their obligatory nature. Even assuming that review of cases on appeal is obligatory, however, the Court is not required to give such cases the full consideration they might give to cases whose review is discretionary (i.e., certiorari cases). Thus, to the extent that the Court is required to hear cases on appeal that it would otherwise reject we might expect the Court to be more likely to dispose of such cases summarily.

TABLE 5 ABOUT HERE

Table 5 contains data on the Warren Court's summary dispositions, broken down by both certiorari versus appeal and whether the case was affirmed or reversed. For Table 5 a case was considered to have been summarily disposed of if the Court's announced grant of review was made at the same time (i.e., in the same opinion) as its decision on the merits. Such summary dispositions were usually done in a very short per curiam opinion.[12] Of the 964 cases indicated in the table, 501 were appeals (52.0%). Given the proposition that the Court may summarily dispose of cases it feels obligated to hear, it is a little surprising that appeals were only slightly more than half of the summary dispositions. On the other hand, from Table 3 we know that there were twice as many certiorari cases than those on appeal. Thus, the percentage of cases disposed of summarily was much higher for cases on appeal (501 of 992 for 50.5%) as opposed to those on certiorari (463 of 2,067 for 22.4%).

Unlike petitions for certiorari where the Court must clearly grant the petition before deciding the case, even if it does so in one short per curiam, the review decision for appeals can

[12] On the other hand, not all per curiam opinions were considered summary dispositions. The Court might, for example, decide to review a case and dispose of it later in a per curiam opinion. Although the per curiam was likely very short, it would not be considered a summary disposition in the sense that the Court announced the outcome at the same time review was granted.

be handled in three basic ways. First, the Court may "note probable jurisdiction" which means that it has agreed to review the case. A second option is for the Court to "postpone the question of jurisdiction until a hearing on the merits." For practical purposes, this is effectively a grant of review even if the Court later changes its mind and dismisses the appeal.[13] The third option for the court is to just decide the case on the merits with no separate indication as to a prior review decision.

Given the different procedural approach to appeals, defining summary dispositions as instances where the review and merits citations are the same may provide a sufficiently clear picture of the Court's summary dispositions. The key to the notion of a summary disposition is that the Court did not feel a particular need to justify its disposition on the merits. Making the effort to explain the disposition, even if only briefly, suggests that there might have been more to the case than one would think if the Court only took the case because it felt obligated to do so.

With this view in mind, the summary dispositions identified for Table 5 were examined to determine whether the Court disposed of the case on the merits via a true summary disposition (i.e., a minimal per curiam) or via what could be considered a full opinion (per curiam or signed). The results of this reexamination of the summary dispositions are presented in Table 6.[14]

TABLE 6 ABOUT HERE

The top half of Table 6 shows the results for the true summary dispositions. These results are even more extreme than those from Table 5. Specifically, the Court summarily affirmed only

[13] The Court changed its mind for 11 appeals during the Warren Court. For comparison, the Court initially granted certiorari in 73 cases and later dismissed the case.

[14] Let me acknowledge that determining whether a summary disposition was "true" or more of a short opinion is somewhat subjective. Simply affirming or reversing a case with a citation to a recently decided case was considered a true summary disposition. This occurred many times following the Court's decision in *Redrup v. New York* (1967). When the Court offered a few words of explanation, perhaps a sentence or two, it was still counted as a true summary. Anything longer than that was considered "full."

31 of the 438 certiorari cases (7.1%), while doing so for 362 of the 479 appeals (75.6%). The cases disposed of via full opinions were similar in that the percentage of cases on certiorari were overwhelmingly reversed (16.0%). Although the percentage of appeals affirmed in short or full opinions was greater than those on certiorari, the percentage was far below that for true summary dispositions (54.5%).

The different treatment between cases on certiorari and appeal is statistically significant for both halves of the table, though less so for the full opinion dispositions due to the much smaller number of cases involved and the much closer percentages.

Discussion

The results presented in the tables make it clear that cases on appeal are treated differently by the Court than those on certiorari. At one level these results come as little surprise. The criteria used by the Court to grant review varies based on whether it is asked to exercise its appellate or certiorari (discretionary) jurisdiction (see Stern and Gressman (1969), chapters 2 and 3). The criteria for appeals is more restrictive, but there may be instances where a case could be filed via either method. When either method is proper, Stern and Gressman recommend using an appeal because of "the so-called obligatory jurisdiction of the Court" (1969, 89).[15]

Stern and Gressman's advice for filing an appeal over a petition for certiorari when either is appropriate is certainly justified given the difference in acceptance rates presented in Tables 1 and 2. On the other hand, because the losing party is the one to request review by the Court, the much higher affirmance rate for appeals, as shown in Tables 3 and 4, might give such a

[15] Interestingly, in the first edition of their book Stern and Gressman suggested that if it seemed certain that certiorari would be granted that may be the better approach given the simpler procedure for filing certiorari petitions (1950, 58). That advice was deleted from the same paragraph of the second edition (1954, 69). The reason may be related to the revision of the Supreme Court Rules that took effect in July of 1954 as mentioned in the Author's Note to the Second Edition (1954, v).

petitioner second thoughts about submitting the filing as an appeal. Of course, the manner in which a case comes to the Court should not make a difference relative to the Court's disposition of the legal issues. Then again, because the method of reaching the Court does seem to make a difference (for both the review and merits decisions) we must return to the central question of this examination: have prior researchers been justified in excluding appeals from examinations of the Court's agenda setting?

Although the results presented in the tables make clear the statistically significant differences between cases on appeal and certiorari, the answer to the central question is not so clear. From a social science perspective it is always better to work with a population. Of course, how the population is defined also makes a difference. Prior studies of the Court's agenda setting effectively defined the population of cases as those on the Court's *discretionary* docket, thus excluding cases on appeal. Even to the extent that the results presented here show differences in the Court's treatment of appeals, that does not necessarily justify their exclusion.

The legal criteria used to determine whether a case is properly filed as an appeal or a petition for certiorari (see Stern and Gressman 1969, chapters 2 and 3), means that appeals constitute an important set of cases. For example, one of the situations in which appeal from a state court is appropriate is "where the validity of a state statute has been drawn in question and the state court has held it *valid*" (Stern and Gressman 1969, 81, emphasis in original). Given a general preference on the part of the Court to allow state courts to have the first opportunity to determine the constitutionality of their state statutes, excluding these appeals from examinations of the Court's agenda setting would remove an important set of cases from the analysis. We would not know, for example, whether the Court treated these cases differently merely because

of the method by which they reached the Court or because of the underlying issues and result in the lower court.

On the other hand, when we drill down to the true summary dispositions (Table 6) we may be seeing where there really is a difference based more on the method a case reaches the Court. Thus, what may be required is a middle ground such that appeals are not automatically excluded, but are examined in more detail to determine whether a grant of review is based more on the substance of the case as opposed to the mere fact that it is an appeal.

Concluding Comments

Despite the statistical significance of the results, the conclusions to be drawn from them are somewhat indeterminate. More specifically, it would be unwise to conclude from these results that all appeals should or should not be included in examinations of the Court's agenda setting. What seems to be needed is a more nuanced approach. Although this approach may require a bit more effort relative to determining whether an appeal is granted review because of the substance of the case rather than some notion of obligatory jurisdiction, it should be worth it to prevent an important set of cases from being excluded from the analysis.

Support for a more nuanced approach to appeals comes from the fact that the results call into question the basic notion of the obligatory nature of reviewing them. Clearly, if the Court is rejecting nearly 48% of appeals (Table 1) then such cases are not obligatory in the usual sense of the word. Moreover, differences in whether the lower court was state or federal (Table 2) and the Court's ultimate disposition of the cases (Tables 4 and 6) indicate that there is much more going on with appeals than a simple notion that the Court was required to hear and decide them. Additional evidence can be found by comparing Tables 2 and 4. If the difference in acceptance

rates between state and federal cases (Table 2) was just a matter of the Court rejecting state cases that should not have been filed as an appeal, then perhaps we would not expect such a great disparity in the disposition of those cases on the merits (Table 4).

Although the fundamental question under examination here is basically empirical, the results have implications for variations of the attitudinal model and more specific applications such as an error correction strategy. For the attitudinal model, to the extent that the decision to review appeals is not governed solely by legal criteria it will be worthwhile to determine the degree to which discretionary factors play a role. Even if researchers determine that the factors affecting the review decision for appeals are substantially different from those affecting certiorari cases such that the two types still cannot be combined, a fuller understanding of how appeals are treated can only enhance our understanding of the Court's processes. Similarly, more specific applications of attitude-based theory, such as an error correction strategy, may be fine-tuned by a closer examination of the different treatment of cases on certiorari and appeal at the merits and summary disposition levels.

The relative stability of the Vinson Court's docket provided a good baseline that researchers can use for comparison with later Courts. Despite the much larger number of cases filed during the Warren Court era, many of the results shown here are consistent with those found for the Vinson Court. Even so, the larger number of cases filed, and the Court's likely inability to accept a similarly larger number of cases for review necessarily means a higher percentage of cases denied review. Although the percentage of certiorari cases accepted for review was only slightly lower during the Warren Court period (15.1% versus 16.2%), the acceptance rate for appeals was several points lower (52.5% versus 57.4%). In separating out

cases coming from federal and state courts, the main difference comes in cases on appeal from the state courts where the Warren Court accepted 19.0% while the Vinson Court accepted 28.9%.

The affirmance rates were down during the Warren Court for both cases on certiorari (26.2% versus 39.7%) and appeal (52.8% versus 62.4%). This might be an indication that with more cases the Court has to engage in more of an error correction strategy to handle them. Another strategy the Court may have used to process the increasing number of cases was to dispose of them summarily. There were only 214 such cases during the Vinson Court, but 964 during the Warren Court.

Finally, fleshing out aspects of agenda setting on the Warren Court is important for examinations of the Court's later agenda setting. As noted previously, the Court's appellate docket began a period of expansion during the Warren Court, which continued through the Burger Court. By extension, a closer examination of the treatment by the Court of cases on certiorari and appeal will be important in determining whether changes in that treatment occurred after the change in the law that effectively made appeals discretionary as well.

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Table 1

Acceptance Rates for Certiorari and Appeal on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Certiorari	2,090	11,711	13,801	15.1%*
Appeal	998	903	1,901	52.5%
Total	3,088	12,614	15,702	19.7%

* $p < .001$, two-tail difference of means test (see Wonnacott and Wonnacott 1972, 178).

Table 2

Acceptance Rates of Federal Versus State Cases on the Warren Court's Appellate Docket

Cases From Federal Courts

	Accepted	Denied	Row Total	Acceptance Rate (%)
Certiorari	1,612	8,918	10,530	15.3%**
Appeal	809	98	907	89.2%
Total	2,421	9,016	11,437	21.2%

Cases From State Courts

	Accepted	Denied	Row Total	Acceptance Rate (%)
Certiorari	478	2,793	3,271	14.6%*
Appeal	189	805	994	19.0%
Total	667	3,598	4,265	15.6%

** $p < .001$, two-tail difference of means test
* $p < .01$, two-tail difference of means test

Table 3

Disposition of Cases Granted Review on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	541	1,526	2,067	26.2%
Appeal	524	468	992	52.8%*
Total	1,065	1,994	3,059	34.8%

* $p < .001$, two-tail test difference of means test

Table 4

Disposition of Federal Versus State Cases Granted Review on the Warren Court's Appellate Docket

Cases From Federal Courts

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	454	1,142	1,596	28.4%**
Appeal	474	332	806	58.8%
Total	928	1,474	2,402	38.6%

Cases From State Courts

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	87	384	471	18.5%*
Appeal	50	136	186	26.9%
Total	137	520	657	20.9%

* $p < .05$ two-tail difference of means test
** $p < .001$, two-tail difference of means test

Table 5

Summary Dispositions of Cases Granted Review on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	35	428	463	7.6%*
Appeal	374	127	501	74.7%
Total	409	555	964	42.4%

* $p < .001$, two-tail test difference of means test

Table 6

Summary Dispositions of Cases Granted Review on the Warren Court's Appellate Docket

True Summary Dispositions

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	31	407	438	7.1%**
Appeal	362	117	479	75.6%
Total	393	524	917	42.9%

Full Opinion Dispositions

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Certiorari	4	21	25	16.0%*
Appeal	12	10	22	54.5%
Total	16	31	47	34.0%

* $p < .01$, two-tail test difference of means test
**$p < .001$, two-tail test difference of means test