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 13: Ideological Error Correction as a Factor

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Abstract

Although thousands of petitions seeking review by the Supreme Court are filed each year, the justices only accept about 150 or fewer for plenary review, with perhaps a few hundred more disposed of summarily. Because of this low acceptance rate scholars have long thought that the justices must use some strategy or process to reduce their workload to manageable levels. Although the examination of agenda setting on the Supreme Court is of continuing interest to judicial scholars, previous studies have usually focused only on cert petitions, specific issues, particular terms, or sampling for their data collection. A more comprehensive examination of the cases filed before the Supreme Court will provide a clearer picture of how the justices set their agenda.

Drawing from an ongoing database project this study examines all cases filed before the Warren Court (1953 to 1968 Terms) on its appellate docket. The specific question involves the extent to which the Court takes cases to reverse them on ideological grounds. The results strongly suggested that the Warren Court had an ideological approach to both accepting cases for review and for disposing of them on the merits. This proved to be true for cases from federal and state courts as well as those before the Court on certiorari and on appeal.

Agenda Setting on the Warren Court
Paper 13: Ideological Error Correction as a Factor

This is the thirteenth 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 decisions on the merits of cases made by the justices of the United States Supreme Court may be the most important aspect of judicial policy making, but scholarly examination of other aspects of the judicial decision making process have contributed to our overall understanding of judicial behavior and politics. A few examples of such research includes examination of opinion writing of the Supreme Court justices (Maltzman, Spriggs, and Wahlbeck 2000), acclimation effects of new justices (Hagle 1993), the use of precedent on the Supreme Court (Segal and Spaeth 1999), and dealing with the lack of precedent in the federal courts of appeal (Klein 2002).

Of course, agenda setting and its attendant strategic considerations have also been the focus of many studies. *Marbury v. Madison* (1803) may have been the earliest and most famous example of strategic agenda setting or decision making by the Supreme Court. Despite a general view at the time that judges were not policy makers—at least not along the lines of executives and legislators (see, for example, Spaeth 1979, chapter 1)—histories of the Court have certainly recognized strategic aspects to the Court's decision making (e.g., Rodell 1955). Walter Murphy's *Elements of Judicial Strategy* (1964) is one of the earliest and most important

examinations of how strategic considerations may affect judicial decision making. Other scholars have expanded and refined Murphy's arguments (e.g., Epstein and Knight 1998). A related line of research focused more specifically on the ideological preferences of judges (e.g., Segal and Spaeth 2002) and a book by Brenner and Whitmeyer (2009) compared various models of strategic judicial behavior.

One aspect of strategic judicial behavior lies in agenda setting, which means how the Supreme Court decides which cases it will take to decide on the merits. Although several thousand petitions seeking review by the Supreme Court are filed each year, the justices only accept about 150 or fewer for plenary review (i.e., full briefs submitted, oral arguments held, and opinions written), with maybe a few hundred more disposed of summarily (i.e., the Court simply affirms, reverses, or vacates in a very short per curiam opinion, sometimes as little as "Judgment affirmed."). Thus, scholars have long thought that the justices must use some strategy or process to reduce their workload to manageable levels (e.g., Hagle 1990).

In his book-length examination of Supreme Court agenda setting Perry (1991) noted that aspects of agenda setting have been of interest to judicial scholars at least since Schubert (1959). Perry also noted that a few years later Tanenhaus, Schick, Muraskin, and Rosen, (1963) formulated "cue theory" as a way of explaining how the justices were able to navigate the "sea of work that must be processed" (1991, 114). As Perry goes on to note, cue theory fell out of favor when later, more sophisticated, studies failed to replicate the initial results (1991 116). Nevertheless, although a study by Ulmer, Hintze, and Kirklosky rejected two of the three cues Tanenhaus et al., found significant, a third—the federal government as a petitioning party—was significant and the authors concluded that cue theory retained some viability (1972, 642).

Regardless of how cue theory itself has developed, like those two early examinations of the Supreme Court's agenda setting many later studies focused on how the justices deal with the large number of petitions for writs of certiorari.[1] Caldeira and Wright (1988), for example, examined organized interests in agenda setting with respect to the cert petitions filed during the Court's 1982 Term. In a recent edition of his text on the Supreme Court, Baum (2022) provided an example of work examining litigant status (Black and Boyd 2012). Thus, although the examination of agenda setting on the Supreme Court is of continuing interest to judicial scholars previous studies have usually focused only on cert petitions (Tanenhaus et al. 1963), specific issues (Caldeira and Wright 1988; Black and Boyd 2012), particular terms (Ulmer, Hintze, and Kirklosky 1972), or sampling for their data collection (Tanenhaus et al. 1963; Perry 1991). A more comprehensive examination of the cases filed before the Supreme Court will provide a clearer picture of how the justices set their agenda. To that end, this study will examine all cases on the Warren Court's appellate docket.[2]

[1] Cases come before the Supreme Court via two basic methods: petitions for writs of certiorari and appeals. Because this study will not distinguish between "cert" petitions and appeals, I hesitate to wade too deeply into their differences. Briefly, however, cert petitions are discretionary, which means that the justices are free to grant or deny them as they see fit. No legal meaning is attached to a denial except that the Supreme Court chose not to hear the case. Technically, the Supreme Court must hear cases that come as appeals, but the justices may avoid review by indicating that a case was not properly presented as an appeal for one reason or another. The Court may then treat the appeal papers as a petition for a writ of certiorari and grant or deny the petition. See Perry (1991, Chapter 2) for more on the difference between cert petitions and appeals. Of course, changes to the law in 1988 (Public Law No: 100-352) removed several categories of the Supreme Court's mandatory jurisdiction in appeals.

[2] Until the Court changed its numbering system for filed cases there were essentially three dockets: appellate, miscellaneous, and original. The appellate docket contained what are usually referred to as the "paid" cases, the miscellaneous docket contained the "unpaid" cases (also known as paupers, *in forma pauperis,* or *ifp* cases), and the original docket contained those cases coming to the Court via its limited original jurisdiction. Given my concern about excluding cases on appeal from prior analyses one might reasonably wonder why I do not examine all cases on the Court's three dockets. The original jurisdiction cases can be excluded because they are so few and are of a fundamentally different character. It is well documented that the *ifp* cases on the Court's miscellaneous docket are treated differently, on average, than cases on the appellate docket (e.g., Perry 1991, Chapter 2; Baum 2022, 90-91). Nevertheless, the Court sometimes grants review to unpaid cases (and sometimes grants *in forma pauperis* status to cases on the appellate docket). See below for more on how these cases are treated for this study.

Ideological Error Correction

Although the papers in this series are primarily empirical with a basic grounding in behavioral judicial politics, a few additional comments are needed regarding the concept of error correction and more specifically what I have termed ideological error correction.

The concept of error correction regarding Supreme Court decision making should be a familiar one. The basic idea is that the Supreme Court has a tendency to take cases to reverse them. Given how many cases are filed before the Court each year and how few it accepts for review, the concept of error correction suggests that of necessity the Court must take more cases to correct errors in the lower courts than it might otherwise prefer. On the other hand, few mention error correction as a recognized reason for accepting a case for review. For example, in discussing the factors motivating the granting of certiorari, Stern and Gressman (1969, 147 et seq.) devote sections to conflict between decisions (e.g., lower court conflict with Supreme Court decisions, conflicting decisions between federal courts of appeals) and the importance of the issues as factors increasing the chances for review. Stern and Gressman do have a section on erroneous lower court decisions as a factor (1969, 178-180), but they note at the outset that, "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." A footnote at the end of that sentence (omitted here) provides an example by directing the reader to an address by Chief Justice Vinson before the American Bar Association. Years later, in his interviews of Supreme Court justices and their clerks, Perry indicates that they told him "the purpose of cert. is not error correction" (1991, 36).

In his brief study of error correction Brenner (1997) quotes Perry as well as a later edition of Stern and Gressman's work for the notion that error correction is not an official reason for

granting review to a case.[3] On the other hand, Brenner (1997, 2) notes that even Stern, Gressman, and Shapiro (1986, 222) suggest that "on occasion the Court does accept a case for review for no apparent reason other than error in the lower court decision." This exact phrase also appeared in the first edition of their work (1950, 113-114).[4]

If the justices and Supreme Court scholars suggest that error correction is not a factor in setting the Court's agenda, one must wonder why the notion persists. Brenner (1997) also notes that scholars have regularly addressed the error correction question. In particular he cites Baum (1992, 104) who notes that the justices "are more likely to vote to accept a case when they disagree with the position of the lower court." That language was in the fourth edition of Baum's book. By the fourteenth edition Baum had softened the language a bit, but still indicated justices "can act on their policy goals primarily in two ways. First, they may vote to hear cases because they disagree with the lower-court decision . . ." (2022, 96). In addition, in discussing procedures related to petitions for certiorari Stern and Gressman essentially advise petitioners to argue that the lower court ruling was in error because, "after taking all other factors into account, the Court is more inclined to review a decision which it thinks to be wrong" (1978, 469).

Brenner (1997) discusses the back and forth regarding error correction a bit more and also directs readers to Segal and Spaeth (1993, 194-196) for a review of the literature. Regardless of whether error correction is a preferred or approved approach to Supreme Court decision making, it is hard to deny that the Court has a tendency to overturn more cases than it affirms. In particular, Baum (2022, 96) indicates that the Court "overturns the lower court altogether or in

[3] Brenner cites Stern, Gressman, and Shapiro (1986), which is the sixth edition of the book. I have cited the fourth edition in part because it was published during the end of the Warren Court period. The same phrase appears in the first edition of their work (1950, 113-115), which shows that the general disapproval of error correction has persisted for a long time.

[4] In the fifth edition of their book Stern and Gressman (1978, 292) note, "There have been several prominent types of cases in which the Court seems to have granted certiorari predominantly to correct an erroneous ruling on the particular facts."

part in more than two-thirds of its decisions." That proportion may vary based on time period and issue area. For example, Hagle and Spaeth (1992) found that the Burger Court reversed lower court business decisions 2.6 times more often than it affirmed them. Hagle (1992) found that the Court reversed over 80% of lower court obscenity and pornography decisions. To the extent such variations exist it is reasonable to ask why.

The "why" question hints at another aspect of error correction. Specifically, what is meant by an error. There seem to be two main possibilities. The first is that there was some type of legal or factual error in the lower court decision. The second is that the Court decided that it did not agree with the ideological outcome in the lower court, thus viewing it as an error. Of course, the two are not unrelated. In ideologically divided Supreme Court opinions it is not unusual to see justices in favor of upholding the lower court decision to see it as correct while the justices in favor of reversing it to see it as incorrect. The language from Stern and Gressman (1950, 113-114) seems to suggest the former while Baum (1992, 104; 2022, 96) suggests the latter fairly directly.

Determining whether a true legal or factual error exists in the lower court decision would be a fairly difficult task given that nearly every appellant seeking Court review believes the lower court decision was erroneous for one reason or another.[5] In contrast, it is relatively easy to determine whether the lower court decision was liberal or conservative. Thus, to be more precise regarding the focus of this examination I will use the phrase ideological error correction.

There are two aspects to ideological error correction. The first is what the Court does with cases on the merits. Does it, for example, overturn more liberal lower court decisions than

[5] Recall the advice provided by Stern and Gressman (1978, 469) noted above. Along similar lines, claims of conflict among the circuits or violations of due process are far more frequent than is actually the case.

conservatives ones? The second aspect has to do with agenda setting. Specifically, is the Court more likely to grant review to liberal lower court decisions or conservatives ones?[6]

Data

Data for this study were drawn from an ongoing database project involving all cases on the Supreme Court's appellate docket since the 1946 Term. Data are complete for the Warren Court (1953 through 1968 Terms) and provide a relatively stable 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 filed on the Court's appellate docket during the 1953-1968 Terms is included in the dataset. This results in 15,858 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] Because of the differing criteria used for the tables to follow, the number of cases included for any given comparison will vary from that total number.

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[6] It is worth recognizing the difference between aggregate versus individual decisions regarding review decisions and error correction. It is, of course the individual justices who vote to review the lower court decisions. That is why Brenner (1997) chose to examine Justice Burton's clerks' memos to determine the reasons why he voted one way or the other on granting certiorari. Although examining the individual decisions makes sense, this series of papers and the work of many others have examined "Court" decisions even to the extent it represents an aggregate of individual level decisions.

[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

An additional note on the coding for this examination is worthwhile before proceeding. Regarding the dispositions of the cases to which the Court granted review the comparison will be between those cases affirmed and those cases the Court "reversed" which includes those that are reversed, reversed and remanded, vacated, vacated and remanded, or affirmed in part and reversed in part (and possibly remanded). This division comports with Baum's language about cases reversed in whole or part noted above (2022, 96). The ideological classification, liberal or conservative, of the lower court and Supreme Court dispositions follows the principles of Spaeth's coding for the United States Supreme Court Judicial Database.

Results

I begin by noting that of the 15,706 cases in the dataset where the Court made a review decision it accepted 3,095 of them for review. That results in an overall acceptance rate of 19.7%.[9] Thirty-one of these cases were either dismissed by a Supreme Court Rule after acceptances or were disposed of in unusual ways (e.g., remand to a lower court). That leaves 3,064 cases for examination.

TABLE 1 ABOUT HERE

In Table 1 we can see the comparison with the Supreme Court's disposition and the ideological direction of the lower court decision. Of the 3,064 cases the Court accepted for

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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.)

[9] This number is less than the 15,858 noted previously because it does not include 152 cases where the Court did not make a review decision on the substance of the case. One hundred and forty-eight were due to requests for dismissal by the petitioner before the review decision and the remaining four were due to other rule dismissals.

review and disposed of on the merits, 908 (29.6%) had a liberal lower court decision and 2,156 (70.4%) had a conservative lower court decision. Of the liberal lower court decisions, the Court affirmed 472 (52.0%) of them and reversed 436 (48.0%). For the conservative lower court decisions, the Court affirmed 593 (27.5%) of them and reversed 1,563 (72.5%). The Warren Court was over twice as likely to take conservative lower court decisions for review and nearly twice as likely to reverse them compared to liberal lower court decisions. The difference was enough to reach the $p < .001$ level of significance using a two-tailed difference of means test (Wonnacott and Wonnacott 1972, 178).

Given the findings from several prior papers in this series it is worth exploring whether there is a difference in how the Warren Court dealt with cases from state and federal lower courts. Tables 2 and 3 show the same comparison as in Table 1 by looking at federal and state cases, respectively.

TABLE 2 ABOUT HERE

Table 2 compares the Court's disposition of lower court liberal and conservative decisions from lower federal courts. There were 2,407 of these cases of which 829 (34.4%) were liberal and 1,578 (65.6%) were conservative. Here we see that the Court affirmed 438 of 829 (52.8%) liberal lower court decisions. The Court granted review to a much larger number of conservative lower federal court decisions but affirmed a much lower percentage of them at 31.1% (490 of 1,578).

TABLE 3 ABOUT HERE

Table 3 shows the comparison in the Court's disposition of liberal and conservative decisions from state lower courts. The Court granted review to a much smaller number of state court cases, only 657, of which 79 (12.0%) were liberal and 578 (88.0%) were conservative.

Here the Court affirmed 34 of the 79 (43.0%) of the liberal state court decisions. The Court accepted for review over seven times as many conservative state court cases and affirmed only 17.8% (103 of 578) of them. This difference is statistically significant at the $p < .001$ level using a two-tailed test.

Most of the prior studies touching on error correction have only or primarily examined cases before the Supreme Court on petitions for writs of certiorari. The basic reason, as I explained in the second paper in the series, was that the decision to grant review to a certiorari petition was discretionary but to an appeal was not.[10] Although I generally feel it is inappropriate to exclude cases before the Court on appeal from examinations of the Court's agenda setting, I do think it is worthwhile to explore possible differences between such cases. At the very least such examinations can confirm or reject reasons for only focusing on certiorari petitions. To that end, the next three tables follow the pattern of the first three but only by examining cases seeking review by certiorari. The three tables after that focus on those cases before the Court on appeal.

TABLE 4 ABOUT HERE

Table 4 shows that the Court granted review to and disposed of 2,069 cases that were before the Court on petitions for a writ of certiorari. Of these, 466 (22.5%) were liberal lower court decisions and 1,603 (77.5%) were conservative. Of the liberal lower court decisions the Court affirmed 197 of 466 (42.3%). Interestingly, the affirmance rate for conservative lower court decisions was about half that figure at 21.3% (342 of 1,603). Once again, this difference is highly significant.

TABLE 5 ABOUT HERE

[10] The second paper in the series is titled, "Agenda Setting on the Warren Court, Paper 2: Certiorari and Appeal on the Warren Court Agenda."

In Table 5 we see the comparison of the Supreme Court's grant of review and disposition of liberal and conservative decisions coming from lower federal courts on grants of certiorari. Once again, the Court was more likely to take conservative cases for review, 1,171 of 1,598 (73.3%) in this category. Of the 427 liberal lower court decisions before the Court on certiorari the Court affirmed 181 (42.4%). As in Table 4, the affirmance rate for conservative lower federal court decisions before the Court on certiorari was much lower at 23.1% (271 of 1,171).

TABLE 6 ABOUT HERE

Table 6 shows the comparison of liberal and conservative state lower court decisions before the Supreme Court on certiorari petitions. There were 471 of these cases of which a large majority, 91.7% (432 of 471), were conservative. There were only 39 liberal state court decisions granted review by the Court on certiorari petitions and the Court affirmed 16 (41.0%) of them. In contrast, the Court affirmed only 16.4% (71 of 432) of the conservative state court decisions. The difference between 41.0% and 16.4% reaches statistical significance, but note that the Court overturned over 15 times as many conservative state court decisions as liberal ones (361 conservative versus 23 liberal).

TABLE 7 ABOUT HERE

Turning to the cases on appeal to which the Supreme Court granted review, in Table 7 we see that there were 993 such cases. Of these, the Court affirmed 525 (52.9%) and reversed only 468 (47.1%). This affirmance rate is much higher than the rate for cases before the Court on certiorari. This finding—that the Court is more likely to affirm cases on appeal—is consistent with Table 4 of the second paper in the series. There we saw that the affirmance rate for cases on appeal was nearly 30% higher than cases before the Court on certiorari. Table 7 shows that there was a much more equal distribution of liberal and conservative lower court decisions

before the Court on appeal, with 441 liberal and 552 conservative. The Court affirmed 274 of the 441 (62.1%) liberal lower court decisions but only 251 of the 552 (45.5%) conservative ones. Once again this differences reaches statistical significance.

TABLE 8 ABOUT HERE

Table 8 shows the comparison of liberal and conservative decisions on appeal from federal courts. There were 807 of these cases in which the ideological division was nearly equal with 401 liberal and 406 conservative decisions. The Court affirmed 256 of the 401 (63.8%) liberal decisions and 219 of the 406 (53.9%) conservative ones. Although this difference was closer than in several previous tables, it still reaches statistical significance at $p < .01$ with a two-tail test.

TABLE 9 ABOUT HERE

Table 9 shows the comparison of liberal and conservative decisions on appeal from state courts. There were only 186 of these cases 40 of which were liberal (21.5%) and 146 (78.5%) were conservative. Of the 40 liberal lower court decisions the Court affirmed 18 (45.0%). In contrast, the Court affirmed 23.1% (32 of 146) of the conservative lower court decisions. Despite the smaller number of cases in this comparison that the affirmance rate for liberal cases was double that of conservative cases allowed the difference to reach statistical significance. In addition, note that the Court reversed five times as many conservative state cases on appeal than it reversed.

The first nine tables showed some differences in how the Supreme Court disposed of liberal and conservative lower court decisions. On the whole it reversed more conservative decisions than liberal ones. The differences in affirmance rates between liberal and conservative decisions reached statistical significance reached statistical significance in every comparison thus

far. Plus, the Court tended to accept more conservative cases for review, which produced a much higher number of reversed conservative decisions. That leads to the question of whether the Court accepted a higher percentage of the available conservative cases. Tables 10 through 12 address this question.

TABLE 10 ABOUT HERE

Table 10 shows the comparison of the acceptance rate of liberal lower court decisions with that of conservative lower court decisions. There were 15,659 cases in this group. Of these 5,652 (36.1%) of the lower court decisions were liberal and 10,007 (63.9%) were conservative. Thus, as a starting point, there were simply more conservative decisions for the Court to choose from when making its review decisions. Of the 5,652 liberal lower court decisions the Court accepted 916 (16.2%) for review. As it turned out, that acceptance rate was less than six points below the rate for conservative lower court decisions, which was 21.8% (2,178 of 10,007), but that difference did reach statistical significance.

TABLE 11 ABOUT HERE

Table 11 shows the comparison of the acceptance rate for liberal lower court decisions coming from the federal courts with conservatives ones. There were 11,410 cases from the lower federal courts. Of these, 4,437 (38.9%) were liberal and 6,973 (61.1%) were conservative. Of the 4,437 liberal lower federal court decisions the Court accepted 835 (18.8%) for review. In contrast, the Court accepted 1,592 of the 6,973 (22.8%) conservative cases for review. Although the difference was only 3.0%, the large number of cases makes the difference statistically significant.

TABLE 12 ABOUT HERE

Table 12 shows the comparison of the acceptance rates for liberal lower court decisions coming from the state courts with conservatives ones. There were 4,249 cases from the state courts. Of these, 1,215 (28.6%) were liberal and 3,034 (71.4%) were conservative. The Court accepted 81 of the 1,215 (6.7%) liberal state cases for review. In contrast, the Court granted review to 586 of the 3,034 (19.3%) conservative state cases. Once again, this difference reaches statistical significance. Of particular note is that although the Court's acceptance rate for conservative lower court decisions was very close for federal (22.8%) and state (19.3%) courts, there was a substantial difference in the Court's acceptance rate for liberal lower court decisions depending on whether they come from federal courts (18.8%) or state courts (6.7%).

Following the prior pattern, the next step is to separately examine the ideological direction of cases before the Court on certiorari petitions and appeals. The next six tables do this.

TABLE 13 ABOUT HERE

Table 13 compares the acceptance rate for liberal and conservative lower court decisions coming to the Court on petitions for writs of certiorari. There were 13,759 cases before the Court on certiorari petitions, 4,805 (34.9%) liberal and 8,954 (65.1%) conservative. The Court granted review to 472 of the 4,805 (9.8%) liberal lower court decisions and 1,621 of the 8,954 (18.1%) conservative ones. Although less than a 10 percent difference, because of the large number of cases it does reach statistical significance.

TABLE 14 ABOUT HERE

Turning to the cases petitioning for a writ of certiorari coming from the federal courts, in Table 14 we see that there were 10,499 such cases of which 4,007 (38.2%) had a liberal lower court decision and 6,492 (61.8%) had a conservative one. Of the 4,007 cases with a liberal lower court decision the Court granted review to 432 (10.8%) of them. The acceptance rate for cases

with a conservative lower court decision was 18.2% (1,183 of 6,492 cases). This difference proved to be highly significant ($p < .001$).

TABLE 15 ABOUT HERE

Table 15 shows the comparison of liberal and conservative cases seeking a certiorari petition coming from state courts. There were 3,260 of these cases, 798 (24.5%) liberal and 2,462 (75.5%) conservative. The Court accepted 40 (5.0%) of the cases with a liberal lower court decision for review. That acceptance rate was much lower than the 17.8% acceptance rate for cases with a conservative lower court decision (438 of 2,462). Here we see that the Court granted review to nearly 11 times as many conservative state cases as liberal ones.

TABLE 16 ABOUT HERE

Turning to the cases on appeal before the Court, Table 16 shows the comparison between liberal and conservative decisions. There were 1,895 such cases, 846 (44.6%) with liberal lower court decisions and 1,049 (55.4%) with conservatives ones. The Court granted review to 443 of the 846 (52.4%) cases with a liberal lower court decision. The acceptance rate for cases with a conservative lower court decision was 53.0% (556 of 1,049 cases). This difference was the closest for any comparison we have seen and it is the first to not reach a traditional level of statistical significance.

TABLE 17 ABOUT HERE

Table 17 shows the comparison of liberal and conservative lower court decisions on appeal before the Court that came from lower federal courts. There were 906 of these cases, 429 (47.4%) liberal and 477 (52.6%) conservative. The Court granted review to 402 of the 429 (93.7%) of the liberal lower court decisions and 408 of the 477 (85.5%) of the conservatives

ones. The exceptionally high acceptance rates for these cases is consistent with the findings of prior papers in the series.[11]

TABLE 18 ABOUT HERE

Finally, Table 18 shows the comparison between liberal and conservative cases before the Court on appeal from state courts. There were 989 such cases, 417 (42.2%) had liberal lower court decision and 572 (57.8%) had a conservative one. The Court granted review to 41 of the 417 (9.8%) cases with a liberal lower court decision and 148 of the 572 (25.9%) cases with a conservative lower court decision.

Discussion

Overall, the results for this examination proved to be statistically significant in all but one of the 18 comparisons. Even aside from that the results are quite interesting. As a starting point, the first nine tables examined various aspects of the Court's disposition of the cases for which it granted review. From Table 1 in particular we saw that the Warren Court certainly reversed more cases than it affirmed and the percentage, 65.2%, was very close to the two-thirds that Baum suggested (2022, 96). Aside from the overall results, distinguishing between the types of lower courts, federal or state, and the difference between cases on certiorari and appeal yielded some interesting results.

The difference in the affirmance rate between liberal and conservative lower court cases was a bit smaller for those cases coming from the federal courts than the state courts, but only by a few percentage points. More interesting was that cases from the state courts were more likely

[11] See, for example, Table 10 of the twelfth paper in the series that showed the acceptance rate for cases coming to the Court directly from a three-judge federal district court to be 95.4%.

to be reversed by nearly 10 points if they had a liberal lower court decision and about 13 if it was conservative.

Examining the differences between federal and state lower court decisions and between cases filed by certiorari and appeal provided some interesting results as well. To the extent that granting petitions for certiorari is more discretionary than granting review to cases on appeal one might expect that if error correction exists it would be more evident in the cases before the Court on certiorari. That proved to be the case as we saw that the affirmance rates for liberal and conservative lower court decisions shown in Tables 4, 5, and 6 for cases before the Court on certiorari were much further apart than they were for cases on appeal in Tables 7, 8 , and 9.

Of course, even if affirmance rates had been nearly equal, the larger number of conservative cases granted review as shown in Table 1 gave the impression of an error correction leaning to the liberal side. That led to an examination of the pool of cases from which the Court chose those to review.

In Table 10 we saw that there were more than half again as many cases with conservative lower court decisions seeking review before the Court than liberal ones. Table 10 also showed that the acceptance rate for liberal and conservative lower court decisions was less than six points apart. On the other hand, when these cases were broken out by those coming from federal and state lower courts we saw that there was a significant difference in the acceptance rates between liberal and conservative cases coming from the lower federal courts as well as those from the state courts. The acceptance rate for conservative lower court decisions was very close between those coming from federal and state courts. The big difference was in the acceptance rate for liberal lower court decisions. The rate for cases from federal courts was only a few

percent below the conservative cases. For the liberal state cases, however, the acceptance rate was a very low 6.7%, about 12 points below the rate of liberal cases from the federal courts.

For the cases from both the federal and state courts, a higher acceptance rate for conservative decisions coupled with a lower affirmance rate (Tables 2 and 3) produced the larger number of conservative decisions that were reversed. This appears to provide support for ideological error correction.

The separate examinations for the cases on appeal versus certiorari petitions proved particularly informative regarding the cases from lower federal courts. Consistent with the findings from prior papers in the series, there was a very high acceptance rate for cases on appeal from federal courts. For both liberal lower court decisions on appeal the acceptance rate was 93.7%. Conservative lower federal court decisions had a slightly lower rate at 85.5% Once the cases on appeal were removed, the difference in the cases before the Court from lower federal courts seeking certiorari petitions became even more pronounced. The significantly higher acceptance rate for conservative lower federal court decisions was entirely the result of the cases seeking a writ of certiorari. Given the larger number of lower federal court cases with a conservative lower court decision, the higher acceptance rate resulted in more than half again as many conservative decisions chosen for review. Thus, when the Warren Court had more discretion to take cases, it took more cases with a conservative lower court decision and reversed them at a higher percentage.

The only comparison that did not reach statistical significance was for Table 16, which compared the acceptance rates for liberal and conservative lower court decisions. Interestingly, however, when broken out into those coming from federal and state courts each comparison was statistically significant and in opposite directions. The Court was more likely to take liberal

lower court cases from the federal courts, but less likely to do so from the state courts. The very high acceptance rate for cases on appeal from the federal courts was consistent with the findings of previous papers. The Court would seem to have more discretion about accepting state cases on appeal (as opposed to those from the federal courts) and this seems to be reflected both in the much lower rates for all state cases and particularly for the very low rate for liberal cases.

Vinson Court Comparison

In prior papers in this series the comparisons between the results for the Warren and Vinson Courts showed there to be many similarities as they dealt with various types of cases. In this paper, however, there were substantial differences. At a very basic level, for the Vinson Court only five of the 18 comparisons reached a traditional level of statistical significance and only one of those was at the $p < .001$ level.

From the very first table there were differences between the two Courts. The Vinson Court affirmed liberal lower court decisions by only 4.3% more than conservatives one. In sharp contrast, the Warren Court affirmed liberal decisions by over 24% more. When breaking the cases into those coming from the federal and state courts the Vinson Court only affirmed liberal decisions by two percent more than conservative ones. The difference for the Warren Court was over 20 points in favor of liberal decisions. For cases from state courts the Vinson Court actually had a higher affirmance rate than the Warren Court by about 15 points. On the other hand, the Vinson Court's affirmance rate for conservative state cases was about 25 points higher than the Warren Court's.

In examining the cases coming to the Court on a petition for a writ of certiorari the Vinson Court's affirmance rates for liberal and conservative cases was nearly equal. For the Warren

Court the liberal affirmance rate was nearly twice that for conservative cases. Separating the certiorari cases into those from the federal and state courts showed that the Vinson Court actually had a slightly higher rate for conservative federal cases. Though the Vinson Court had a higher affirmance rate for liberal state cases, it was by less than five percent. The Warren Court strongly favored liberal lower court decisions, by about 19 points for federal cases and about 25 points for state cases.

For the cases on appeal the Vinson Court had larger affirmance rates for liberal lower court cases in general and for both federal and state cases. None of the three comparisons reached a traditional level of statistical significance using a two-tailed test, particularly given the relatively small number of cases in the categories. The differences in affirmance rates for liberal and conservative cases on appeal during the Warren Court were closer than the certiorari cases, but they all favored the liberal decisions and reached statistical significance.

Turning to the examinations of what cases the Courts were accepting, it is here that we saw more comparisons reach statistical significance for the Vinson Court. Four of the five comparisons that reached significance for the Vinson Court were among these nine comparisons.

Both Courts granted review to a higher percentage of the conservative lower court decisions, but the Vinson Court's rate was less than a point above the rate for liberal decisions. The rate for the Warren Court favored conservative decisions by about five points, but the number of cases involved made that difference statistically significant. Both Courts had a statistically significant higher acceptance rate for conservative cases from federal courts by about four percent. The Vinson Court favored liberal state cases by about the same four percent. The Warren Court, however, had an acceptance rate for state conservative cases only a few points

below that of conservative federal cases. The big difference for the Warren Court was the much lower rate for liberal state cases, which was only 6.7%.

Separating the cases into those on certiorari and those on appeal found that both Courts had a significantly higher acceptance rate for conservative cases on certiorari. The same was true for both Courts for federal certiorari cases. For state cases on certiorari, the Vinson Court actually had a higher rate for liberal decisions, but by less than a point. The Warren Court again favored conservative state cases, mainly because the acceptance rate for liberal decisions was a very low 5.0%.

The final comparisons were for cases on appeal. The Vinson Court favored liberal lower court decisions by about seven points, but the number of cases was too small for the difference to be statistically significant. The difference for the Warren Court was less than a point and favored conservative cases. Separating the cases on appeal into those from the federal and state courts showed that the Vinson Court only slightly favored liberal decisions by a few points. In contrast, the Warren Court had a higher acceptance rate for liberal federal cases on appeal by about eight points, but favored conservative state cases on appeal by 16 points.

Conclusion

One reason for the differences with prior studies of error correction, and particularly with the Vinson Court results, might be the Warren Court's focus on particular issues areas. Another reason might be the terms examined. As to the latter, it might be that during the Vinson Court era (1946 to 1952 Terms) the Court was less inclined to accept cases for review due to error correction. This could be because the Court was less ideologically-inclined during those years,

at least, perhaps, as compared with the Warren Court. At a more practical level it could simply be because fewer cases were filed during the Vinson Court terms than in later terms. Other than the 1946 Term which seemed to have an unusually large number of cases filed, no other term during the Vinson Court period had more than 800 cases filed. In contrast, during the Warren Court era the number of cases steadily grew until it was over 1,300 cases for the final two terms. Part of the argument supporting the notion of error correction is that as more cases are filed there is more pressure on the Court to focus on the decisions that need correcting.

On the whole, the results of this examination seem to provide strong evidence regarding the Warren Court's use of an ideological error correction strategy. It is true, of course, that more cases with a conservative lower court decision were filed during this period by a bit more than a two-to-one margin (Table 1). Although the Court did not accept conservative cases in that same margin (Table 10), it did reverse over three times as many conservative lower court decisions (Table 1).

Nevertheless, to the extent that ideological error correction might be a factor in the Court's agenda setting (as well as decision making), it seems to be somewhat complex and possibly related to other factors. These other factors include the greater discretion associated with petitions for writs of certiorari as opposed to appeals and the possibility of the Court's greater willingness to oversee the federal courts relative to the state courts. Additional factors not examined here could also include differences in issue areas as well as the increased number of cases seeking review that occurred after the Vinson Court period. The number of cases filed on the Court's appellate docket continued to climb during the Burger Court (1969 to 1985 Terms) so it will be interesting to see how that Court's results differ.

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Table 1

Affirmance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	472	436	908	52.0%*
Conservative	593	1,563	2,156	27.5%
Column Total	1,065	1,999	3,064	34.8%

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

Table 2

Affirmance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	438	391	829	52.8%*
Conservative	490	1,088	1,578	31.1%
Column Total	928	1,479	2,407	38.6%

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

Table 3

Affirmance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	34	45	79	43.0%*
Conservative	103	475	578	17.8%
Column Total	137	520	657	20.9%

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

Table 4

Affirmance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	197	269	466	42.3%*
Conservative	342	1,261	1,603	21.3%
Column Total	539	1,530	2,069	26.1%

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

Table 5

Affirmance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	181	246	427	42.4%*
Conservative	271	900	1,171	23.1%
Column Total	452	1,146	1,598	28.3%

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

Table 6

Affirmance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	16	23	39	41.0%
Conservative	71	361	432	16.4%
Column Total	87	384	471	18.5%

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

Table 7

Affirmance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	274	167	441	62.1%*
Conservative	251	301	552	45.5%
Column Total	525	468	993	52.9%

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

Table 8

Affirmance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	256	145	401	63.8%*
Conservative	219	187	406	53.9%
Column Total	475	332	807	58.9%

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

Table 9

Affirmance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	18	22	40	45.0%*
Conservative	32	114	146	21.9%
Column Total	50	136	186	26.9%

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

Table 10

Acceptance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	916	4,736	5,652	16.2%*
Conservative	2,178	7,829	10,007	21.8%
Column Total	3,094	12,565	15,659	19.8%

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

Table 11

Acceptance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	835	3,602	4,437	18.8%*
Conservative	1,592	5,381	6,973	22.8%
Column Total	2,427	8,983	11,410	21.3%

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

Table 12

Acceptance Rates for Cases With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	81	1,134	1,215	6.7%*
Conservative	586	2,448	3,034	19.3%
Column Total	667	3,582	4,249	15.7%

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

Table 13

Acceptance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	472	4,333	4,805	9.8%*
Conservative	1,621	7,333	8,954	18.1%
Column Total	2,093	11,666	13,759	15.2%

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

Table 14

Acceptance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	432	3,575	4,007	10.8%*
Conservative	1,183	5,309	6,492	18.2%
Column Total	1,615	8,884	10,499	15.4%

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

Table 15

Acceptance Rates for Cases before the Supreme Court on Petitions for Writs of Certiorari With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	40	758	798	5.0%*
Conservative	438	2,024	2,462	17.8%
Column Total	478	2,782	3,260	14.7%

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

Table 16

Acceptance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	443	403	846	52.4%
Conservative	556	493	1,049	53.0%
Column Total	999	896	1,895	52.7%

Table 17

Acceptance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from Lower Federal Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	402	27	429	93.7%*
Conservative	408	69	477	85.5%
Column Total	810	96	906	92.6%

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

Table 18

Acceptance Rates for Cases before the Supreme Court on Appeal With Liberal Lower Court Decisions Compared With Cases With Conservative Lower Court Decisions from State Courts on the Warren Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	41	376	417	9.8%*
Conservative	148	424	572	25.9%
Column Total	189	800	989	19.1%

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