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 1: State and Federal Circuit Differences

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Abstract

Agenda setting of the United States Supreme Court is a matter of continuing interest to judicial scholars. Previous studies have examined several aspects of the agenda setting process. These studies have usually focused on 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. To that end, this study will examine all cases on the Warren Court's appellate docket. As a first cut with this data, this study will examine four empirical questions related to cases filed before the Supreme Court: 1) is there a difference in acceptance rates between state and federal cases, 2) is there a difference in acceptance rates between federal circuits, 3) is there a difference in acceptance rates for state cases in the federal circuits, and 4) is there a difference in acceptance rates between state and federal cases from the same federal circuits?

Agenda Setting on the Warren Court
Paper 1: State and Federal Circuit Differences

This is the first 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. 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. One difference this series of papers will have from those of the Vinson Court is that in these papers I will have the opportunity to discuss differences in the results for the two periods.

Theoretical Considerations

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 appeals (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 certainly recognized strategic aspects to the Court's decision making (e.g., Rodell 1955). Walter Murphy's *Elements of Judicial Strategy* (1964) was 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 went on to note, cue theory fell out of favor when later, more sophisticated, studies failed to replicate the initial results (1991 116). Even so, 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 these two early examinations of the Supreme Court's agenda setting, many later studies focused on how the justices dealt with petitions for writs of certiorari.[1] Caldeira and Wright (1988),

[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 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. 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. See also Stern and Gressman (1978) for a more extended discussion of the topic. Changes to the law in

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 (2019, 87) provides an example of work focusing on *in forma pauperis* petitions (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]

Four Empirical Questions

Regardless of whether one subscribes to some form of cue theory, it is clear that judicial scholars have examined Supreme Court agenda setting for decades. As noted

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 in the 1971 Term 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 2019, 104-107). 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.

above, however, an underlying assumption in most previous studies was the distinction between cases coming before the Court on a petition for a writ of certiorari and those before the Court on appeals. Perry discusses the distinction at some length (1991, Chapter 2) and it seems logical to focus attention on the more discretionary cert petitions. Even so, and as the lyric goes, we should start at the very beginning, a very good place to start.[3] For present purposes this means examining all the cases on the Court's appellate docket.

Current theories and models of Supreme Court agenda setting are heavily based on the examination of certiorari petitions. This may or may not be appropriate for the entire agenda setting process. The primary goal of this study is to take a more fundamental look at the Court's agenda-setting. As Chalmers notes, "Scientific theories are derived in some rigorous way from the fact of experience acquired by observation and experiment" (1982, 1). Because a fundamental approach must focus more heavily on the observational, I label the items to be tested empirical questions rather than hypotheses. Even so, I do not intend this examination to be theory-free and the specific questions examined were certainly selected with at least an eye to current theories and models, even if they are not directly tested here. In short, a goal of this study is to perform initial observation and testing so that later studies can more directly examine current theories and models in a broader agenda-setting context.

[3] A paraphrase from the song "Do-Re-Me" from *The Sound of Music*.

Thus, as a first cut with a more comprehensive dataset, this study will step back from the prior appeal/certiorari distinction and examine four empirical questions related to all cases filed on the Supreme Court's appellate docket: 1) is there a difference in acceptance rates between state and federal cases, 2) is there a difference in acceptance rates between federal circuits, 3) is there a difference in acceptance rates for state cases in the federal circuits, and 4) is there a difference in acceptance rates between state and federal cases from the same federal circuits? Again, although I call these empirical questions, they are not atheoretical. Rather, the questions are loosely related to aspects of the legal model (jurisdiction) as well as the attitudinal model (expertise of judges, expertise of collective courts).[4]

Data

Data for this study were drawn from a larger, ongoing database project involving all cases on the Supreme Court's appellate docket. Data are complete for the Vinson and Warren Courts (1946 through 1968 Terms). Although there were 1,512 cases on the 1946 Term appellate docket, this was more than twice the average number of cases for the remaining six terms of the Vinson Court. Beginning with the early Warren Court, the number of cases on the appellate docket rose steadily until it reached a high of 1,338 in the 1968 Term (the last of the Warren Court) and continued to grow during the Burger Court, eventually surpassing 2,000 cases in the 1979 Term.

[4] See Brenner and Whitmeyer (2009) for a general discussion and comparison of the legal, attitudinal, and strategic models.

Information on the cases was drawn from a variety of sources including the *United States Law Week*, reporters for the state and federal courts, LEXIS, and other online sources. For this examination of the Warren Court, each case that received a docket number during the 1953 to 1968 Terms is included in the dataset. This results in 15,862 cases. Included in this number are 121 cases that eventually received a 1969 Term (the first term of the Burger Court) or later docket number.[5] Included in this number are 308 cases that originally appeared on the Court's miscellaneous docket.[6]

Acceptance Rates for State and Federal Cases

Table 1 compares acceptance rates for cases coming from state courts versus those coming from federal courts.[7] Aside from subject matter differences, at one level this

[5] Until 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.

[6] Through the Vinson and Warren Courts, cases originating on the miscellaneous docket (sometimes referred to as the "paupers' 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). (This is 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.)

[7] I will use the shorthand "state cases" to refer to cases coming from state courts and "federal cases" to refer to those coming from federal courts. Cases considered accepted for review include those where the Court granted review and disposed of the case on the merits. This includes 17 cases in which the Court initially denied review. Also, included are 21 cases in which the Court granted review then dismissed on motion of the petitioner and one case that was a rule dismissal after granting review. Cases considered to have been denied review include denials of cert and dismissed appeals. Not included are rule dismissals prior to a decision on whether to grant review (on motion of petitioner or other).

comparison speaks to whether the justices may see themselves as more a part of the federal system and therefore more likely to grant review to cases from federal courts. At another level, differences here may speak to questions regarding the quality of state versus federal judging.[8] Regardless of the reasons, we see that there is a statistically significant difference in the Court's acceptance rates.

TABLE 1 ABOUT HERE

Although there were two and one half times as many cases from federal courts (11,442 versus 4,264 from state courts), the Court granted review to over three and a half times as many federal cases, 2,430 to only 670 state cases. Thus, during this period the Court granted review to 21.2% of cases coming from the federal courts, but only 15.7% of those from state courts. Although we might have suspected this result in favor of federal courts given even a fairly basic knowledge of the Court's agenda setting, because the goal here is to take a fresh look at the data I used a two-tailed significance test. Despite this more rigorous test, the difference between the acceptance rates for state and federal cases is highly significant ($p < .001$).

Circuit Differences

Having established a difference in how the Court treats state and federal cases, I now turn to an examination of the extent to which this difference can be explained by,

[8] Perry notes that during the Burger Court the cert pool memo contained information on the judges in the lower court as well as who authored the opinion and any judges who dissented (1991, 42). It seems reasonable to believe that this information was included as part of the pool memo because prior justices found it useful, possibly as an indicator of the quality of the judging.

or is related to, differences among the federal circuits. As with reasons why the justices may treat state and federal cases differently, the basis for possible differences among the circuits is loosely related to theoretical concerns involving views of the Court's role and the quality of judging. As to the latter, this may speak to questions of the judicial selection process or to some form or regionalism.[9] Perry also related how clerks of the justices (and presumably the justices themselves) were aware of circuit differences on some issues (1991, 94). Of course, before we can begin to theorize as to reasons for differences we must establish that such differences exist.

Federal Cases

I begin with an examination of whether there are differences in acceptance rates of the cases coming to the Supreme Court from the various federal courts. Given the basic jurisdictional structure of the federal court system, it seems logical to begin by dividing the cases into their respective geographic circuits. During the Warren Court there were ten numbered circuits (First through Tenth) and the District of Columbia Circuit. Although the Federal Circuit was not established by name until 1982, cases coming from "non-geographic" courts such as the Court of Claims, Court of Customs and

[9] As Murphy, Pritchett, Epstein, and Knight (2006, 154) note, debates have continued over the "best" method of judicial selection even though there do not seem to be significant differences in the qualifications of the judges produced by the different selection processes (citing Glick and Emmert, 1987). Rather than qualifications, differences may depend more on the outlook of selected judges toward the judicial role, public policy, and accountability (Murphy et al., 2006, 154). Regional differences may also be difficult to demonstrate, but their perception persists for Supreme Court justices (Carp, Manning, Holmes, and Stidham 2020, 378). Carp et al. also note that a bit more evidence exists regarding regional differences at the federal court of appeals level (2020, 379).

Patent Appeals, and the Emergency Court of Appeals were grouped together as a "circuit" for this analysis.[10]

TABLE 2 ABOUT HERE

The results for the twelve circuits are presented in Table 2. The first thing one notices about the acceptance rates for the circuits is the *lack* of variation. Ten of the circuits fall in the narrow range of 19.9% to 24.2%. The differences for the two circuits that fall outside this range, one above and one below, both reached statistical significance.[11] The cases from the Federal Circuit had a lower, and statistically significant, acceptance rate. The cases in this circuit come from the three courts mentioned previously, but the vast majority of them were from the Court of Claims (459 of 512 cases). Closer examination shows that cases from the Court of Claims had an acceptance rate of 9.1%, which was only slightly higher than the rate for the other courts in the Federal Circuit.

At the other end of the scale, cases coming from the Tenth Circuit had a significantly higher acceptance rate at 29.1%. A thorough examination of the reasons for this difference is beyond the scope of this study, but even with a bit of speculating

[10] Cases in the Emergency Court of Appeals (1942-1961) were handled a bit differently than those in the Temporary Emergency Court of Appeals (1971-1992). The ECA primarily heard cases coming from various federal agencies. The later TECA functioned more like a regular (i.e., geographic) court of appeals in that it heard appeals from various federal district courts, but with limited subject matter jurisdiction. It is also worth mentioning here that cases coming directly to the Supreme Court from a federal district court (usually three-judge district courts) are grouped as part of that circuit's cases. For example, the 18 cases coming directly from the United States District Court for the Eastern District of Virginia are considered part of the Fourth Circuit.

[11] As with the difference between state and federal cases I assume no difference beforehand and therefore use a two-tailed test. The acceptance rate for cases from the Eighth Circuit lies outside the traditional level of significance at $p < 0.096$.

there does not seem to be an obvious explanation. We can see from Table 2 that the cases from the Tenth Circuit were not the fewest in number, the First Circuit had that distinction (only 359 compared to 536). We can also see that the three geographic circuits with the smallest number of cases (First, Tenth, and the Eighth which had 554) had the three highest acceptance rates (22.6%, 24.2%, and 29.1%, respectively). This may not tell us much, however, unless we know, for example, how the Court disposed of those cases.

State Cases Within Federal Circuits

The data presented in Table 1 demonstrated a clear difference in the Court's acceptance rate between state and federal cases. On the other hand, the data in Table 2 demonstrated that with only one exception there was little variation in the acceptance rates of federal cases from the geographic circuits. For the same reasons that we might have anticipated some differences in the acceptance rates for federal courts from the various circuits, we might also anticipate some differences in the acceptance rates for state cases as grouped by the geographic federal circuits.

Grouping the states by their federal circuits does not coincide precisely with how we might ordinarily think of regional grouping. Most regional groupings would divide the states into four or perhaps five groups. In contrast, using the circuits places the states into 10 groups with an unequal number of states in each.[12] Even so, most of the

[12] Leaving aside the District of Columbia Circuit, the Second, Third, and Seventh Circuits have the smallest number of states with three each (though the Virgin Islands was also assigned to the Third Circuit beginning with the 1951 Term) and the Ninth Circuit has the largest number of states with nine

circuits maintain a regional feeling: First through Third in the northeast, Ninth and Tenth in the west, Seventh and Eighth in the midwest and plains, Fifth in the south. The Fourth may be considered generally southern, despite the presence of West Virginia and Maryland. The Sixth may have the least regional identity given the combined midwestern and southern grouping of Michigan, Ohio, Kentucky, and Tennessee. One could certainly argue for or against various other groupings, but adhering to the federal circuits is, at a minimum, consistent with the way the justices are assigned circuits from which they handle applications for stays (often a stay of execution, see Perry 1991, 94). The data for the acceptance rates for state cases grouped by the ten federal circuits is presented in Table 3.[13]

TABLE THREE ABOUT HERE

Unlike the federal cases, the state cases show more variation among the circuits. So much variation, in fact, that the acceptance rate for cases coming from state courts in six of the circuits reach statistical significance when compared to the cases from the other states. Four of the six are below the overall mean acceptance rate of 15.7% and two are above.

The state cases from the four circuits below the overall acceptance rate are those from the First (8.8%), Third (7.7%), Seventh (9.0%), and Ninth (12.8%) Circuits.

(including Alaska and Hawaii which did not become states until 1959), plus Guam and the Northern Mariana Islands.

[13] There is obviously no "federal" circuit for state cases. There were eight cases appealed directly from the District of Columbia courts to the Supreme Court. All were denied review. The Column Totals in Table 3 do not include these eight cases, but they are included for purposes of the statistical tests. There would be no difference in reaching the indicated levels of significance if those eight cases had been excluded.

Although the cases from states in the First Circuit are the smallest in number and have the second lowest acceptance rate, there does not seem to be a strong relationship between the number of cases from a circuit and the acceptance rate. The lowest acceptance rate was for the cases coming from the Third Circuit's states, but the 379 cases from this circuit were only the fifth smallest number. Conversely, the 12.8% acceptance rate of cases from the Ninth Circuit's states was the fourth lowest, but at 784 cases it had the second largest number.

At the other end of the scale, the Fourth and Fifth Circuits had the two highest acceptance rates at 26.3% and 22.2%, respectively. The largest number of cases, 824, also came from the Fifth Circuit, but the 331 from the Fourth Circuit were the fourth smallest number.

One explanation for the higher acceptance rate for cases coming from the states in the Fifth Circuit may lie in the Court's apparent focus on criminal justice issues during the latter years of the Warren Court. Liberal precedents set during Warren Court may have had more of an effect on the southern states of the Fifth Circuit. Again, examination of this possibility is beyond the scope of this paper, but will be something to consider for later papers that will examine selected case specifics.

State Versus Federal Cases Within Circuits

Although there was a clear difference in the acceptance rates between cases coming from the state versus the federal courts, differences among the circuits for federal cases were concentrated in just a few circuits whereas those for the state cases

showed much more variation. The remaining question to address is whether there are differences in the acceptance rates between state and federal cases within each of the federal circuits. As noted previously, differences here may speak to perceptions the Supreme Court justices may have regarding the quality of the judging of state versus federal judges. The data for this comparison are presented in Table 4.

TABLE 4 ABOUT HERE

The percentages in the Acceptance Rate columns of Table 4 come from Tables 2 and 3. The comparison in Table 4 is between the acceptance rates of state versus federal cases within each of the ten indicated geographic federal circuits (leaving out the District of Columbia and Federal Circuits). Looking at the Average line we see that the overall difference between the acceptance rate for these ten circuits is 6.1%, which is statistically significant at $p < .001$.[14] Given this overall difference in the treatment between state and federal cases, it is reasonable to expect there to be differences within the circuits as well and this is confirmed in Table 4. The results in Table 4 also show more variation among the circuits. As indicated by the right column, the absolute values of the differences in the acceptance percentages for federal versus state cases range from a high of 13.8% in the First Circuit to a low of 0.4% in the Fifth Circuit.

Given the lack of variation among the circuits for federal cases and greater variation for state cases within the circuits, it is not surprising that the comparisons of

[14] The difference here from Table 1 is the exclusion of the federal cases from the District of Columbia and Federal Circuits. This exclusion was made to directly compare state and federal cases within the ten indicated geographic circuits. From the results in Table 4 we see that even without those circuits federal cases have a significantly higher acceptance rate than state cases.

the acceptance rates of state and federal cases within the circuits show significant differences for eight of the ten circuits.[15] Four of the circuits (First, Third, Seventh, and Tenth) had a percentage difference of over 12%, all favoring federal cases. Only two circuits (Fourth and Fifth) had a higher acceptance rate for state cases and these were the only two circuits where the difference did not reach statistical significance.

As noted above, the First Circuit had the largest difference at 13.8%. This was due to the combination of having the third highest acceptance rate for federal cases and the second lowest for state cases. Although the Third Circuit's federal acceptance rate of 20.7% was below the average federal rate, the acceptance rate in that circuit was the lowest of the ten at only 7.7%. At 9.0%, the Third Circuit was the only other circuit with a state acceptance rate below 10%. Given that at 21.3% the acceptance rate of federal cases in the Seventh Circuit was only slightly below the average this resulted in a difference of 12.3%. The difference in the Tenth Circuit was the fourth over 12%, but it did not quite fit the same pattern given that the state acceptance rate for this circuit was above the state average at 16.9%. Even so, given that the federal acceptance rate of 29.1% was the highest, it allowed the difference to surpass double digits.

The two circuits where the difference between state and federal acceptance rates did not reach statistical significance, the Fourth and Fifth, were also the two that had the highest state rates (26.3% and 22.2%, respectively). For both circuits, the federal

[15] Unlike in Tables 2 and 3, here the comparisons are within each circuit. Although the indicators of statistical significance are positioned next to the difference in percentage, the difference of means tests were done on the underlying numbers of accepted and denied cases within each circuit. Given the results from Table 1, we could expect federal cases to have a higher acceptance rate, so a one-tailed test was used.

acceptance rate was the same as or very near the federal average of 21.8%, so the differences were quite small.[16]

FIGURE 1 ABOUT HERE

In addition to examining acceptance rates and percentage differences among the circuits, it is also worth considering the number of cases and how many were accepted from each of the circuits. To that end, Figure 1 provides a visual representation of the number of state and federal cases from the ten indicated circuits and the proportion of those cases accepted and denied.

As mentioned previously, with the state cases there seemed to be a bit of a connection between the number of cases coming from a circuit and the acceptance rate. This was because the Fifth Circuit's 824 state cases were the second most and also had the second highest acceptance rate at 22.2%. In addition, the First Circuit had the smallest number of state cases filed at 114, but had the second lowest acceptance rate at 8.8%. Conversely, the Fourth Circuit's state cases had the highest acceptance rate at 26.3% but the fourth smallest number of cases filed at 331.

More generally, there is a relatively strong correlation between the number of cases filed from state and federal courts from the given circuits ($r = 0.84$). The correlation between the acceptance rates between state and federal cases, however, is minimal ($r = 0.16$). Also minimal, is the correlation between the number of state cases filed and their acceptance rate ($r = 0.17$). On the other hand, for the federal cases from

[16] The absolute values of the differences for the Fourth and Eighth Circuits are the same at 5.3%. The latter is marked as statistically significant but the former is not because a two-tailed test was used given that the difference was not in the expected direction.

these ten circuits it is interesting that there is a moderate inverse correlation between the number of cases filed and the acceptance rate (r = -0.42). This is largely due to the two federal circuits with the largest number of cases (1,403 from the Second and 1,385 from the Fifth) having an acceptance rate of 21.8% which was the same as the average for the ten circuits. At the same time, the two circuits with the highest acceptance rates (Tenth 29.1% and Eighth 24.2%) had the third and fourth smallest numbers of cases filed with 536 and 554, respectively.

Differences Between the Vinson and Warren Courts

As I note elsewhere (Hagle 2018, 1), we often refer to periods of the Supreme Court's history based on who the Chief Justice was at the time. Changes in the Chief Justice might signal an ideological change for the Court, such as when Burger and Blackmun replaced Warren and Fortas, or it could mark a particularly important Court decision, as *Brown v. Board of Education* (1954) did at the start of Warren's tenure, or it could just be a convenient way of marking a particular period in the Court's history. Regardless of the particular importance of a change of Chief Justice, dividing the study of the Supreme Court into periods coinciding with the tenure of particular Chief Justices is fairly common.

In the Introduction to *Supreme Court Agenda Setting: The Vinson Court 1946 to 1952 Terms*[17] I provide some reasons for beginning my examination of the Court's agenda

[17] As I mentioned before the book is available in electronic form from Amazon.com—and for a very reasonable price!

setting with the Vinson Court. Not surprisingly, similar reasons exist for examining the Warren Court. One of the reasons I mentioned is that by focusing each set of papers on the period covered by a particular Chief Justice I can then compare those periods. To that end, there are a few differences between the results from the Vinson and Warren Courts worth noting.

The first item to consider is the number of cases involved between the two courts. In comparing Table 1 here and Table 4-1 in the Vinson Court book we can see that total number of cases filed during the Warren Court was 2.74 times as many more than during the Vinson Court (15,706 versus 5,728).[18] The increase was a bit larger for federal cases (2.79) than state cases (2.62). Of course, such a large increase was to be expected given that the Warren Court covers 16 terms as opposed to the seven of the Vinson Court. Thus, a better measure for comparison purposes is the per term average. For the Warren Court the average number of cases filed per term was 981.63 compared to 818.23 for the Vinson Court.[19]

FIGURE 2 ABOUT HERE

Figure 2 shows the number of cases filed each term of the Warren Court. The number of cases on the appellate docket in the 1953 and 1954 Terms was similar to those of the Vinson Court. A sharp increase in the next two terms was followed by a

[18] A reminder that the figures in the tables only include cases for which the Court made a review decision. Also, although it would be easier to compare the corresponding tables in the two sets of papers, as I worked through the Vinson Court papers there were occasional corrections to the coding that resulted in minor changes to the original tables. Thus, the most up to date Vinson Court data is contained in the tables for the book, which, as you might have heard, is available in electronic form on Amazon.com.
[19] As noted above, the 1946 Term had about twice the number of cases filed as the next few terms. That large number inflated the average for the Vinson Court as a whole by about 100 cases.

reduction and period of stability through the 1961 Term. Slight increases the next few terms were followed by a sharp increase for the 1965 Term and then continued increases in the final two terms of the Warren Court.

In terms of the mix of state and federal cases, the state per term average was 232.14 cases during the Vinson Court and 266.50 cases during the Warren Court. Given that relatively small increase, it is no surprise that the bulk of the increase in cases during the Warren Court was the result of more cases from federal courts: 586.14 cases per term during the Vinson Court versus 715.13 during the Warren Court. Interestingly, despite these increases in the number of state and federal cases the acceptance rates for state and federal cases was not that different between the two Courts. The Vinson Court accepted 16.6% of state cases and 22.0% of federal cases. The Warren Court accepted 15.7% of state cases and 21.2% of federal cases. These slight reductions in the acceptance rates seem understandable given the increased number of cases.

The next comparison worth mentioning is that between the federal cases in the circuits as seen in Tables 2 here and 4-2 for the Vinson Court. The circuits that showed statistically significant differences for the Vinson Court were the District of Columbia and Federal. Two circuits also showed significant differences for the Warren Court, but they were the Tenth and Federal. The Federal Circuit during the Warren Court was again well below the overall average. For the Vinson Court the DC Circuit had the highest acceptance rate at 29.4%. During the Warren Court, however, the acceptance rate was only 21.7%. For the Vinson Court period I wondered if the high acceptance rate for the DC Circuit was due to the Court's view that this circuit was more "federal,"

meaning fewer cases based on state law (e.g., those based on diversity jurisdiction or habeas corpus petitions from state prisoners). Even if that was true during the Vinson Court, it was apparently not the case during the Warren Court.

During the Vinson Court the Tenth Circuit had an acceptance rate of 18.8%, which was a few points below the overall rate though not significantly so. During the Warren Court, the acceptance rate for the Tenth was the highest among the circuits at 29.1%. No obvious reason for this increase in the acceptance rate comes to mind, so it will be interesting to see if examinations in later papers help to explain this change.

The third item to mention concerns the differences in the acceptance rates for states cases geographically divided by the federal circuits. Tables 3 here and 4-3 in the book present these values. As noted above, the state cases from six of the circuits were significantly different from the overall average. This was in contrast to the Vinson Court period when only state cases from the Second and Seventh Circuits were significantly different. During both court periods the acceptance rate for state cases from the Seventh Circuit were significantly below the overall average (8.6% during the Vinson Court and 9.0% during the Warren Court). In contrast, the state cases from the Second Circuit were significantly higher during the Vinson Court (24.3%) but slightly below the overall average during the Warren Court (14.5%). The per term cases from the Second Circuit during the Warren Court were only a bit above the Vinson Court period, so that does not explain the drop.

The largest drop in the acceptance rate of state cases from one of the federal circuits actually came from the First Circuit. The acceptance rate for state cases from the

First Circuit during the Vinson Court was 33.3% but during the Warren Court it was only 8.8%. Such cases went from the highest acceptance rate to the second lowest. The explanation, however, might lie largely in the number of cases filed from this circuit. During the Vinson Court period very few state cases came from the First Circuit, only 27 total for the seven terms, a bit under four per term, but during the Warren Court that number jumped to 114, over seven per term. That was still the smallest number of state cases from any of the circuits, but perhaps such cases were not seen as special due to their rarity as they had been as the number increased.

Overall, state cases from the circuits had an increased acceptance rate in four circuits and a decreased rate in the other six. State cases from the Fifth Circuit had the largest increase, going from a slightly below average 15.9% during the Vinson Court to a statistically significant above the average 22.2% during the Warren Court. As a bit of speculation, it may have been that the activism of the latter Warren Court, particularly in the area of criminal procedure, may explain the increased acceptance rate for these cases.

The final item to mention is the comparison between the different acceptance rates between state and federal cases from the circuits as shown in Tables 4 here and 4-4 in the book. Given the increased differences in the state cases, it is not surprising that there were many changes between the two court periods. Interestingly, cases from the First Circuit had the largest difference between state and federal cases during the

Vinson Court with state cases having the higher rate (-15.1% difference[20]) and the largest during the Warren Court but with federal cases having the higher rate (13.8% difference). Again, however, this was largely a result of the very small number of cases from that circuit. The next most remarkable change was with the cases from the Tenth Circuit which went from an acceptance rate 6.6% higher for state cases to 12.2% higher for federal cases. The increase in the rate for the federal cases was mentioned above in the discussion for Table 2, but there was also a substantial drop in the acceptance rate for the state cases from that circuit (25.4% during the Vinson Court period, 16.9% during the Warren Court).

Concluding Comments

Judicial scholars have long studied agenda setting on the United States Supreme Court. Many such studies, however, have restricted their data to cases coming to the Court on petitions for writs of certiorari, cases from selected terms, cases from select subject areas, or some combination of these limitations. The primary purpose of this study was to perform a more comprehensive examination of all cases filed on the Warren Court's appellate docket. By conducting this more comprehensive examination without prior limitations on the cases allowed for a more fundamental and complete view of the cases being filed and the Supreme Court's review decisions of them.

[20] The negative sign on the percentage indicates that the acceptance rate for state cases was higher than for federal cases.

Rather than proceeding from extant theories and models of the Court's agenda setting this study proceeded from the notion that one must observe before theorizing and hypothesizing. Put another way, is there anything there worth studying (or, even more colloquially, is there any "there" there)? With at least a nod to current theories and models, an initial question to ask was whether the Court treats cases coming from the state courts differently than those from the federal courts. The answer, as presented by the data in Table 1, is a resounding yes.

Having established this difference in treatment between state and federal cases at the Warren Court's agenda setting stage, the next step is to begin to flesh out and explain this difference. Two immediate factors come to mind: filing type (cert versus appeal) and the disposition on the merits (with an eye to an error correction strategy). As each of these factors is sufficiently important to warrant a separate study, for present purposes I chose to explore three aspects of the state/federal difference in relation to geographic factors.

The notion of a geographic aspect to judges and judging is certainly not new. It is well known at the judicial selection level (e.g., Nixon's "Southern strategy," Carp et al. 2020, 378). Substantively, notions of a geographic aspect to judicial decision making come by way of specific studies (e.g., Hagle 1992), anecdotal evidence (e.g., Perry 1991, 94), or just conventional wisdom (e.g., the Court is more likely to defer to the Court of Appeals for the Second Circuit on economic matters). The results presented in Tables 2 through 4 show a mixed pattern regarding a geographic aspect to agenda setting on the Warren Court. In Table 2 we saw very little variation in the acceptance rate for federal

cases coming from all but two circuits. The variations were were statistically significant in the Tenth Circuit and from the courts that would eventually belong to the Federal Circuit. The differences in the Tenth and Federal Circuits deserve additional study. The lack of variation from the other circuits also deserves closer examination to determine whether it holds up on closer examination considering factors such as the disposition on the merits, subject matter, etc.

More variation was found among the state cases as grouped by federal circuits. This was true when comparing state cases across circuits and when comparing state versus federal cases within circuits. Some of these differences might be explained as the result of an unusual set or number of cases, but, again, additional study is necessary to explain the nature of the differences.

Comparisons of the Warren Court cases with those of the Vinson Court showed both similarities and differences in the results. Overall acceptance rates for state and federal cases were similar and both courts had a statistically significant higher rate for federal cases. Among the federal cases, those coming from the Federal Circuit were again well below the average, which might call for additional study. On the other hand, a large increase in the acceptance rate for cases from the Tenth Circuit is also worthy of additional examination. The increased variability in the acceptance rates of the state cases grouped by federal circuits resulted more significant differences with the federal cases from those circuits. It will be interesting to see if those changes remain when examining the cases filed during the Burger Court period.

On the whole, this study provides a solid foundation for more extensive and detailed examinations of agenda setting on the Warren Court. Along those lines, the increasing number of cases filed each term will be of interest both in terms of the extent to which the nature of the cases changed as well as in comparison with the cases of the Vinson Court.

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Table 1

Acceptance Rates for State and Federal Cases on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate* (%)
State	670	3,594	4,264	15.7%*
Federal	2,430	9,012	11,442	21.2%
Column Total	3,100	12,606	15,706	19.7%

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

Table 2

Circuit Differences in Acceptance Rates for Federal Cases on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
First Circuit	81	278	359	22.6%
Second Circuit	391	1,403	1,794	21.8%
Third Circuit	177	677	854	20.7%
Fourth Circuit	142	534	676	21.0%
Fifth Circuit	385	1,385	1,770	21.8%
Sixth Circuit	181	690	871	20.8%
Seventh Circuit	250	921	1,171	21.3%
Eighth Circuit	134	420	554	24.2%
Ninth Circuit	262	1,054	1,316	19.9%
Tenth Circuit	156	380	536	29.1%*
District of Columbia Circuit	226	817	1,043	21.7%
Federal Circuit	45	453	498	9.0%*
Column Total	2,430	9,012	11,442	21.2%

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

Table 3

Acceptance Rates for State Cases Within Federal Circuits on the Vinson Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
First Circuit	10	104	114	8.8%*
Second Circuit	73	430	503	14.5%
Third Circuit	29	350	379	7.7%**
Fourth Circuit	87	244	331	26.3%**
Fifth Circuit	183	641	824	22.2%**
Sixth Circuit	74	412	486	15.2%
Seventh Circuit	36	364	400	9.0%**
Eighth Circuit	43	185	228	18.9%
Ninth Circuit	100	684	784	12.8%*
Tenth Circuit	35	172	207	16.9%
Column Total@	670	3,586	4,256	15.7%

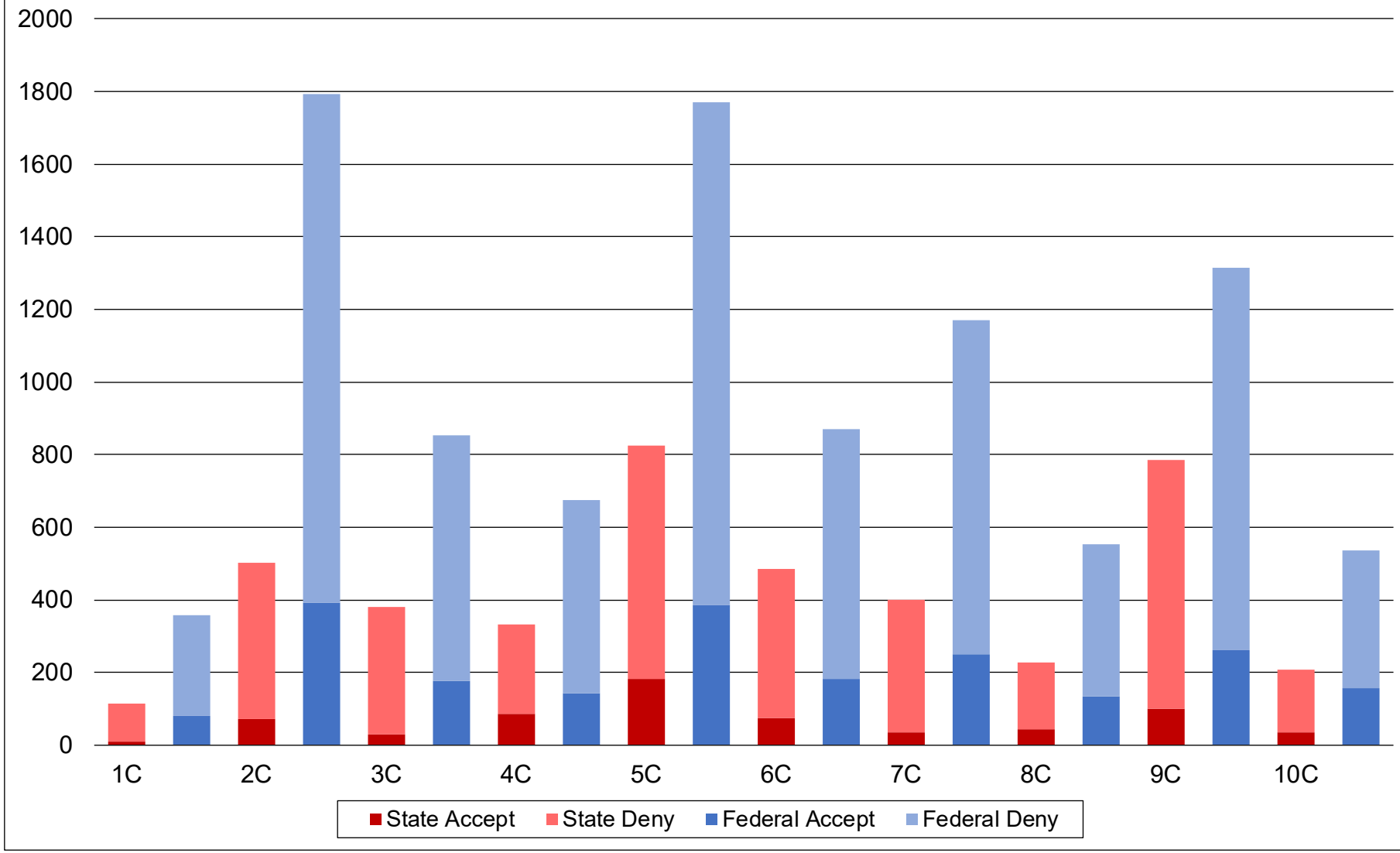
@ Column Totals do not include eight cases from DC, all denied review.
* $p < .01$, two-tail difference of means test
** $p < .001$, two-tail difference of means test

Table 4
Acceptance Rates for State and Federal Cases Within Federal Circuits on the Vinson Court's Appellate Docket

	Federal Cases Acceptance Rate (%)@	State Cases Acceptance Rate (%)#	Difference (Federal - State)
First Circuit	22.6%	8.8%	13.8%***
Second Circuit	21.8%	14.5%	7.3%***
Third Circuit	20.7%	7.7%	13.1%***
Fourth Circuit	21.0%	26.3%	-5.3%
Fifth Circuit	21.8%	22.2%	-0.4%
Sixth Circuit	20.8%	15.2%	5.6%**
Seventh Circuit	21.3%	9.0%	12.3%***
Eighth Circuit	24.2%	18.9%	5.3%*
Ninth Circuit	19.9%	12.8%	7.1%***
Tenth Circuit	29.1%	16.9%	12.2%***
Average	21.8%	15.7%	6.1%**

@ Percentages (except Average) are from column four of Table 2.
# Percentages are from column four of Table 3.
* $p < .05$, one-tail difference of means test
** $p < .01$, one-tail difference of means test
*** $p < .001$, one -tail difference of means test

Figure 1: State and Federal Cases Filed on the Warren Court Appellate Docket by Federal Circuit



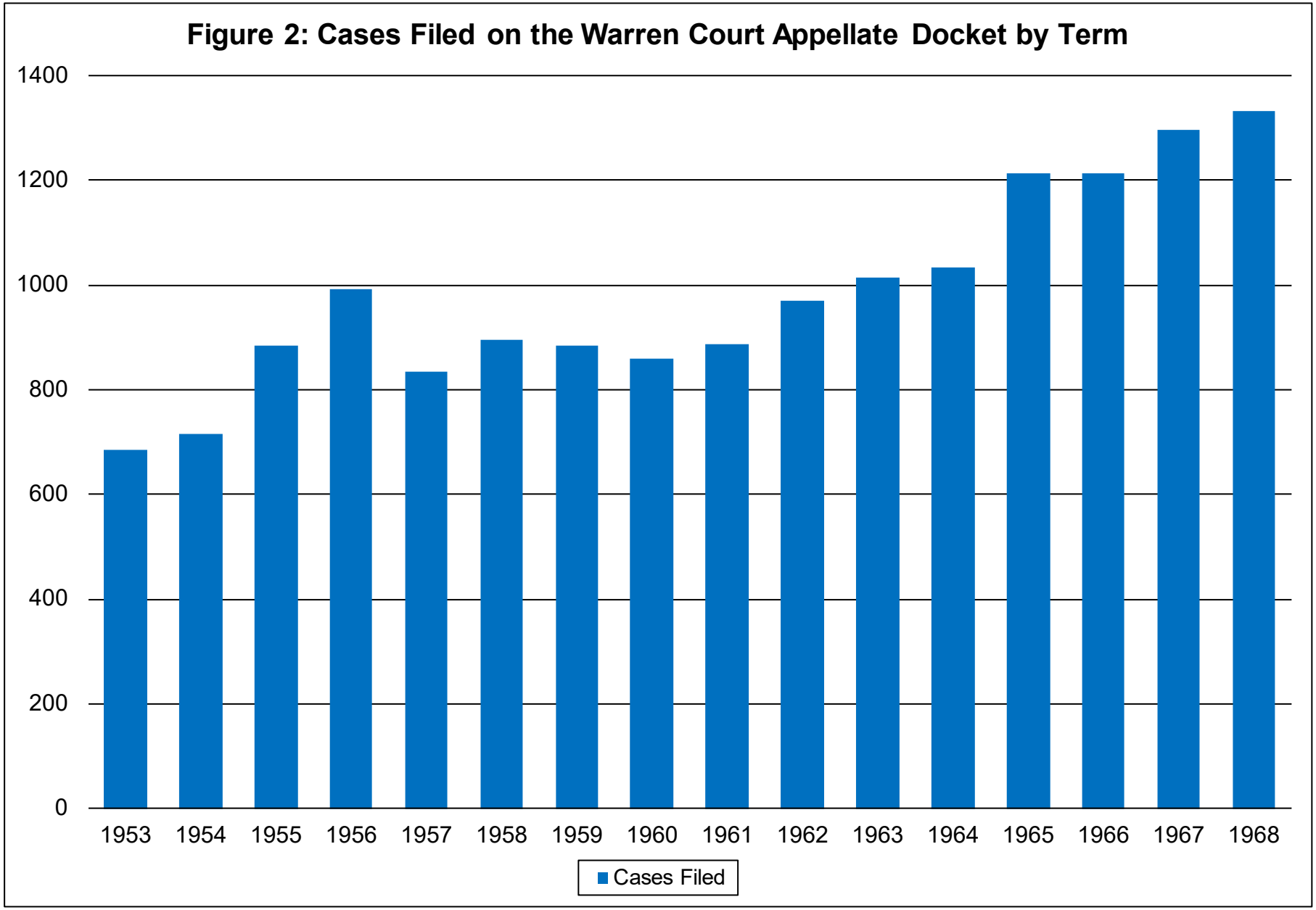


Figure 2: Cases Filed on the Warren Court Appellate Docket by Term
1400
1200
1000
800
600
400
200
0
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
Cases Filed