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 3: Workload as a Factor

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Abstract

Judicial scholars have long been interested in Supreme Court agenda setting. Political histories and biographies touch on the topic in relatively general terms and a long line of studies have examined factors related to why some petitions for writs of certiorari are granted review by the Court and others not. Because of the sheer number of certiorari petitions filed each term, most scholars sampled the data. Despite the many studies that have examined various aspects of the Court's agenda setting, my focus here is on a specific aspect of the agenda setting process that has not yet been addressed in the literature. Although legal considerations are clearly important, the Court's workload may affect the justices' agenda setting as well. In this paper I assume that the justices are consistent in the approach they use to cope with their workload. Even so, it is the workload that tends to vary and this leads us to the central question of this study.

In this paper I examine all cases filed on the Warren Court's appellate docket. Using charts to illustrate the data and difference of means tests to determine the significance of the results I find that that workload does seem to affect certain aspects of the Court's agenda setting, particularly when appeals and petitions for certiorari are considered separately.

Agenda Setting on the Warren Court
Paper 3: Workload as a Factor

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

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

Theoretical Considerations

Judicial scholars have been interested in Supreme Court agenda setting for over 50 years. Various political histories touch on the topic of agenda setting in relatively general terms (e.g., Rodell 1955) and biographies of the justices may mention the "rule of four" or the cert pool begun during the early Burger Court (e.g., Jeffries 1994) but often do not provide details beyond what can be obtained from a good text (e.g., Baum 2022). Schubert's "The Certiorari Game" (1959) was the first in a long line of studies concerned with explaining why some petitions for writs of certiorari are granted review by the Court and others not. Judicial scholars such as

Tanenhaus, et al. (1963) and Ulmer, et al. (1972) continued to explore the factors affecting the Court's review decisions on "cert" petitions. Provine (1980) examined various aspects of case selection in a book-length study of the 1947-1957 Terms. Because of the sheer number of certiorari petitions filed each term, most scholars sampled the data. Caldeira and Wright (1988) took a different approach and focused on all the certiorari petitions for a single term. In another book-length treatment, Palmer (1990) compiled and examined data for the entire Vinson Court era (1946-1952 Terms). Perry (1991) also used sampled data for his book, but he also conducted dozens of interview with clerks and justices in his examination of the 1976-1980 Terms. Epstein and Knight (1998) provided some insights to the Court's agenda setting in their more general analysis of judicial decision making. Caldeira and Wright (2009) revisited and updated their prior work. More recently, Baum's (2022) book on the Supreme Court noted a study of aspects of the Court's certiorari decision making (Black and Boyd (2012)).

There are certainly many more studies that have examined various aspects of the Court's agenda setting. Perry (1991), in particular, provided an extensive list of these studies. I do not intend to minimize the importance of the studies I have not mentioned, but my focus here is on a specific aspect of the agenda setting process that has not yet been addressed in the literature.

Although the work of Tanenhaus, et al. (1963) was later criticized by Ulmer, et al. (1972), among others, it nevertheless set the stage for a common approach to the study of the Court's agenda setting. Namely, the search for legal factors that would weigh for or against the Court's granting review. For Tanenhaus, et al., the cues suggesting that the justices would grant review included whether the federal government was the petitioning party, whether the case involved a civil liberty question, or whether there was dissension (i.e., a dissenting vote) in the court(s) below. (See also Ulmer, et al. (1972).) In addition to traditionally legal factors, Provine

discussed individual-level factors such as judicial philosophy and general ideological orientation as possible influences on the justices (1980, chapter four). Caldeira and Wright (1988) focused their study on the influence of organized interests (via amicus briefs) on the Court's review decision, but also included in their model legal considerations such as whether there was a conflict (alleged or actual) among the lower courts.

Legal considerations are clearly important to the Court's agenda setting decisions, but other factors may affect the justices as well. In particular, the workload of the Court may affect the decision making process. The general thrust of studies considering the Court's workload is usually on the decision on the merits and often takes the view that the justices cannot be comprehensive in their decision making due to human limitations and must find ways to speed the process along. Hagle (1990) provides a brief overview of this approach, which builds on the more general decision making work of Simon (1957, 1981), Steinbruner (1974), and others. We need not explore the workload literature for present purposes except to recognize that those making the review decisions have the usual limitations of any human decision maker. It does not particularly matter whether one posits that the justices are comprehensive decision makers, are using a form of bounded rationality, or are merely satisficing. Instead, I assume that the justices (and, to the extent applicable, their clerks) are consistent in the approach they use to cope with their workload. Even so, it is the workload that tends to vary and this leads us to the central question of this study.

The Supreme Court famously begins its term on the first Monday in October. With some variation, the Court ends its term in June of the following year and then goes on hiatus for July through September. Unlike the Supreme Court, lower courts generally function year round, which, in turn, means that petitions requesting that the Court review these lower court decisions

are filed even while the Supreme Court is on break. Thus, when the justices return to work in October they face a large backlog of review requests. In a statement to the Hruska Commission[1], Justice Blackmun noted, "The heavier the burden, the less is the possibility of adequate performance and the greater is the probability of less-than-well considered adjudication" (Ripple 1980, 175). Although Blackmun was speaking of the general increase in the Court's caseload, the same concern may apply to the extent that the work is not distributed evenly over the course of a term.

Although Perry (1991) did some data analysis in his study of the Court's agenda setting, the more important aspect of his work was the interviews he conducted with dozens of clerks and justices. His interview subjects raised the issue of an uneven workload in two ways at different points during the Court's term. As noted previously, the justices arrive at the Court in October with a large backlog of review requests awaiting them. Of course, the clerks for that term arrive before their justices and begin work on "cert memos."[2] Although the clerks may have had experience clerking on a federal court of appeals, they would not have had to write memos relating to whether the court should review a particular case.[3] The clerks are rarely familiar with the types of issues heard by the Supreme Court when they begin their work, and the justices rarely provide them much advance guidance.[4] As Perry noted, "Clerks are expected to plunge into the cert. process and essentially learn on their own" (1991, 78). Thus, in addition to a

[1] Established by the US Congress (Public Law 489, 92d Cong., 2d sess., 13 October 1972), the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures was better known as the Hruska Commission.
[2] These memos are essentially summaries of the petitions indicating whether the lower court decision should be reviewed by the Court. Also, despite the name "cert memo," such memos are also written for cases coming to the Court on appeal. Although I will make distinctions between cases on certiorari and those on appeal below, unlike prior studies I do not exclude appeals from the analysis.
[3] For example, Greenburg noted that in O'Connor's first term neither she nor her clerks were familiar with what cases should be heard by the Court and it is only after a few years that justices get a sense of what is important to the Court (2007, 66-67).
[4] See Perry (1991, 78-79) for some of these specific comments.

summer backlog of cases that must be processed quickly the clerks are faced with a steep learning curve in determining which cases are worthy of review.

Of course, the justices do not have to rely on the memos from their clerks. Although a new justice might also need time to adjust to the Court's workload,[5] experienced justices may rely on their own reading of the petitions, as Brennan apparently did (Jeffries, 1994, 270-271). Even so, and regardless of whether the bulk of the work was done by inexperienced clerks or the justices themselves, one may reasonably wonder whether there is a difference in the agenda setting decisions made during the hectic and pressure-filled (for the clerks) start of the term relative to the rest of the term.

The second point at which workload may affect the Court's review decisions occurs later in the term. Although the clerks, in particular, will have mastered the process after a few months and are able to spend far less time on preparing cert memos (Perry 1991, 80), there is also less time available for the memos (1991, 60). More specifically, as the term progresses, and particularly in late spring, more time is spent on the drafting of opinions. Thus, one may again wonder whether the crush of work on opinions late in the Court's term affects the review decisions.

Thus, we reach the central question of this study: Is the review decision affected by workload pressures. Put another way, is the Court more or less likely to accept a case for review at the beginning of the term when there is a large backlog of cases from the summer? Similarly, is the Court more or less likely to accept a case for review late in the term when the justices (and clerks) are more focused on finishing opinions in cases already argued?

[5] This notion is known as either a "freshman" or "acclimation" effect. Prior studies have considered such an effect in areas such as the decision on the merits (e.g., Brenner 1983; Hagle 1993) and opinion writing (e.g., Brenner and Hagle 1996), but I am not aware of a comprehensive study of such an effect relative to review decisions.

Data

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

Information on the cases was drawn from several sources including the *United States Law Week*, various reporters for the state and federal courts, LEXIS (now called NexisUNI), and other online sources. Every case filed on the Court's appellate docket number during the 1953-1968 Terms is included in the dataset. This results in 15,862 cases. Unlike the examinations of the Vinson Court, not included in this number are any cases filed before the 1953 Term that were held over and received a 1953 Term or later docket number.[6] Included in this number are 308 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.[7]

Does Workload Matter?

Before addressing the central question of whether the workload matters for the Court's review decision we must confirm some initial assumptions. The first is to verify that the cases

[6] 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.

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

are filed in a relatively even pattern throughout the year. Figure 1 shows the cumulative number of cases filed each month during the 16 terms of the Warren Court.

FIGURE 1 ABOUT HERE

From Figure 1 we see that November has the lowest total for the 16-year period with only 958. That number was substantially below January (1,139) and December (1,147) the months with the next lowest totals. August had the highest total at 1,550, the only month to cross the 1,500 mark. July (1,470) and September (1,485), the other two months the Court was on its summer break, had the next two highest totals. Close behind, however, were the final three months of the terms: April (1,467), May (1,446), and June (1,405).

Although the explanation for the lack of case filings in November is beyond the scope of this paper, it is interesting to see the pattern that appears in the cumulative totals. After reaching a peak in August, the cumulative totals decrease through the fall until they dip significantly in November. The filings rebound in December and, with the exception of a slight decline in January, continue to grow each month through April then have a slight decline for May and June. This pattern does not necessarily present itself in every term, though November has the lowest monthly total in 11 of the 16 terms. Regardless of the reasons for this overall pattern, with the exception of November, we can see that there is a relatively even distribution of case filings during the year.

FIGURE 2 ABOUT HERE

The next step is to determine when during the year the Court makes its review decisions. Figure 2 shows the cumulative monthly totals for when the Warren Court made its review decisions.[8] Not surprisingly, the figure shows very little activity while the Court is on summer

[8] The focus here is on the cases filed during the Warren Court period. Thus, cases filed during the Vinson Court are not included, even if the review decision was made during the 1953 Term or later. Similarly, cases filed during the

hiatus,[9] but a large jump for October. The 4,309 review decisions made during October were well over the average of 1,437 for the other eight months (November through June) and were 27.2% of all review decisions. As with the filing month, we see a slight pattern to the timing of the Court's review decisions. After October, the cumulative number of review decisions made each month eventually dropped to a low of 981 in February. The number made in March was nearly half again the February total at 1,467. The number dropped a bit in April, then rose in May, and rose again to 1,696 as the Court closed out its term in June.

The very large number of review decisions made in October is no surprise and confirms our expectations. June's second highest total is also not surprising as the Court is no doubt looking to finish as much work as possible before leaving for the summer. The jump in the totals from February to March may generally fit with a period when the Court had been working to finish opinions from cases heard earlier in the term (February) and then turned its attention to a slight backlog in the review decisions (March). Regardless of the reason, it might be worthwhile for future research to take a careful look at the review decisions made in March, as well as those for October and June.

FIGURE 3 ABOUT HERE

A different aspect of the timing of the Court's review decisions is how many days it takes for the Court to make a review decision after the case was filed. The average number of days between case filing and review decision on the Warren Court was 86.18. Of course, there was a good deal of variation based on the month of filing, as shown in Figure 3.

Warren Court but that did not have a review decision until the 1969 Term or later are included. There were 201 of these cases. Most were filed late in the 1968 Term, so it was not surprising the review decisions on them would be held over to the 1969 Term or later.

[9] It is hard to see from the figure, but the Court did make a small number of review decisions in July through September. The total for the 16 Terms was only 15 for July, 14 for August, and 25 for September.

Figure 3 shows the average number of days before a review decision by filing month. Given the Court's summer hiatus, it is no surprise that July had a large average, slightly exceeding three months. Similarly, the decreasing averages for August and September can be expected as the filing date gets closer to the start of the Court's term in October. From October through January the average was generally decreasing but relatively stable. We then see a fairly sharp drop in February with March and April at about the same level. Interestingly, as the Court neared the end of its term in May and June we again see a substantial increase in the average time until a review decision, with June having the highest average. This sharp increase at the end of the term fits with the prior comments noted by Perry (1991, 60) that more of the clerks' (and justices') time is spent on finishing outstanding opinions. Obviously, if a review decision on a case filed at the end of the term cannot be made quickly, it will be held over to the next term, adding at least 90 days to the decision time.[10] In fact, in looking at the dispersion of the values for the number of days until a review decision for each month, May had the largest standard deviation at 90.65 days. June's standard deviation of 59.57, however, was lower than that of March (69.27) but above that of February (49.47).

Even more than the month in which the review decision was made (Figure 2), the variation by filing month in the number of days until the review decision shows distinctive differences in the two periods noted by Perry (1991, 60): the beginning of the term (given the backlog) and end of the term. Even so, it is worth exploring this difference a bit further and determining if there is a difference in the number of days until a review decision for cases granted review and those denied.

[10] The shortest time between filing and review decision was zero days, meaning that the Court issued a review decision on the same day the case was filed. This occurred twice in month October. The longest turnaround time was 1,187 days. There were 163 cases for which the Court took a year or longer to announce a review decision. There were one or more such cases in every month.

FIGURE 4 ABOUT HERE

Figure 4 separates the data from Figure 3 into those granted review ("accepted") and those denied. Each set of columns in the figure follows the general pattern from Figure 3. Specifically, accepted cases filed during the summer month of July had the third longest period between filing and review decisions, with that period decreasing for August and then again for September. From October to April we see some variation in the number of days before the review decision was made. The time until cases were accepted for review was fairly stable in October, December, and January, before dipping sharply in February. The number of days for accepted cases then increased in March and April before a bigger increase for May and June. In contrast, it took consistently fewer days for the Court to deny review to cases. Cases filed in July had the third longest time until a review decision was made. The time decreased steadily through February, remained stable in March and April, then sharply increased in May and June.

From Figure 1 we saw that the cases were filed before the Court in a relatively even pattern throughout the year. From Figure 2 we saw that there were differences in when the Court made its review decisions, pronounced for October, less so for June. From Figures 3 and 4 we saw that there are differences in the number of days until a review decision based on the month of filing and whether the case was accepted or denied review. We can now begin a closer look at possible patterns in acceptance rates.

FIGURE 5 ABOUT HERE

Figure 5 shows the acceptance rate by filing month for the 16 terms of the Warren Court. The overall acceptance rate during this period was 19.72%, with a monthly high of 22.54% in December to a low of 17.17% in April. There is not much of a visual pattern to the monthly acceptance rates. July was one of five months above 20%. The acceptance rate dipped for

August then slowly climbed over the next few months until the December high was reached. The acceptance rate dropped in January and February then began an up and down pattern through the end of the term. Given previously stated concerns with possibly hurried work at the beginning and end of the term, we might have expected lower rates for the summer months. The lower acceptance rate for cases filed in April generally fits the notion that review decisions at the end of the term (which would likely occur for cases filed in April) might have a lower acceptance rate if the Court had less time to review them as completely. Higher rates for May and June might be explained by the larger number of cases held over until the next term, but the extra time would just place them in the backlog of cases filed during the summer. Thus, even though a difference of over 5% between the months with the lowest and highest acceptance rates would be of interest to the litigants, there does not seem to be a clear relationship between the filing month and the acceptance rate.

Most prior studies of the Court's agenda setting focused exclusively on certiorari petitions (e.g., Tanenhaus et al., 1963; Ulmer et al., 1972; Provine, 1980; Caldeira and Wright, 1988; Perry 1991). The basic justification was the understanding that the Court's review decisions on petitions for writs of certiorari were discretionary, but their decisions on appeals were not. In a separate paper I examined various differences between the Court's handling of cases on certiorari and those on appeal (Hagle, 2022). The basic conclusion I reached was that cases on appeal should not be excluded out of hand from examinations of the Court's agenda setting. Given possible differences in the two types of cases the next step here is to take another look at the acceptance rate by filing month for each type.

FIGURE 6 ABOUT HERE

Figure 6 shows the acceptance rate by filing month broken out by certiorari and appeal. We can immediately see that the acceptance rates for certiorari cases were below those presented in Figure 5 and all were below 18.0%. Moreover, the acceptance rates for certiorari cases were all well less than half those of appeals. The average acceptance rate for certiorari cases was only 15.33% with a range of 14.01% (April) to 17.62% (December). In sharp contrast, the average acceptance rate for appeals was 52.08% with a low of 42.25% for February and a high of 64.00% for January. Cases on appeal made up about 12% of the cases filed and that percentage varied only slightly for the individual filing months.

As with Figure 5, there is little in the way of a visual pattern to the monthly acceptance rates for each type of case. For certiorari cases, April still had the lowest acceptance rate at 14.01% with September (14.15%) and February (14.25%) only slightly higher. December had the highest acceptance rate at 17.62% with July (16.62%) the only other month above 16%. November, which had the second highest overall acceptance rate, dropped to sixth for certiorari cases. It is hard to see from the figure, but the acceptance rate in the second half of the year (15.00%, January through June) was slightly lower than during the first half of the year (15.69%, July through December). If there is an end of year time crunch or just an exhaustion factor it did not seem to affect the acceptance rate much for certiorari cases.

A bit more of a pattern appears for the cases on appeal. Here we see that the cases filed from July to January had an overall higher acceptance rate than those filed from February to June, which reached traditional levels of significance using a difference of means test ($p < .001$, 2-tailed test).[11] We also see a sharp drop off in the acceptance rate from January's monthly high (64.00%) to February's monthly low (42.86%). From that low the acceptance rate gradually

[11] See Wonnacott and Wonnacott, 1972. Even if the comparison is between the first six months of the term with the latter six months the difference is statistically significant at $p < .01$, 2-tailed test.

increased over the remaining months of the term. Interestingly, there was an up and down pattern throughout the term. Beginning with July's acceptance rate of 55.32%, the rate dropped for August, rose for September, and so on until reaching an overall high in January. Even after the sharp drop to February's overall low of 42.25%, the pattern continued through the end of the term.

Aside from the sharp drop in the monthly acceptance rate for appeals from January to February, February's rate was sufficiently below the average rate for the other months that it reached statistical significance ($p < .02$, 2-tailed test). Although one might be tempted to suggest a midterm exhaustion factor of some sort, given that the certiorari acceptance rate decreased only slightly from January to February (15.12% to 14.25%) it would seem the explanation lies elsewhere.

In Figure 2 we saw that the Court made over 27% of its review decisions in October. We also saw that the number of review decisions dropped sharply for November and December, rebounded a bit in January, then dropped to only 6.19% for February. For the remainder of the term the rate hovered around 9%. Having examined acceptance rates by filing month in Figures 5 and 6, it is worthwhile to do so as well by decision month.

FIGURE 7 ABOUT HERE

Figure 7 shows the acceptance rate by the month in which the Court made its review decision broken out by cases on certiorari and appeal. In looking at Figure 7 I must immediately point out that the columns for July and September are anomalies. Although the Court officially begins its term at the beginning of October, during the Warren Court years the Court actually made a few review decisions in July and September. Although two of the nine cases decided in

August were accepted (one of seven cert cases and one of two appeal cases), the Court granted review to five of the seven certiorari cases in September.

Beginning in October, the acceptance rate for certiorari cases contained some variation, but stayed below 20.0% except for June (21.76%). The June high was nearly half again the average for the other months of the term (again, not counting the summer months) and proved to be statistically significant ($p < .001$, 2-tail test). From October through February, the acceptance rate for certiorari cases stayed within a range of about one percentage point (13.65% to 14.85%). It then increased to 17.17% for March, dropped to 15.79% for April, then hit the low of 13.00% for May before jumping to the June high.

As was seen in Figure 6, appeals once again had much higher acceptance rates. Unlike the certiorari cases, there was more variation in the acceptance rate for cases on appeal. October had the second lowest acceptance rate at 46.72%. The rate increased each month through January (60.17%), dropped in February (53.04%), hit the term high in March (60.71%), dropped again for April to the term low (45.78%), then rebounded in May and June (55.51%).

Discussion

Having set out to examine aspects of how workload may affect the Warren Court's agenda setting, it is fair at this point to ask what we have learned from the results presented. The short answer is that there are certainly some differences and patterns in acceptance rates when considering either the filing month or the review decision month, as well as differences in how cases on certiorari and appeal are treated. On the other hand, the patterns and differences, even

when statistically significant, do not clearly adhere to the basic notion that an overworked Court might be less inclined to accept cases for review at the beginning and end of the term.[12]

I began by showing that despite some monthly variation, cases are filed mostly regularly throughout the year. Of course, the Supreme Court is not in session during the months of July through September. This means that the justices, and their new clerks, face a large backlog of cases to start the term. Perhaps litigants understood this and held off filing cases in November, which had the lowest overall monthly total. Somewhat similarly, the low numbers for December and January may have been the result of recognizing the Court's need to work through the backlog of cases and working around the holidays.

One aspect of how workload might affect agenda setting is in how quickly the work gets done. Not surprisingly, the time until the Court issued a review decision was longer for cases filed during the summer hiatus. An interesting pattern occurred at the end of the Court's term as the average number of days until a review decision was made jumped sharply from April to May, and then again from May to June. The standard deviation for May was the largest, suggesting that the Court either made a review decision quickly or waited until the following term. June had 42 cases for which the review decision was made that month with the rest being held over until the start of the next term.

As might be expected, there was a substantial difference in the waiting period for cases granted and denied review. The average number of days until a review decision for cases denied review was 78.03. In contrast, the number of days for those granted review was 111.98. The average difference based on the filing month was 33.95 days. April had the largest monthly difference at 49.46 days. December, January, and March all had waiting times over 40 days. At

[12] I am sure many researchers have been tempted to quote the opening lines of Buffalo Springfield's song, "For What It's Worth," when faced with mixed results. Having been beaten to the punch by at least one scholar (Rohde 1991), I will resist the temptation.

the other end of the scale, the shortest waiting time was for November (19.53 days) with February (24.70 days) having the second shortest time.

At one level a simple explanation for the variations in the number of days until a review decision was made might be that some cases were so clearly not worth reviewing that a decision could be made very quickly on them. At another level, the slightly longer waiting period for cases granted review may have been a function of the Court's handling of cases on appeal. Although not examined here, the Court often did not issue a separate review decision when it accepted a case on appeal for review. As a practical matter, if the Court decides a case on appeal with a full opinion it must necessarily have decided to review the case well before the opinion was written.

Figure 4 showed that there was a pattern to the average number of days until the Court issued a review decision. Not shown in that figure were the standard deviations for the days until a review decision. Although May had the largest at 90.65, the second highest was in January (76.82), with April (75.86) coming in third. Interestingly, June (59.57) had the fourth lowest standard deviation as only a relatively small number of the 1,405 cases filed that month were decided quickly. Thus, if the Court was performing any sort of triage, review decisions on "easy" cases made quickly and the rest delayed until the following term, it was happening in April and May rather than June.

In looking at the review decisions relative to the month a case was filed (Figure 5) it was somewhat surprising that the monthly average acceptance rate did not show more of a pattern, particularly for the summer months.

More interesting were the results in Figure 6 when cases on certiorari and appeal were viewed separately. As previously noted, most prior studies of agenda setting only examined

cases on certiorari. The justification for excluding appeals was the general understanding that the review decisions on certiorari petitions were discretionary and those on appeals were not. Nevertheless, the statute in effect during the Warren Court set out the legal requirements governing the Court's appellate jurisdiction and the Court had the ability to reject cases on appeal if they did not meet those criteria.[13] The results presented in Figure 6 show that the Court clearly treated appeals differently, but that appeals were not "obligatory" in the usual sense of the word given that even for January, the month with the highest acceptance rate, the Court denied review to roughly 36% of the appeals and over all the rejection rate for appeals was nearly 48%. Thus, even though there was a bit of a visual pattern to the results shown in Figure 6, and the February low did reach statistical significance, the more important finding may be that appeals were not treated in an absolute fashion by the Court and may be deserving of greater attention in the context of agenda setting.

The results presented in Figure 7 switch from filing month to decision month. As with the results presented in Figure 6, in Figure 7 we saw some visual patterns to the monthly acceptance rates and there were some statistically significant differences for certain months. Unlike the filing month, the Court controls the decision month. Cases can be decided quickly, as many were toward the end of the term, or they can be held onto for months or even to the next term.

Vinson Court Comparison

A brief comparison of the results from the Warren Court with those from the Vinson Court shows there to be similarities as well as differences in how the courts handled their dockets. One similarity was the general distribution of cases by filing month. Despite the longer period and

[13] See generally, Stern and Gressman (1969, Chapters 2 and 3). As Perry notes, the law was fundamentally changed to make appeals nearly as discretionary as certiorari cases (1991, 25-27).

increasing number of cases on the Warren Court's appellate docket, the patterns were surprisingly similar. Both courts had a strong start in July, a jump in August, then three months of decreasing filings reaching a low for November. Both courts then had mostly increasing numbers for several months and finished out the term with relatively stable numbers. Of course, the justices do not control when cases are filed, but it is interesting that the pattern is so similar for two such different periods.

It is certainly no surprise that October had by far the most review decisions for both courts. It probably also makes sense that June had the second highest number of review decisions for each court as the justices worked to finish their terms.

We start to see more differences between the courts when examining the number of days until a review decision was made. For the Vinson Court, June was the only month with an average of over 100 days. In contrast, although June was also the month with the highest average for the Warren Court at 126.26 days, both May and July also averaged over 100. Another difference was that there were eight months with averages at about 60 days or fewer for the Vinson Court. For the Warren Court, the smallest average was 62.14 days for February.

Another difference between the two courts was shown in the difference between the average number of days until a review decision between cases accepted for review and those denied. For the Vinson Court, accepted cases had longer wait times than denied cases. Although that was also true for the Warren Court, the differences were much greater.

Interestingly, the acceptance rate by filing month did not vary as much as one might have expected given the much larger number of cases filed each year during the Warren Court. Overall, the acceptance rates were a bit lower for the Warren Court, but only slightly.

Finally, when examining the acceptance rates by decision month separated by those on certiorari and appeal, we see a somewhat similar pattern as the term progressed though the specific months with increases and decreases varied a bit.

Conclusion

The purpose of this study was to examine a particular aspect of the Court's agenda setting that had not yet received attention. The focus on workload, particularly when cases were filed and when the Court issued review decisions on them, tapped into general decision making theory related to the limitations of human decision makers. Overall, the results were mixed in that some visual patterns were found, and some differences reached statistical significance, but there was no clear *Aha!* finding. That said, the findings were strong enough to suggest, at the very least, that the practical pressures of workload were related to the Court's agenda setting and that further study is warranted. Moreover, the results clearly show that cases on appeal, which had been regularly excluded from prior agenda setting studies, need a more nuanced approach.

That this study focused on the Warren Court is not just of historical interest. The Warren Court era was a period of increasing workload for the Court. At the start of the period the Court was handling about the same number of cases on its appellate docket as the Vinson Court but that number had nearly doubled by the 1968 Term. Thus, it is important to know how the Court handled the increased workload. This is particularly so given that the workload continued to increase during the Burger Court years.

Similarly, the change in the law respecting the Court's jurisdiction over appeals actually makes the study of appeals during earlier terms of greater interest. Again, given that most prior studies of the Court's agenda excluded appeals and focused on petitions for certiorari, we would

not know how the change in the law affected the Court's agenda setting for appeals if we do not examine how the Court treated these cases before the change. Doing so allows us to both determine whether there was a change in how the Court treated appeals before and after the law changed and the extent to which the Court treated appeals and petitions for certiorari similarly under the new law.

In short, this study took an observational approach to the Court's workload. Not so much as a naïve inductivist that would argue observation must always precede theoretical development (see, generally, Chalmers 1982, Chapter 3), but as one with an eye to providing an additional perspective beyond extant theories of legal or attitudinal decision making. Having established that some aspects of workload seem to influence the Court's agenda setting, it is worth pursuing these issues in greater depth.

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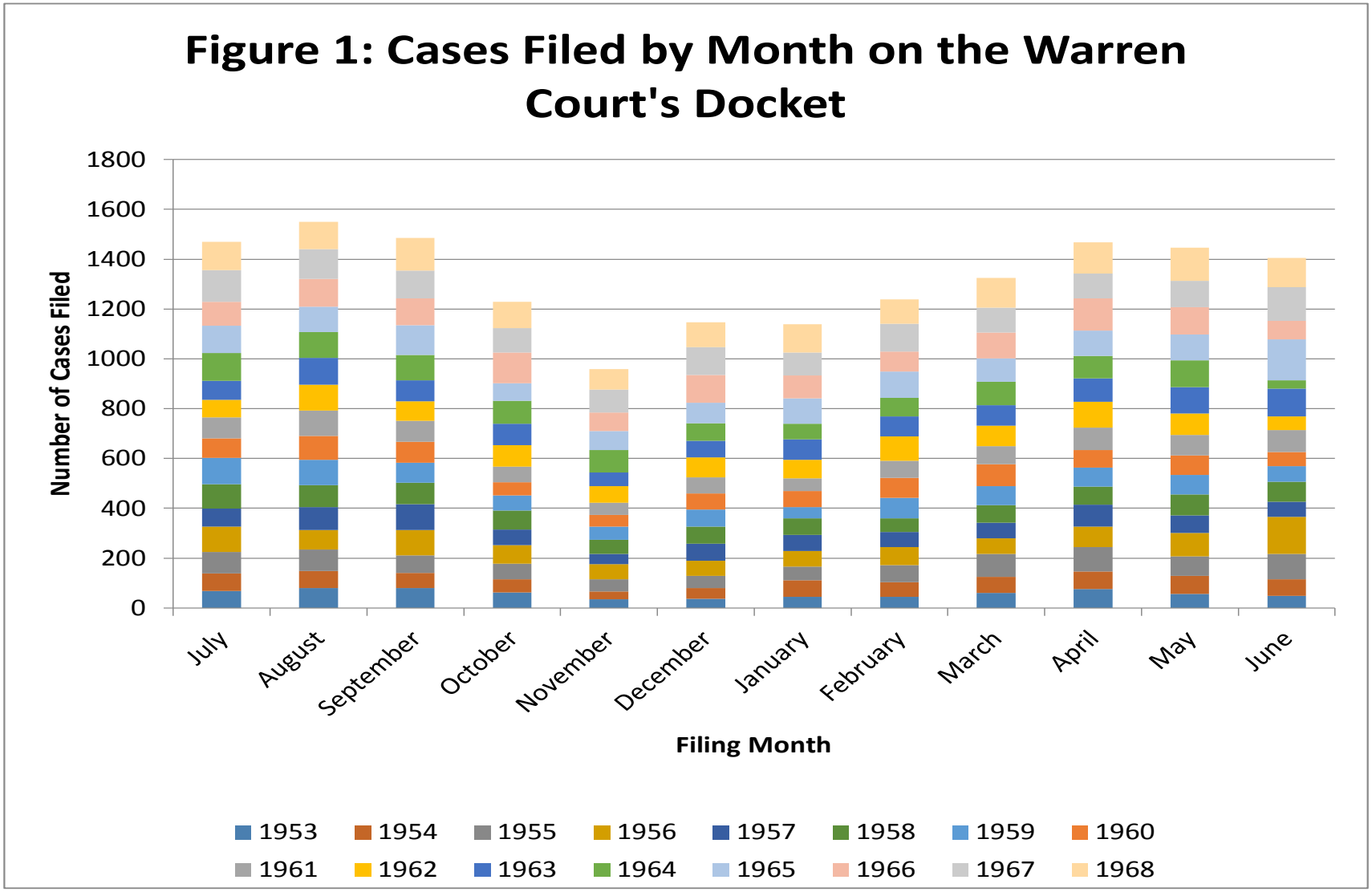
Figure 1: Cases Filed by Month on the Warren Court's Docket
Number of Cases Filed
1800
1600
1400
1200
1000
800
600
400
200
0
July
August
September
October
November
December
January
February
March
April
May
June
Filing Month
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968

Figure 2: Warren Court Review Decisions by Month

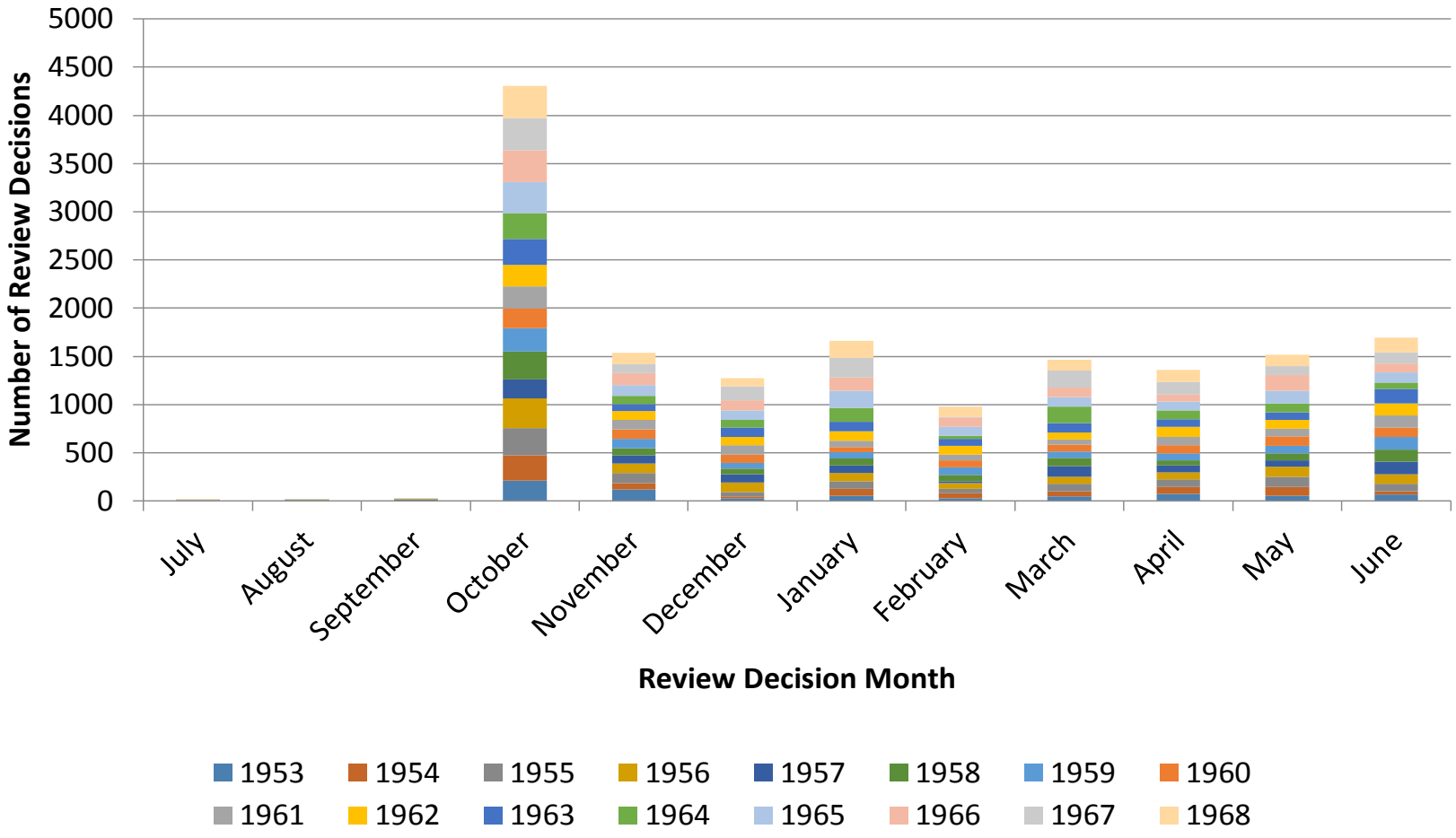

Figure 3: Average Days Until Review Decision per Filing Month on the Warren Court

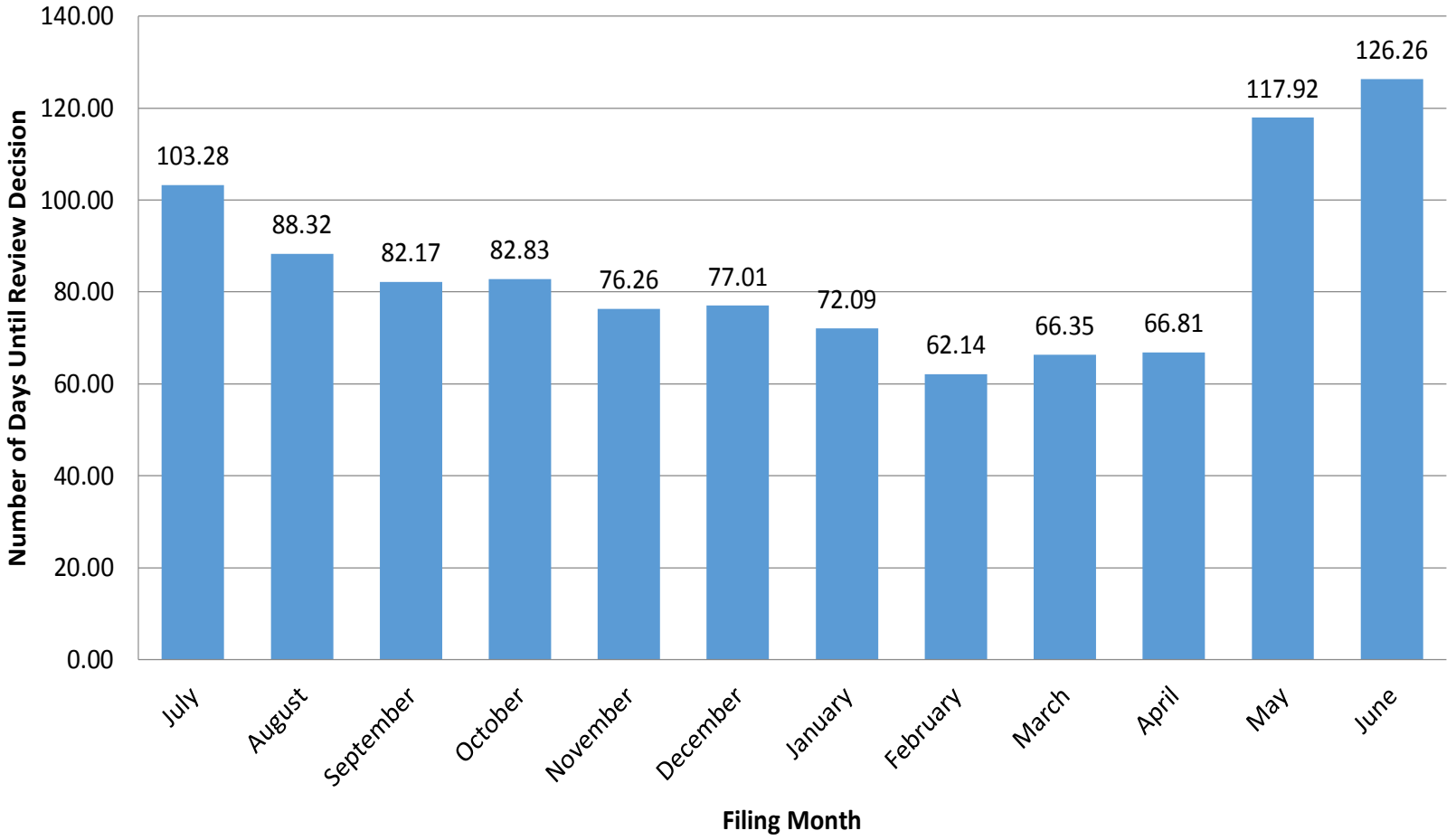

Figure 4: Average Number of Days Until Review Decision by Filing Month for the Warren Court

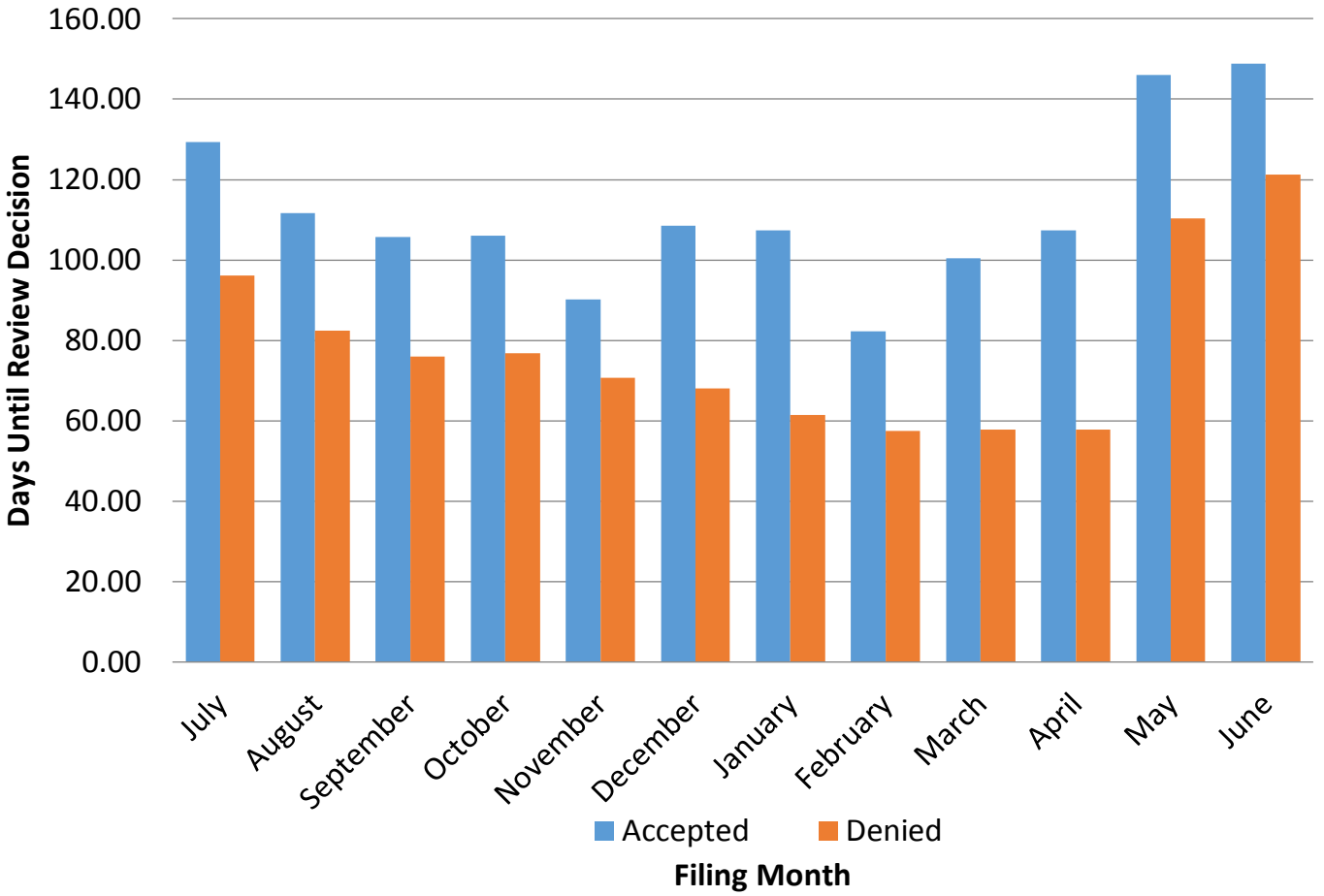

Figure 5: Acceptance Rate by Filing Month for the Warren Court

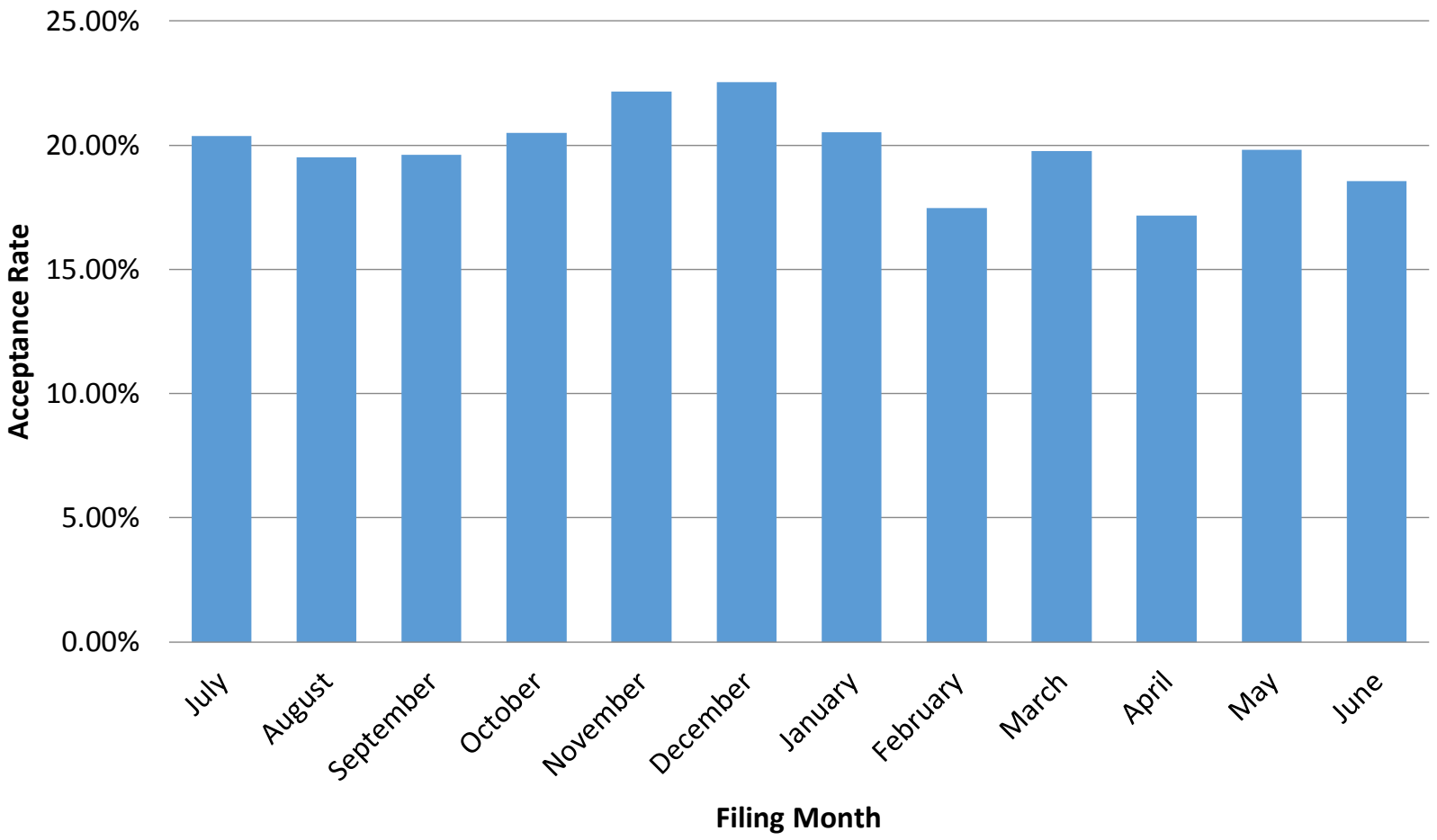

Figure 6: Certiorari and Appeal Acceptance Rates by Filing Month for the Warren Court

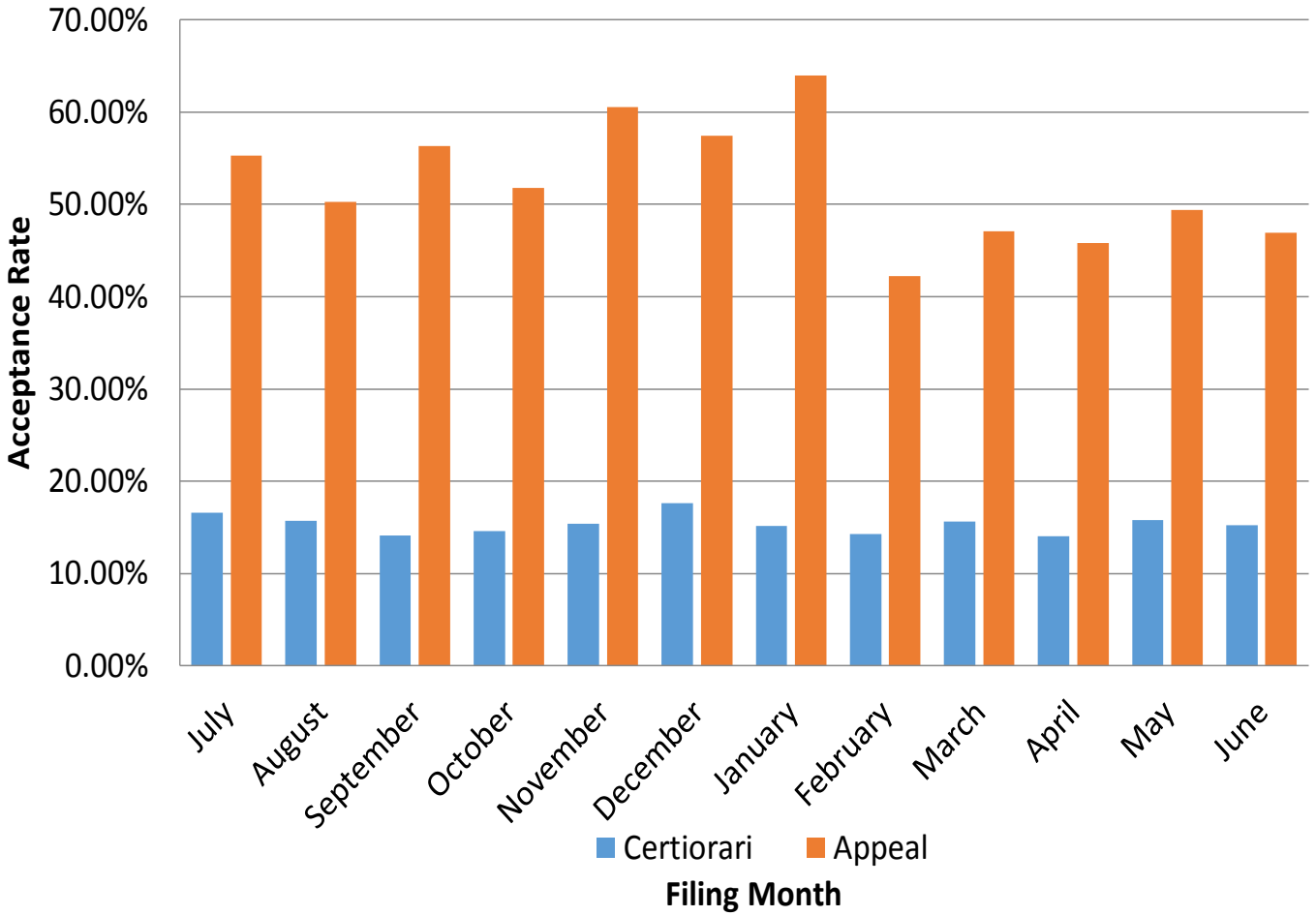

Figure 7: Certiorari and Appeal Acceptance Rates by Decision Month for the Warren Court