

Agenda Setting on the Burger Court

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The paper that follows is one of a series of papers I have written regarding agenda setting on the Burger Court. The papers on Burger Court agenda setting follow the pattern and topics of those I wrote on the Vinson and Warren Courts' 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](https://www.amazon.com)). The papers for the Warren Court were combined in a book titled *Supreme Court Agenda Setting: The Warren Court* (also available on [Amazon.com](https://www.amazon.com)). The paper for the Burger Court will be combined in a book to be titled *Supreme Court Agenda Setting: The Burger Court*. I expect it will be available on Amazon.com in the summer of 2026. The book will use the final numbers after all the corrections and updates.

Agenda Setting on the Burger 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 Burger 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 Burger Court

Paper 3: Workload as a Factor

This is the third in a series of papers examining agenda setting on the Burger Court (1969-1985 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) and the Warren Court (1953-1968 Terms). As such, certain elements of the prior papers will be repeated in the corresponding papers for the Burger 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*, and those of the Warren Court in a book titled, *Supreme Court Agenda Setting: The Warren Court (1953 to 1968 Terms)*, both of which are available in electronic form from [Amazon.com](https://www.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 prior Courts, the papers for the Burger 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 three Court periods.

Theoretical Considerations

Judicial scholars have been interested in Supreme Court agenda setting for over 60 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 interviews 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 Commission¹, 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

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.

into the cert. process and essentially learn on their own” (1991, 78). Thus, in addition to a 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 from the Vinson Court through the Burger Court (1946 through 1985 Terms). Data are complete for the Burger Court (1969 through 1985 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 during the 1969-1985 Terms is included in the dataset. This results in 33,112 cases. Unlike the examinations of the Vinson Court, not included in this number are any cases filed before the 1969 Term that were held over and received a 1969 Term or later docket number.⁶ Included in this number are 23 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.⁷

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 12 cases with a miscellaneous docket number (with an "M" in the DOCKET field, meaning they were not transferred to the appellate docket) during the 1969-1985 Terms. There were also a large number cases from the Miscellaneous Docket after the numbering changed. Many of these cases 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 1,344 cases initially filed on the appellate docket for which the Court granted *in forma pauperis* status to one of the parties (587 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>.)

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 are filed in a relatively even pattern throughout the year. Figure 1 shows the cumulative number of cases filed each month during the 17 terms of the Burger Court.

FIGURE 1 ABOUT HERE

From Figure 1 we see that November had the lowest total for the 17-year period with only 2,444. That number was slightly below February (2,470) and January (2,489) the months with the next lowest totals. August had the highest total at 3,027, the only month to cross the 3,000 mark. December (2,965) and September (2,931) had the next two highest totals. September is one of the months when the Court is on its summer break. It is interesting that December has such a large number of filings. Perhaps those filing the review requests are doing so before the Court returns from a brief holiday break. After the lower filings for January and February, the number increases in March (2,668) and then increases a bit more and remains relatively steady through the end of the term and into July (2,791).

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 after a decline in January and February grow in March and April, are down a bit in May, then grow again in June. This pattern does not necessarily present itself in every term, though November has the lowest monthly total in 7 of the 17 terms. Regardless of the reasons for this overall pattern, with the exceptions of

November, January, and February, 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 Burger Court made its review decisions.⁸ Not surprisingly, the figure shows very little activity while the Court was on summer hiatus,⁹ but a huge jump for October. The 8,924 review decisions made during October were well over the average of 2,929 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 dropped significantly for November, then reached the low in December. After a substantial increase for January the totals dropped for the next three months before increasing slightly in May and then jumping 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 in January likely reflects a slight need to catch up again after the lower number of review decisions in December. The gradual decline in the totals from January through April may be the result of the Court needing to finish opinions from cases heard earlier in the term. Regardless of

⁸ The focus here is on the cases filed during the Burger Court period. Thus, cases filed during the Warren Court are not included, even if the review decision was made during the 1969 Term or later. Similarly, cases filed during the Burger Court but that did not have a review decision until the 1986 Term or later are included.

⁹ It is hard to see from the figure, but the Court did make a small number of review decisions in August and September. Interestingly, the Burger Court made more review decisions in July than during the Warren Court. This seems to be mostly a matter of getting into July before finishing the Court's end of term business.

the reason, it might be worthwhile for future research to take a careful look at the review decisions made at different points during the term.

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 Burger Court was 102.69. Of course, there was a good deal of variation based on the month of filing, as shown in Figure 3.

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 and a half 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 December the average was nearly the same as for August and September. We then see a fairly sharp drop in January with February and March at about the same level. Interestingly, there was a substantial increase in April as the Court neared the end of its term and then in May and June we again see a substantial increase in the average time until a review decision, with May 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 filing month, April had the second largest standard

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. The longest turnaround time was 2,113 days.

deviation at 83.62 days. October had the largest at 83.73. June's standard deviation of 61.60, however, was the smallest.

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.

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, for accepted cases July had the largest average number of days until the review decision for the three summer months. The average was slightly larger for October and then decreased each month through February. The average increased in March, and then again in April, before making a large increase in May, when the average was at its largest. The average then decreased slightly for the end of the term in June.

In contrast, the time it took for the Court to deny review to cases was shorter but more consistent throughout the year. As with the accepted cases, June had the highest average of the summer months for those denied review. The time until review was then fairly stable for several months. The average dipped in January and then hit its low point in February. The time increased slightly for March and a bit more in April before making a larger jump in May. Note that both accepted and denied cases had their shortest time until review if they were filed in February and longest if filed in May.

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 most other months. From Figures 3 and 4 we saw that there were 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 17 terms of the Burger Court. The overall acceptance rate during this period was 13.29%, with a monthly high of 14.63% in November to a low of 11.62% in June. There is not much of a visual pattern to the monthly acceptance rates. The rate was up and down during the summer months then increased in October before reaching the November high. The average decreased for the next two months before increasing in February and then decreasing each month through the end of the term in June. 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. That did not seem to happen for the Burger Court. Despite the decreases in acceptance rates in the final months of the term, the differences were relatively small.

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, 2025). 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 12.0%. Moreover, the acceptance rates for certiorari cases were all well less than a third those of appeals. The average acceptance rate for certiorari cases was only 9.89% with a range of 9.13% (June) to 11.22% (November). In sharp contrast, the average acceptance rate for appeals was 43.67% with a low of 35.36% for June and a high of 50.17% for October. Cases on appeal made up about 10% 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, the lowest rate occurred for June (9.13%), May had the second lowest rate (9.22%), and March the fourth lowest (9.31%). At the other end of the scale, November had the highest acceptance rate (11.22%), August the second highest (10.78%) and December the third (10.59%). It is hard to see from the figure given the small differences, but the acceptance rate in the final four months of the term (9.29%, March through June) was slightly lower than the other eight months (10.19%, June through February). Although this difference is less than a percentage point, it does reach statistical significance at $p < .05$ using a difference of means test, two-tailed.¹¹

A bit more of a pattern appears for the cases on appeal. Here we see a repeated pattern of one month with a higher acceptance rate followed by two or three with decreasing rates.

¹¹ See Wonnacott and Wonnacott, 1972.

Although July had the seventh highest acceptance rate for appeals (43.73%) it was higher than August (42.63%) and September (39.86%). October had the highest acceptance rate for appeals (50.17%), then the rate decreased for November (48.43%) and December (41.80%). The rate increased again for January (45.63%), then decreased for the next three months, down to 43.17% in April. May had a final increase (45.15%) before dropping to the lowest rate of the year in June (35.36%).

Unlike the certiorari cases, those on appeal did not show a clear decrease in acceptance rates for those filed late in the term. Of course, the appeals filed in June did have the lowest acceptance rate, but note that the acceptance rate for July was slightly over eight points higher. It seemed that the Burger Court had more of a tendency than the Warren Court to finish its work for the term in July rather than June. Speculating on this, it may have been that the justices focused their work in June on opinion writing and then used early July to make additional review decisions before their summer break.

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 decreased for the next several months in a row. 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 through September are anomalies. Although the Court officially begins its term at the beginning of October, during the Burger Court years the Court

actually made some review decisions in July, August, and September. I mentioned above that it seemed the Burger Court pushed its end of term work into July. As a result, there were 354 review decisions made during July. August was very quiet for the Court, but there were still 10 review decisions made including accepting six of the nine cert petitions. More review decisions were made in September (37), but the number was still quite low.

Beginning in October, the acceptance rate for certiorari cases showed little variation until June. Between November and May the monthly acceptance rate was 9.57% and only February (8.46%) and May (10.50%) were about one point off that average. The rate jumped substantially for June (16.79%). Again, this end of term increase is not surprising. Even to the extent the Court's work may have drifted into July, it was certainly working to finish as much of its work as possible in June.

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. Not counting the summer months, June again had the highest acceptance rate at 56.50%. March was not far behind at 54.27% and December had the third highest rate at 46.23%. The apparent up and down pattern might have something to do with the justices' work patterns in terms of balancing working through the review decisions and processing the cases granted review.

Discussion

Having set out to examine aspects of how workload may affect the Burger 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.¹³

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, although the number of filings in December were up, the low numbers for January and February 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 a bit 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 dropped slightly from May to June.

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 95.90. In contrast, the number of days for those granted review was 145.10. The average difference based on the filing month was 49.20 days. Interestingly, October had the largest monthly difference at 67.26 days. November was also over 60 days at 63.08. It seems likely that the Court needed the time to work through the backlog from the summer filings before

¹³ 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.

processing more recently accepted cases. At the other end of the scale, the shortest waiting time was for February at 30.37 days. The only other month under 40 days was January at 37.03.

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 October had the largest at 83.73, April was only slightly lower at 83.62. June had the smallest standard deviation at 61.60 as only a relatively small number of the 2,795 cases filed that month were decided quickly.

May had the largest average number of days until a review decision at 137.78, the second largest was in June (130.32), with July (108.50) coming in third. It is interesting that June had the second largest average number of days until a review decision and the smallest standard deviation.

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 Burger 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.¹⁴ 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 October, the month with the highest acceptance rate, the Court denied review to roughly 49% of the appeals and over all the rejection rate for appeals was slightly over 56%. Thus, even though there was a bit of a visual pattern to the results shown in Figure 6, 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. 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.

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

¹⁴ 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).

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 Burger Court is not just of historical interest. The Burger 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 Warren Court but that number had increased by half again by the 1980 Term. Thus, it is important to know how the Court handled the increased workload.

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 Burger Court's Docket

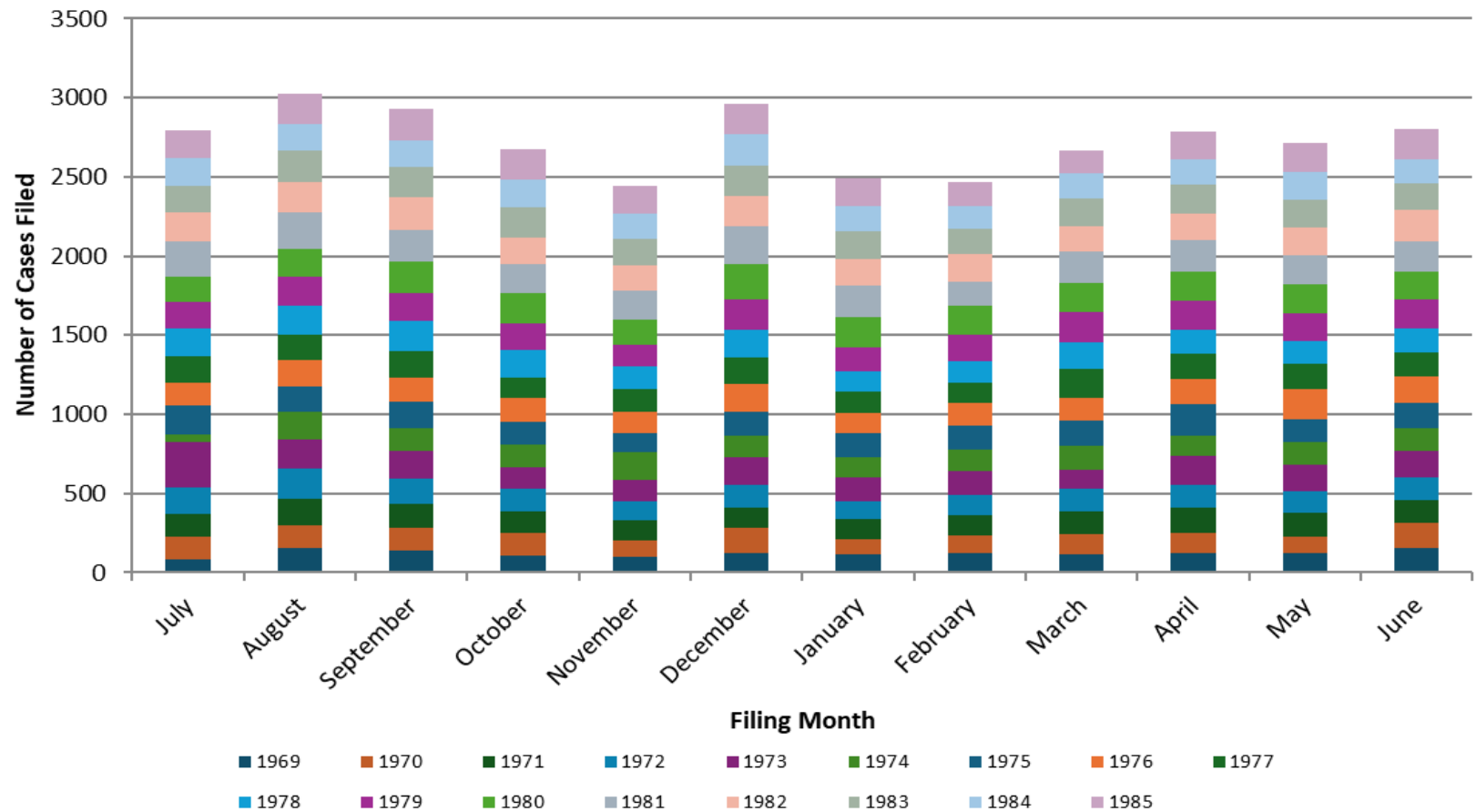


Figure 2: Burger Court Review Decisions by Month

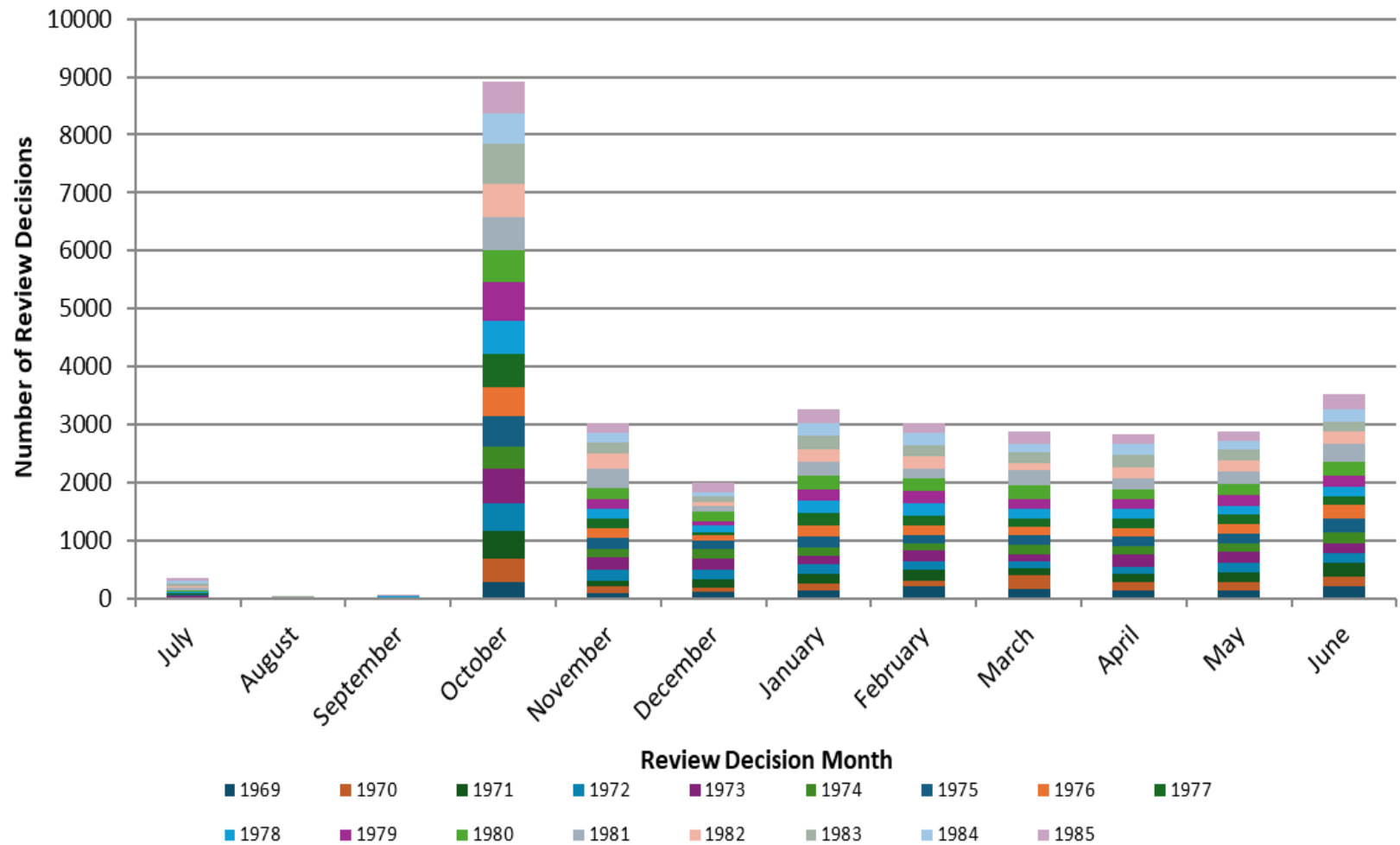


Figure 3: Average Days Until Review Decision per Filing Month on the Burger Court

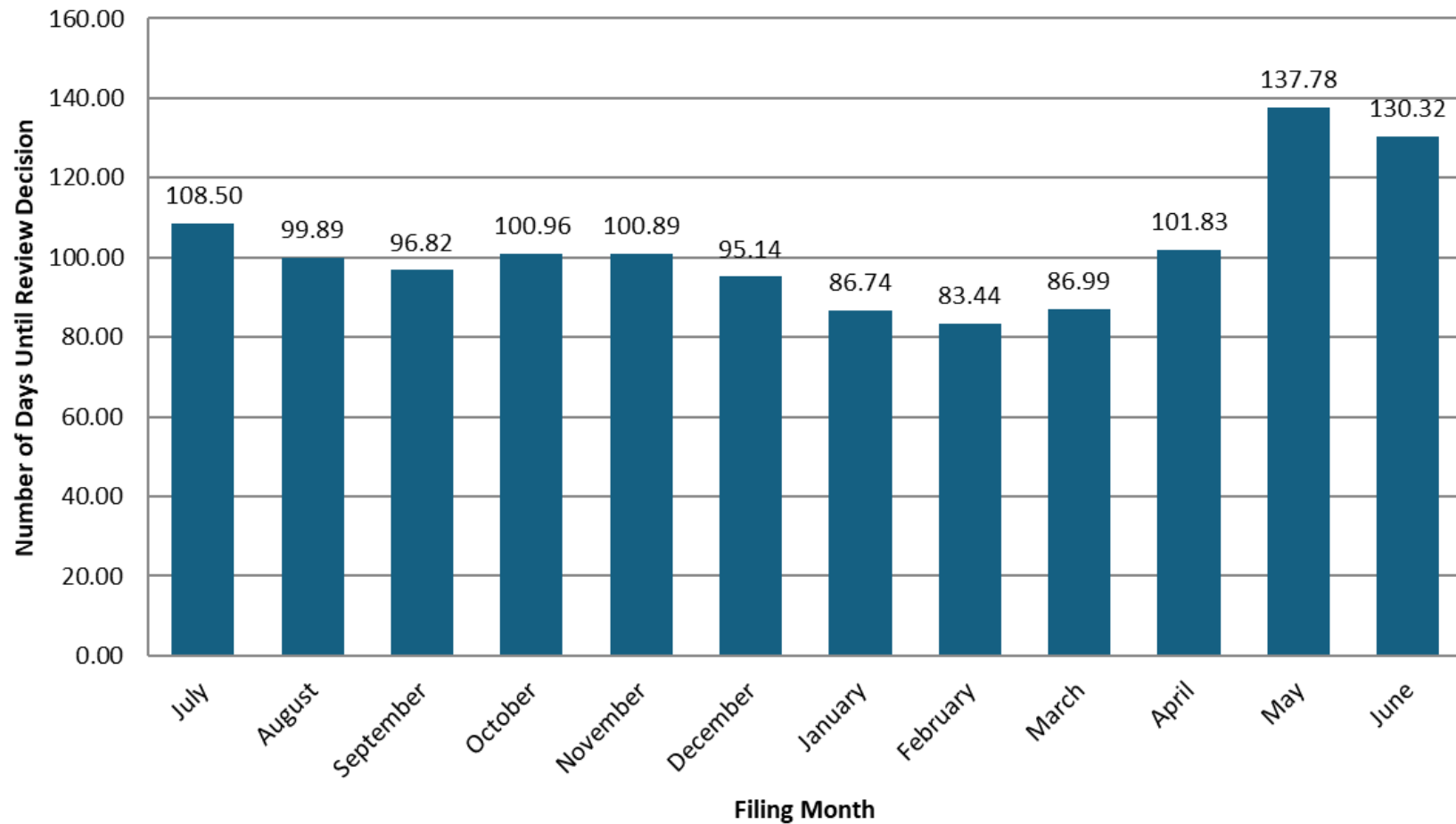


Figure 4: Average Number of Days Until Review Decision by Filing Month for the Burger Court

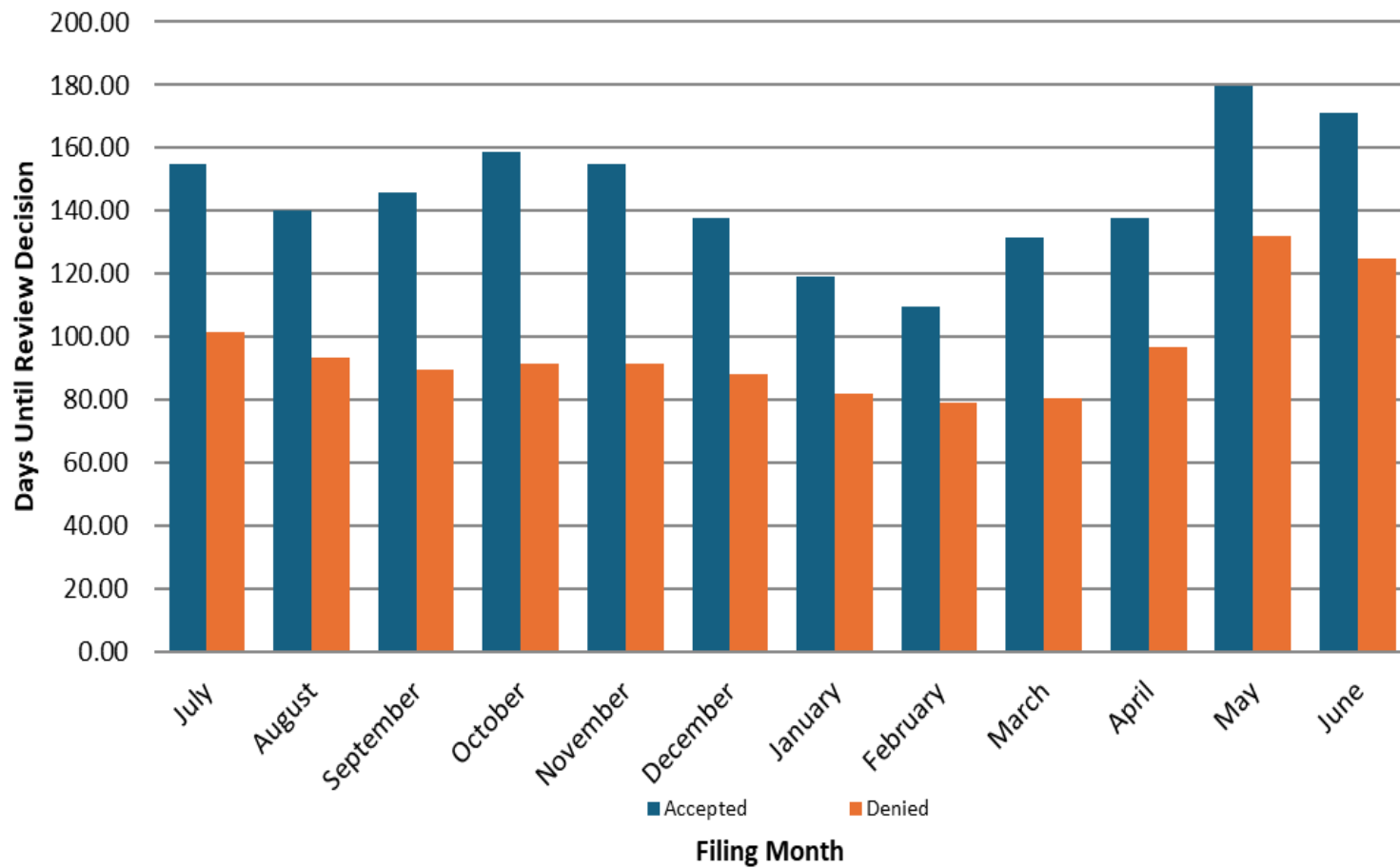


Figure 5: Acceptance Rate by Filing Month for the Burger Court

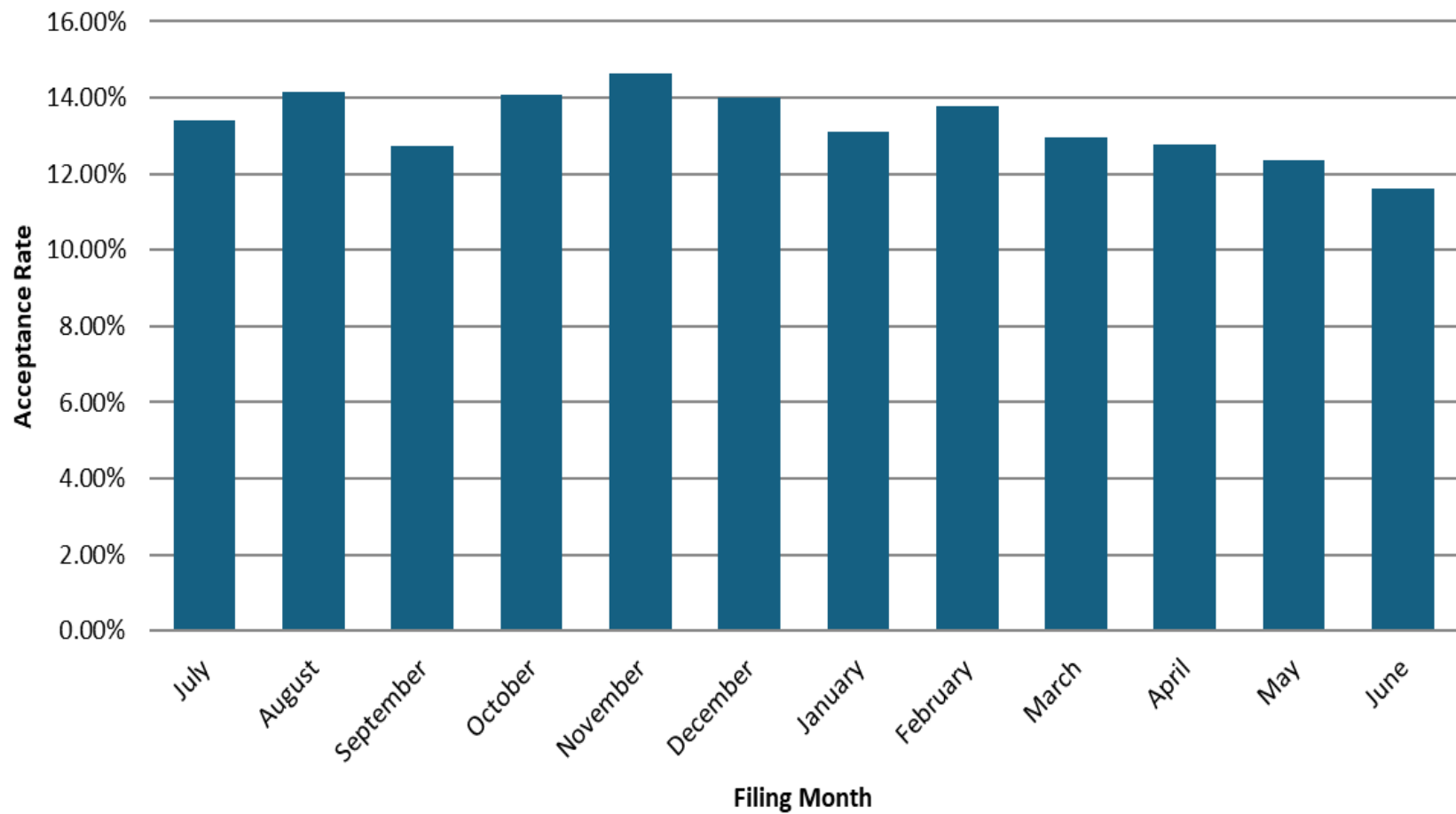


Figure 6: Certiorari and Appeal Acceptance Rates by Filing Month for the Burger Court

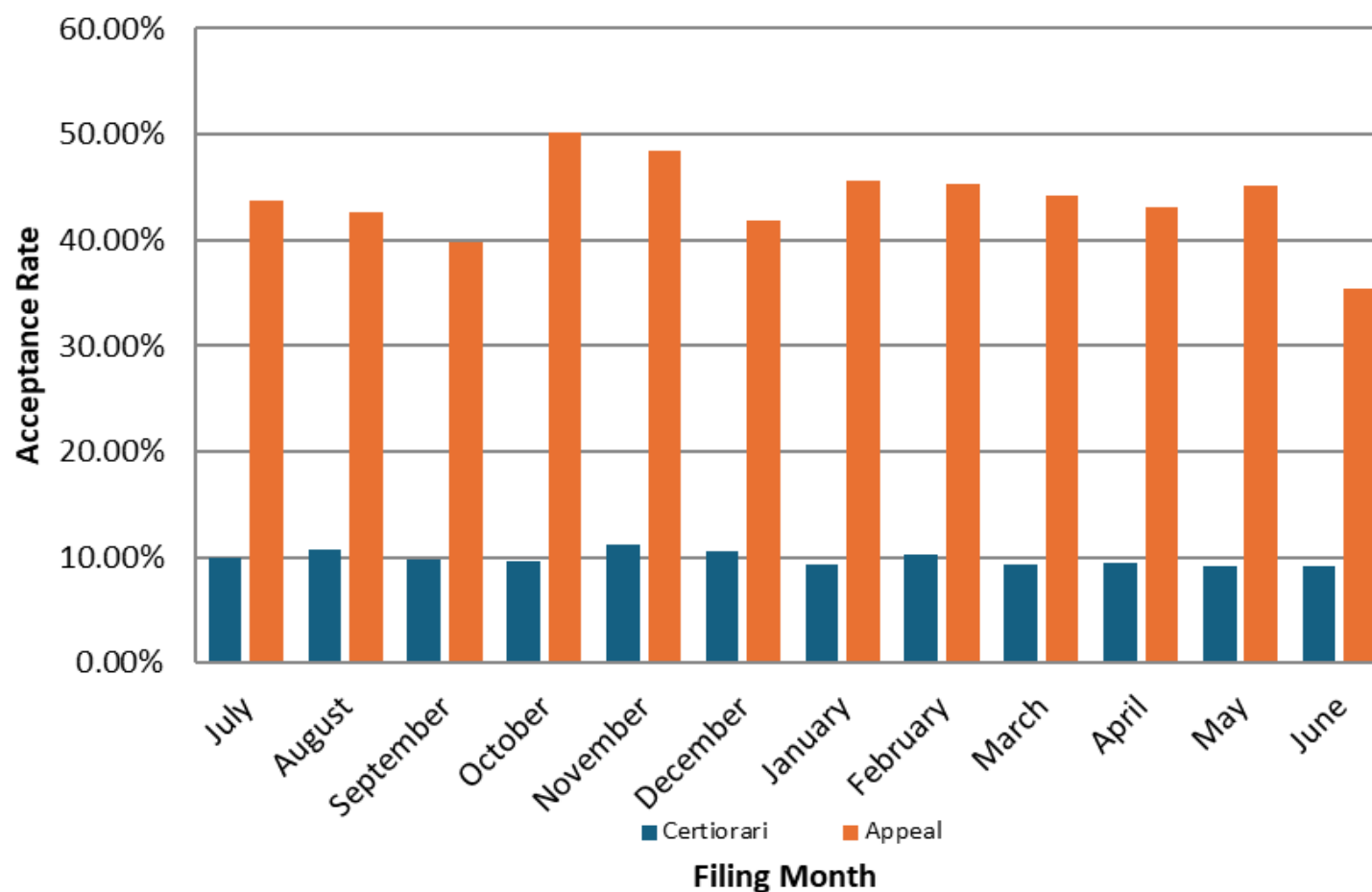


Figure 7: Certiorari and Appeal Acceptance Rates by Decision Month for the Burger Court

