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). The papers for the Warren Court were combined in a book titled *Supreme Court Agenda Setting: The Warren Court* (also available on 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 13: Ideological Error Correction as a Factor

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Abstract

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

Drawing from an ongoing database project this study examines all cases filed before the Burger Court (1969 to 1985 Terms) on its appellate docket. The specific question involves the extent to which the Court takes cases to reverse them on ideological grounds. The results strongly suggest that the Burger Court had an ideological approach to both accepting cases for review and for disposing of them on the merits. This proved to be particularly true for cases from federal courts as well as cases coming before the Court on petitions for writs of certiorari.

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

This is the thirteenth 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 Agena Setting: The Warren Court (1953 to 1968 Terms*, both of which are available in electronic form from Amazon.com.

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

Of course, agenda setting and its attendant strategic considerations have also been the focus of many studies. *Marbury v. Madison* (1803) may have been the earliest and most famous example of strategic agenda setting or decision making by the Supreme Court. Despite a general view at the time that judges were not policy makers—at least not along the lines of executives and legislators (see, for example, Spaeth 1979, chapter 1)—histories of the Court have certainly

recognized strategic aspects to the Court's decision making (e.g., Rodell 1955). Walter Murphy's *Elements of Judicial Strategy* (1964) is one of the earliest and most important examinations of how strategic considerations may affect judicial decision making. Other scholars have expanded and refined Murphy's arguments (e.g., Epstein and Knight 1998). A related line of research focused more specifically on the ideological preferences of judges (e.g., Segal and Spaeth 2002) and a book by Brenner and Whitmeyer (2009) compared various models of strategic judicial behavior.

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

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

Tanenhaus et al., found significant, a third—the federal government as a petitioning party—was significant and the authors concluded that cue theory retained some viability (1972, 642).

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

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

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

Ideological Error Correction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Data

Data for this study were drawn from an ongoing database project involving all cases on the Supreme Court's appellate docket 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 number 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.[7] Included in this number are 23 cases that originally appeared on the Court's miscellaneous docket and were moved to the appellate docket.[8]

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

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

[8] Through the Vinson and Warren Courts, cases originating on the miscellaneous docket (sometimes referred to as the "pauper's docket") that were granted review were usually moved to the appellate docket (sometimes referred to as the "paid docket") and given a new docket number. The Expanded United States Supreme Court Judicial 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 of cases from the Miscellaneous Docket after the numbering changed. Many of these

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

Results

I begin by noting that of the 32,761 cases in the dataset where the Court made a review decision it accepted 4,337 of them for review. That results in an overall acceptance rate of 13.2%.[9] Because of the differing criteria used for the tables to follow, the number of cases included for any given comparison will vary from that total number.

TABLE 1 ABOUT HERE

In Table 1 we can see the comparison with the Supreme Court's disposition and the ideological direction of the lower court decision. Of the 4,293 cases the Court accepted for review and disposed of on the merits, 2,599 (60.5%) had a liberal lower court decision and 1,694 (39.5%) had a conservative lower court decision. Of the liberal lower court decisions, the Court

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.)

[9] This number is less than the 33,112 noted previously because it does not include cases where the Court did not make a formal review decision due to Rule dismissals or due to requests for dismissal by the petitioner before the decision.

affirmed 778 (29.9%) of them and reversed 1,821 (70.1%). For the conservative lower court decisions, the Court affirmed 607 (35.8%) of them and reversed 1,087 (64.2%). The Burger Court was half again more likely to take liberal lower court decisions for review and several percentage points more likely to reverse them compared to conservative lower court decisions. The difference was enough to reach the $p < .001$ level of significance using a two-tailed difference of means test (Wonnacott and Wonnacott 1972, 178).

Given the findings from several prior papers in this series it is worth exploring whether there is a difference in how the Burger Court dealt with cases from state and federal lower courts. Tables 2 and 3 show the same comparison as in Table 1 by looking at federal and state cases, respectively.[10]

TABLE 2 ABOUT HERE

Table 2 compares the Court's disposition of lower court liberal and conservative decisions from lower federal courts. There were 3,584 of these cases of which 2,288 (63.8%) were liberal and 1,296 (36.2%) were conservative. Here we see that the Court affirmed 718 of 2,288 (31.4%) liberal lower court decisions. The Court granted review to a much small number of conservative lower federal court decisions but affirmed a higher percentage of them at 41.1% (533 of 1,296).

TABLE 3 ABOUT HERE

Table 3 shows the comparison in the Court's disposition of liberal and conservative decisions from state lower courts. The Court granted review to a much smaller number of state court cases, only 709, of which 311 (43.9%) were liberal and 398 (56.1%) were conservative. Here the Court affirmed 60 of the 311 (19.3%) of the liberal state court decisions. The Court

[10] As in prior papers, "federal and state cases" means cases coming from either the federal or state courts.

affirmed only 18.6% (74 of 398) of the conservative cases. Given that this difference is less than a percentage point it does not reach statistical significance.

Most of the prior studies touching on error correction have only or primarily examined cases before the Supreme Court on petitions for writs of certiorari. The basic reason, as I explained in the second paper in the series, was that the decision to grant review to a certiorari petition was discretionary but to an appeal was not.[11] Although I generally feel it is inappropriate to exclude cases before the Court on appeal from examinations of the Court's agenda setting, I do think it is worthwhile to explore possible differences between such cases. At the very least such examinations can confirm or reject reasons for only focusing on certiorari petitions. To that end, the next three tables follow the pattern of the first three but only by examining cases seeking review by certiorari. The three tables after that focus on those cases before the Court on appeal.

TABLE 4 ABOUT HERE

Table 4 shows that the Court granted review to and disposed of 2,875 cases that were before the Court on petitions for a writ of certiorari. Of these, 1,815 (63.1%) were liberal lower court decisions and 1,060 (36.9%) were conservative. Of the liberal lower court decisions the Court affirmed 380 of them (20.9%). The affirmance rate for conservative lower court decisions was 25.2% (267 of 1,060). This difference is a bit less than for the federal certiorari cases (Table 5), but still reaches a traditional level of significance.

TABLE 5 ABOUT HERE

In Table 5 we see the comparison of the Supreme Court's grant of review and disposition of liberal and conservative decisions coming from lower federal courts on grants of certiorari.

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

Once again, the Court was more likely to take conservative cases for review, 1,584 of 2,388 (66.3%) in this category. Of the 1,584 liberal lower court decisions before the Court on certiorari the Court affirmed 347 (21.9%). As in Table 4, the affirmance rate for conservative lower federal court decisions before the Court on certiorari was several points higher at 28.2% (227 of 804).

TABLE 6 ABOUT HERE

Table 6 shows the comparison of liberal and conservative state lower court decisions before the Supreme Court on certiorari petitions. There were 487 of these cases of which slightly more than half were conservative (256 of 487, 52.6%), were conservative. There were 231 liberal state court decisions granted review by the Court on certiorari petitions and the Court affirmed 33 (14.3%) of them. In contrast, the Court affirmed 15.6% (40 of 256) of the conservative state court decisions. As with the overall state cases (Table 3), this difference is quite small and does not reach statistical significance.

TABLE 7 ABOUT HERE

Turning to the cases on appeal to which the Supreme Court granted review, in Table 7 we see that there were 1,415 such cases. Of these, the Court affirmed 738 (52.2%) and reversed 677 (47.8%). This affirmance rate is much higher than the rate for cases before the Court on certiorari. This finding—that the Court was more likely to affirm cases on appeal—is consistent with Table 4 of the second paper in the series. There we saw that the affirmance rate for federal cases on appeal was nearly 30% higher than cases before the Court on certiorari. Table 7 shows that the distribution of liberal and conservative lower court decisions before the Court on appeal was similar to the distribution of the cases on certiorari. On appeal there were more cases with a liberal lower court decision, 782 for 55.3%, than a conservative one. The Court affirmed 398

liberal lower court decisions (50.9%) and 340 of the 633 conservative ones (53.7%). This difference does not reach statistical significance.

TABLE 8 ABOUT HERE

Table 8 shows the comparison of liberal and conservative decisions on appeal from federal courts. There were 1,194 of these cases and there were substantially more liberal decisions (703 for 59.9%) than conservative ones (491 for 41.1%). The Court affirmed 371 liberal decisions (52.8%) and 306 of the conservative ones (62.3%). Although this difference was closer than in some previous tables, it still reaches statistical significance at $p < .001$ with a two-tail test.

TABLE 9 ABOUT HERE

Table 9 shows the comparison of liberal and conservative decisions on appeal from state courts. There were only 221 of these cases 79 of which were liberal (35.7%) and 142 were conservative (64.3%). Of the 40 liberal lower court decisions the Court affirmed 27 (34.2%). In contrast, the Court affirmed 23.9% (34 of 142) of the conservative lower court decisions. Despite that the affirmance rate for liberal cases was half again that of conservative cases the relatively small number of cases involved did not allow the difference to reach statistical significance. Nevertheless, note that the Court reversed three times as many conservative state cases on appeal than it affirmed (108 to 34).

The first nine tables showed some differences in how the Supreme Court disposed of liberal and conservative lower court decisions. On the whole it reversed more liberal decisions than conservative ones. The differences in affirmance rates between liberal and conservative decisions reached statistical significance in several of the comparisons thus far. Plus, the Court tended to accept more liberal cases for review, which produced a higher number of reversed

liberal decisions. That leads to the question of whether the Court accepted a higher percentage of the available conservative cases. Tables 10 through 12 address this question.

TABLE 10 ABOUT HERE

Table 10 shows the comparison of the acceptance rate of liberal lower court decisions with that of conservative lower court decisions. There were 32,748 cases in this group. Of these 11,863 (36.2%) of the lower court decisions were liberal and 20,885 (63.8%) were conservative. Thus, as a starting point, there were simply many more conservative decisions for the Court to choose from when making its review decisions. Of the liberal lower court decisions the Court accepted 2,619 (22.1%) for review. As it turned out, that acceptance rate was well above the rate for conservative lower court decisions, which was 8.2% (1,710 of 20,885). The difference was statistically significant.

TABLE 11 ABOUT HERE

Table 11 shows the comparison of the acceptance rate for liberal lower court decisions coming from the federal courts with conservatives ones. There were 23,854 cases from the lower federal courts. Of these, 9,002 (37.7%) were liberal and 14,852 (62.3%) were conservative. Of the liberal lower federal court decisions the Court accepted 2,305 (25.6%) for review. In contrast, the Court accepted 1,307 (8.8%) of the conservative cases for review. Not surprisingly, this difference was statistically significant.

TABLE 12 ABOUT HERE

Table 12 shows the comparison of the acceptance rates for liberal lower court decisions coming from the state courts with conservatives ones. There were 8,891 cases from the state courts. Of these, 2,860 (32.2%) were liberal and 6,031 (67.8%) were conservative. The Court accepted 314 of the liberal state cases for review (11.0%). In contrast, the Court granted review

to 402 of the conservative state cases (6.7%). Once again, this difference reaches statistical significance. Of particular note is that although the Court's acceptance rate for conservative lower court decisions was very close for federal (8.8%) and state (6.7%) courts, there was a substantial difference in the Court's acceptance rate for liberal lower court decisions depending on whether they come from federal courts (25.6%) or state courts (11.0%).

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

TABLE 13 ABOUT HERE

Table 13 compares the acceptance rate for liberal and conservative lower court decisions coming to the Court on petitions for writs of certiorari. There were 29,282 cases before the Court on certiorari petitions, 10,286 (35.1%) liberal and 18,996 (64.9%) conservative. The Court granted review to 1,828 of the liberal lower court decisions (17.8%) and 1,066 of the conservative ones (5.6%). Given the large difference and number of cases it reaches statistical significance.

TABLE 14 ABOUT HERE

Turning to the cases petitioning for a writ of certiorari coming from the federal courts, in Table 14 we see that there were 22,196 such cases of which 8,153 (36.7%) had a liberal lower court decision and 14,043 (63.3%) had a conservative one. Of the cases with a liberal lower court decision the Court granted review to 1,596 (19.6%) of them. The acceptance rate for cases with a conservative lower court decision was 5.8% (809 of 14,043 cases). This difference proved to be highly significant.

TABLE 15 ABOUT HERE

Table 15 shows the comparison of liberal and conservative cases seeking a certiorari petition coming from state courts. There were 7,086 of these cases, 2,133 (30.1%) liberal and 4,953 (69.9%) conservative. The Court accepted 232 (10.9%) of the cases with a liberal lower court decision for review. That acceptance rate was more than twice the 5.2% acceptance rate for cases with a conservative lower court decision (257 of 4,953). Here we see that despite the much larger number of conservative state cases filed by certiorari, the Court granted review to only a small number more than liberal state certiorari cases.

TABLE 16 ABOUT HERE

Turning to the cases on appeal before the Court, Table 16 shows the comparison between liberal and conservative decisions. There were 3,274 such cases, 1,539 (47.0%) with liberal lower court decisions and 1,735 (53.0%) with conservatives ones. The Court granted review to 787 of the cases with a liberal lower court decision (51.1%). The acceptance rate for cases with a conservative lower court decision was 36.9% (640 of 1,735 cases). This difference was fairly large and was statistically significant.

TABLE 17 ABOUT HERE

Table 17 shows the comparison of liberal and conservative lower court decisions on appeal before the Court that came from lower federal courts. There were 1,505 of these cases, 819 (54.4%) liberal and 686 (45.6%) conservative. The Court granted review to 707 of the liberal lower court decisions (86.3%) and 495 of the conservatives ones (72.2%). The exceptionally high acceptance rates for these cases is consistent with the findings of prior papers in the series.[12]

TABLE 18 ABOUT HERE

[12] See, for example, Table 10 of the twelfth paper in the series that showed the acceptance rate for cases coming to the Court directly from a three-judge federal district court to be 93.4%.

Finally, Table 18 shows the comparison between liberal and conservative cases before the Court on appeal from state courts. There were 1,769 such cases, 720 (40.7%) had liberal lower court decision and 1,049 (59.3%) had a conservative one. The Court granted review to 80 of the cases with a liberal lower court decision (11.1%) and 145 of the cases with a conservative lower court decision (13.8). The small difference did not reach a traditional level of statistical significance.

Discussion

Overall, the results for this examination proved to be statistically significant in 13 of the 18 comparisons. Even aside from that the results are quite interesting. As a starting point, the first nine tables examined various aspects of the Court's disposition of the cases for which it granted review. From Table 1 in particular we saw that the Burger Court certainly reversed more cases than it affirmed and the percentage, 67.7% (2,908 of 4,293), was only a few tenths of a percent above the two-thirds that Baum suggested (2022, 96). Aside from the overall results, distinguishing between the types of lower courts, federal or state, and the difference between cases on certiorari and appeal yielded some interesting results.

The difference in the affirmance rate between liberal and conservative lower court cases was larger for those cases coming from the federal courts than the state courts. More interesting was that there was less than a point difference between the affirmance rates for liberal and conservative cases from the state courts.

Examining the differences between federal and state lower court decisions and between cases filed by certiorari and appeal provided some interesting results as well. To the extent that granting petitions for certiorari is more discretionary than granting review to cases on appeal one

might expect that if error correction exists it would be more evident in the cases before the Court on certiorari. We might have expected that the difference in the affirmance rates for liberal and conservative cases would be further apart for the certiorari cases than those on appeal, but that did not always occur. In particular, for state cases on appeal the difference was over ten points, but that difference was not statistically significant given the smaller number of cases involved. On the other hand the difference in affirmance rates was significant for all certiorari cases as a group and those from federal courts, as well as from federal courts on appeal.

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

In Table 10 we saw that 63.8% of the cases seeking review before the Court had conservative lower court decisions. Table 10 also showed that the acceptance rate for liberal and conservative lower court decisions was nearly 14 points apart. When these cases were broken out by those coming from federal and state lower courts we saw that there was a significant difference in the acceptance rates between liberal and conservative cases coming from the lower federal courts as well as those from the state courts. The acceptance rate for conservative lower court decisions was very close between those coming from federal and state courts (8.8% and 6.7%, respectively). The big difference was in the acceptance rate for liberal lower court decisions from the two court systems. The rate for cases from federal courts was nearly 17 points above the conservative cases. For the liberal state cases, however, the acceptance rate was a much lower 11.0%, about 14 points below the rate of liberal cases from the federal courts.

For the cases from both the federal and state courts, a higher acceptance rate for liberal decisions coupled with a lower affirmance rate (Table 1) produced the larger number of liberal decisions that were reversed. This appears to provide support for ideological error correction.

The separate examinations for the cases on appeal versus those on certiorari petitions proved particularly informative regarding the cases from lower federal courts. Consistent with the findings from prior papers in the series, there was a very high acceptance rate for cases on appeal from federal courts. For liberal lower court decisions on appeal the acceptance rate was 86.3%. Conservative lower federal court decisions had a slightly lower rate at 72.2%. When the cases on certiorari were considered separately, the acceptance rates were much smaller, but the difference between the liberal and conservative cases was nearly the same at about 14 points. Despite the much larger number of lower federal court cases with a conservative lower court decision, that the acceptance rate for conservative cases was lower to a statistically significant degree there were still more liberal cases accepted for review than conservative ones. Thus, when the Burger Court had more discretion to take cases, it took more cases with a liberal lower court decision and reversed them at a higher percentage.

There were five comparisons that did not reach a traditional level of statistical significance. Four of them involved state cases. These included the affirmance rates for state cases overall and when separated by certiorari and appeal (Tables 3, 6, and 9, respectively). The fourth was for the acceptance rate for state cases on appeal (Table 18). State cases on appeal is an interesting category. We know from previous papers that the acceptance rate for federal cases on appeal is quite high, as is also shown in Table 17 here. We also know that many of these cases come from three-judge federal district courts. Thus, substantively, they are quite different from,

in particular, state cases on appeal. This was evident in the much lower acceptance rate for state cases on appeal, which was not much higher than those on certiorari.

The fifth comparison that did not reach statistical significance was for the affirmance rate for all cases on appeal (Table 7). Here, although the difference in the liberal and conservative rates for federal cases was statistically significant (Table 8), because the difference for state cases was in the opposite direction (Table 9, though it did not reach a statistically significant level) the difference overall was sufficiently muted that it did not reach statistical significance.

Conclusion

As noted elsewhere, I have chosen to not include comparisons with prior courts as I work through the examinations of the Burger Court. Even so, I will note that the results in this examination of error correction are quite different from those of the Warren Court. The results for the Warren Court were also quite different from those of the Vinson Court. I will leave it at that for now but I plan to eventually do a comparison of the three Courts related to the various factors examined in this series.

On the whole, the results of this examination were not as strong as those of the Warren Court, but they still seem to provide evidence regarding the Burger Court's use of an ideological error correction strategy. It is true, of course, that more cases with a conservative lower court decision were filed during this period by a bit more than a two-to-one margin (Table 1). Even so, the Court accepted conservative cases at a much lower rate (Table 10) and reversed liberal cases at a higher rate (Table 1).

Nevertheless, to the extent that ideological error correction might be a factor in the Court's agenda setting (as well as decision making), it seems to be somewhat complex and

possibly related to other factors. These other factors include the greater discretion associated with petitions for writs of certiorari as opposed to appeals and the possibility of the Court's greater willingness to oversee the federal courts relative to the state courts. Additional factors not examined here could also include differences in issue areas as well as the increased number of cases seeking review that occurred after the Vinson and Warren Court periods.

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Table 1

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	778	1,821	2,599	29.9%*
Conservative	607	1,087	1,694	35.8%
Column Total	1,385	2,908	4,293	32.3%

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

Table 2

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	718	1,570	2,288	31.4%*
Conservative	533	763	1,296	41.1%
Column Total	1,251	2,333	3,584	34.9%

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

Table 3

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	60	251	311	19.3%
Conservative	74	324	398	18.6%
Column Total	134	575	709	18.9%

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Table 4

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	380	1,435	1,815	20.9%*
Conservative	267	793	1,060	25.2%
Column Total	647	2,228	2,875	22.5%

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

Table 5

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	347	1,237	1,584	21.9%*
Conservative	227	577	804	28.2%
Column Total	574	1,814	2,388	24.0%

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

Table 6

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	33	198	231	14.3%
Conservative	40	216	256	15.6%
Column Total	73	414	487	15.0%

Table 7

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	398	384	782	50.9%
Conservative	340	293	633	53.7%
Column Total	738	677	1,415	52.2%

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Table 8

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	371	332	703	52.8%*
Conservative	306	185	491	62.3%
Column Total	677	517	1,194	56.7%

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

Table 9

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

	Affirmed	Reversed	Row Total	Affirmance Rate (%)
Liberal	27	52	79	34.2%
Conservative	34	108	142	23.9%
Column Total	61	160	221	27.6%

Table 10

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	2,619	9,244	11,863	22.1%*
Conservative	1,710	19,175	20,885	8.2%
Column Total	4,329	28,419	32,748	13.2%

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

Table 11

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	2,305	6,697	9,002	25.6%*
Conservative	1,307	13,545	14,852	8.8%
Column Total	3,612	20,242	23,854	15.1%

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

Table 12

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	314	2,546	2,860	11.0%*
Conservative	402	5,629	6,031	6.7%
Column Total	716	8,175	8,891	8.1%

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

Table 13

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	1,828	8,458	10,286	17.8%*
Conservative	1,066	17.930	18,996	5.6%
Column Total	2,894	26,388	29,282	9.9%

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

Table 14

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	1,596	6,557	8,153	19.6%*
Conservative	809	13,234	14,043	5.8%
Column Total	2,405	19,791	22,196	10.8%

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

Table 15

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	232	1,901	2,133	10.9%*
Conservative	257	4,696	4,953	5.2%
Column Total	489	6,597	7,086	6.9%

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

Table 16

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	787	752	1,539	51.1%*
Conservative	640	1,095	1,735	36.9%
Column Total	1,427	1,847	3,274	43.6%

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

Table 17

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	707	112	819	86.3%*
Conservative	495	191	686	72.2%
Column Total	1,202	303	1,505	79.7%

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

Table 18

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

	Accepted	Denied	Row Total	Acceptance Rate (%)
Liberal	80	640	720	11.1%
Conservative	145	904	1,049	13.8%
Column Total	225	1,544	1,769	12.7%