

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 15: Case Types and Issue Areas

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Abstract

Prior papers in this series focused specifically on the Court's decision to grant review.

Although some of those factors were related to the substantive issues presented in the cases, this paper takes a closer look at case types and issue areas in the cases filed.

Drawing from an ongoing database project this paper examines the case types and substantive issue areas of all cases during the Burger Court (1969 to 1985 Terms) on its appellate docket. Examination of case types and issue distribution of the Burger Court's appellate docket provides background and context for prior examinations of the factors related to agenda setting on the Burger Court as well as for examinations of the Vinson and Warren Court agendas.

The examination here is descriptive, meaning no statistical tests are performed. The results show a consistency in the types of cases filed even as the number of cases on the Court's docket grew. There was also a consistency in the types of issues presented to the Court. On the other hand, the Court took higher percentages of some types of cases for review than others, possibly due to its ideological preferences.

Agenda Setting on the Burger Court

Paper 15: Case Types and Issue Areas

This is the fifteenth 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).

Most of the prior 14 papers in the series examined whether a particular factor or set of factors was related to the Court's decision to grant review. As such, those papers contained information on the basic theoretical framework underlying that type of examination. A few of those papers dealt with particular issue areas either directly or indirectly by looking at particular types of parties. For example, the eighth paper in the series examined whether law enforcement parties were a factor in the Court's review decision.¹ Correspondingly, the ninth paper examined the extent to which criminal defendants were a factor in the Court's review decision.² Not surprisingly, most of the cases in which law enforcement or criminal defendants were parties were cases involving criminal justice issues. Similarly, in the tenth and eleventh papers I examined whether administrative parties or administrative action were factors in the Court's

¹ The paper is titled, "Agenda Setting on the Burger Court, Paper 8: Law Enforcement Parties as a Factor."

² The paper is titled, "Agenda Setting on the Burger Court, Paper 9: Criminal Defendants as a Factor."

review decision.³ The administrative focus of these papers meant that many issues concerned economic activity.

In this paper I take a closer look at certain case types and broad issue areas as part of the pool of cases from which the Court made its review decisions each term. This examination will be purely descriptive, which means that unlike prior papers I will not perform statistical tests. Although there are times when one could reasonably argue that certain issues are of greater interest to the Court, for some issue areas such interest can be short-lived rather than enduring.

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.⁴ Included in this number are 23 cases that originally appeared on the Court's miscellaneous docket and were moved to the

³ The papers are titled, "Agenda Setting on the Burger Court, Paper 10: Administrative Parties as a Factor" and "Agenda Setting on the Burger Court, Paper 11: Administrative Action as a Factor."

⁴ 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.

appellate docket.⁵ Because of the differing criteria used for the figures to follow, the number of cases included for any given comparison will vary from that total number.

As was the case for prior papers, an additional note on the coding for this examination is worthwhile before proceeding. The coding for issue areas primarily follows Spaeth's coding for the United States Supreme Court Judicial Database. Of course, Spaeth's database mainly consists of cases granted review by the Court. There are, however, many issues heard by the lower courts that the Supreme Court chooses not to review. In addition, there are some differences in what the lower court saw as the issue in a case and the issue on which the Supreme Court decided a case. A simple example here might be the Supreme Court deciding a case on a procedural issue (e.g., mootness) rather than the substantive one determined by the lower court.

In terms of coding, although Spaeth's database usually codes only one issue per case, the database I created allows for up to six issues to be coded for each case, though the average was around three or four. The initial issue coding was "generous" to allow for the ability to retrieve cases having even a remote connection to a particular issue. For example, if a railroad was involved in a bankruptcy case one of the six issues would still be coded for railroads to be able to retrieve all cases involving railroads even if the primary substantive issue did not involve railroad regulation.

⁵ 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 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>.)

One of the issues coded for a case was selected as the Primary Issue Code. This was the issue that seemed to dominate in terms of the lower court's decision or the issue the petitioner is seeking to have addressed by the Supreme Court. For example, a criminal case involving firearms and a questionable search might have codes for general criminal cases, firearms, and search and seizure. Based on the source materials for the lower court decision and the filings before the Supreme Court, one of those three would be chosen and coded as the primary issue.

Given the complexity of many cases there were times when two issues seemed to be particularly important. When that occurred a second issue was identified as the Secondary Issue Code. Although still secondary to the primary issue, it was of sufficient importance to distinguish it from any other issues listed. In addition, the secondary issue became important for judicial power and federalism issues. Cases involving judicial power or federalism issues would often also involve a substantive issue. If the determination of whether the substantive issue or the judicial power or federalism issue was the more important, the substantive issue would usually be coded as primary and the judicial power or federalism issue as secondary.

Results

The second paper in the series examined differences between cases filed as petitions for a writ of certiorari and those filed as appeals.⁶ That paper only examined the entire Burger Court period as a whole and did not consider the distribution of certiorari and appeals cases for each term. For this paper I want to look at the distribution of cases each term. Thus, Figure 1 shows the distribution of cases on certiorari and appeal for each of the 17 terms of the Burger Court.⁷

⁶ The paper is titled, "Agenda Setting on the Burger Court, Paper 2: Certiorari and Appeal on the Burger Court Agenda."

⁷ Left out of this figure are cases filed as anything other than an appeal or a petition for a writ of certiorari (e.g., certification, writ of mandamus, writ of prohibition, stay).

FIGURE 1 ABOUT HERE

As noted in some prior papers in the series, the number of cases filed during the first two terms of the Burger Court (1969 and 1970) was similar to those of the Warren Court at about 1,500 cases each with roughly 14% of them on appeal and the rest on certiorari. The number of filings increased gradually the next two terms before a big increase in the 1973 Term, the first which crossed the 2,000 mark. The number dropped sharply for the 1974 Term then again mostly increased each term until reaching a high in the 1981 Term. The number then remained mostly steady for the final four terms of the Burger Court.

For the Warren Court, the number of cases filed nearly doubled between the 1953 and 1968 Terms but the proportion of cases on appeal remained roughly the same throughout the period. For the Burger Court, the number of cases increased substantially from the 1969 to 1985 Terms but did not double. The number of cases on appeal remained relatively steady and it was certiorari cases that saw the bulk of the increase. In fact, the first four terms of the Burger Court had more cases filed on appeal than the final four terms.

FIGURE 2 ABOUT HERE

Turning to a consideration of how many cases of each type the Court accepted for review, Figure 2 shows the distribution of each type of case, certiorari or appeal, and how many were accepted or denied review each term.⁸

Despite the sharp increase in the number of cases filed during the Burger Court, the number of cases granted review increased, but at a slower pace. The low in the number of certiorari cases accepted for review occurred for the 1970 Term at 122. The high came for the

⁸ The total numbers here are a bit lower than those shown in Figure 1 as they do not include cases that were rule dismissals, including those dismissed on a motion by the petitioner, made before the Court made a review decision. For purposes of Figures 2, 4, and 6, “granted review” includes those cases initially granted review, those initially denied review but later granted review, and those granted review but then dismissed by rule, including those dismissed on a motion by petitioner.

1981 Term at 223. The percentage of certiorari cases granted review during the period remained relatively steady despite the increase in the number of cases filed. The highest acceptance percentage was for the 1972 Term at 11.87%. The smallest percentage was for the 1977 Term at 8.59%. Interestingly, the average acceptance rate for the first eight terms was 10.41%. The rate for the remaining nine terms was 9.49%. That is less than a percentage point difference despite the large increase in the number of filings.

As shown in prior papers, cases on appeal have had a much higher acceptance rate than cases on certiorari. The average for the 17 terms was 43.81%. Unlike the cases on certiorari, the number of cases on appeal filed did not increase during the period. In fact the average number of appeals filed during the Burger Court's first eight terms was 221 and in the last nine terms it was 174. Given that decrease in the number of appeals filed we might have expected a larger percentage of appeals accepted. In fact, during the Burger Court's first seven terms the acceptance rate for cases on appeal was 55.87%. For the next two terms (1976 and 1977) the percentage dropped by about 14%. For the final eight terms the percentage dropped even more to only 30.48%. That was still well above the acceptance rate for certiorari cases, but also well below what we have seen elsewhere. The drop was likely due to a change in the law that allowed cases from three-judge district courts to be appealed to US Courts of Appeal rather than directly to the Supreme Court.

As noted above, the second paper in the series took a closer look at the Court's treatment of cases on certiorari and appeal. From Figures 1 and 2 we see that although there was a generally increasing number of cases filed during the period, the split between those on certiorari and on appeal was relatively stable. Given this consistency regarding filing types, we can move on to an examination of issue areas.

FIGURE 3 ABOUT HERE

Figure 3 shows the cases divided into seven broad issue areas plus an Other group. Again, these categories follow the grouping noted in the United States Supreme Court Judicial Database. The cases are placed into one of the categories based on the primary issue for that case. The Criminal category includes a variety of statutory specific (e.g. Hobbs Act), constitutional (e.g., search and seizure), and procedural (e.g., Federal Rules of Criminal Procedure) issues. The Civil Rights category includes issues such as voting rights, discrimination, immigration, various First Amendment rights, and so on. Economic Activity is also broad in that it includes issues such as anti-trust, liability, transportation, public utilities, intellectual property, etc.

Judicial Power issues often fall into those concerning federal court reaction to state or state court actions or to the general willingness of federal courts to act. There is an element of federalism to many cases involving judicial power issues, but Federalism is a separate category. As one would expect, cases in the Federalism category usually involve situations where state and federal law seem to be in conflict.

The category Federal Taxation is fairly straightforward and mostly involves income taxes of individuals or businesses. As its label suggests, the Other category includes any cases not included in one of the other categories.

The bottom row in the figure shows the number of criminal cases. The number of criminal cases filed began the period with its lowest number at 430. That number generally rose during the next 16 terms. It reached a high of 705 for the 1981 Term then fell to only 522 by the 1985 Term. We saw this category grow during the Warren Court, likely due to its liberal rulings in this area. The smaller growth during the Burger Court is likely a reaction to its more conservative position on these issues.

Like the Criminal cases, the number of Civil Rights cases filed also increased at a slow but steady pace. The pattern of increase was similar to the criminal cases in that the growth was a bit up and down until reaching a high in the 1981 Term, after which it fell back a bit.

Cases involving Unions and Labor activity were a fairly small portion of the cases filed at the start of the period and only increased by about the same as the total number of cases filed. Related to cases involving Unions and Labor issues, those involving other Economic Activity also grew slowly during the period. Unlike the Unions and Labor cases the Economic Activity cases were a fairly large portion of the cases filed during the 1969 Term (24.0%). Economic Activity cases were the second most numerous to Criminal cases for all but one term (1976). Although there were some spikes in the terms, the number of Economic Activity cases generally grew at about the same pace as the criminal cases.

The Judicial Power cases started the period at about half the number of Economic Activity cases at 180. The number of these cases increased, but at a slower pace than some other issue areas.

Neither of the remaining two categories increased by a large margin during the period. Federal Taxation was the more numerous of these two and actually decreased on average in the last half of the Burger Court. Federalism cases were the smallest category and, except for a spike in the 1985 Term, did not seem to increase at all during the period.

Given these results, we can now turn to an examination of the distribution of cases the Court accepted for review.

FIGURE 4 ABOUT HERE

Figure 4 shows the distribution of cases granted review by the Court by the same broad issue areas as indicated in Figure 3. The number of cases filed is out of the Court's direct

control, but we might expect a fair amount of consistency in how many cases they decide to review. One of the first things to notice about Figure 4 is that the total number of cases granted review, as indicated by the combined height of each term's column, does not increase as much as the number of cases filed did. Again, in Figure 3 we saw that the number of cases filed from the start to the end of the Burger Court era increased by about 50%. In Figure 4 we do see some terms with large increases (1972, 1973, and 1981) but there are seven terms with a smaller number of cases granted review than for the 1969 Term.

There seemed to be a grouping of sorts for the variations in the number of accepted cases. After the 1969 Term the number of cases granted review rose slightly for the next two terms then had a larger increase for the 1972 and 1973 Terms. There was a sharp drop for the 1974 Term, then a larger number for the next two terms. The next three terms (1977 to 1979) were all below the 1969 Term number. The three terms after that were much higher, then the last three terms of the Burger Court were again below the number accepted for the 1969 Term. We saw in Figure 3 that after the high for the 1981 Term the number of cases dropped a bit for the remainder of the Burger Court. That might help to explain the decrease in the number of accepted cases for the Burger Court's last three terms.

Turning to the broad issue areas we again see variations from term to term among the issue areas. Given what we know about Criminal cases, it is not surprising that despite the large number of these cases that were filed the Court did not grant review to a correspondingly large number of them. The number of Criminal cases granted review did increase from the beginning to the end of the Burger Court period, but that increase was much smaller than the increase in the number of cases filed.

The number of Civil Rights cases granted review actually decreased during the period.

Starting at 98 for the 1969 Term, the number granted review was over 100 for five of the next six terms. After that, the average number decreased to 72 cases accepted. Again, this may be an indication of the different priorities of the Burger Court compared to the Warren Court.

The Unions and Labor cases grew somewhat in terms of the number filed, but the Court accepted a fairly consistent number of them of a bit over a dozen per term. Like the Unions and Labor cases, those involving Economic Activity grew somewhat slowly and the Court accepted a fairly steady number of them for review. The low was 35 for both the 1969 Term and the high was 72 for the 1973 Term with an average of about 53 per term.

For the remaining three categories, the number of Judicial Power cases accepted did not grow. The number for the 1969 Term was 26 and for the 1985 Term was 25. The average was about 21. The number of Federalism cases accepted remained fairly steady through the 1980 Term, then increased a bit for the last five terms of the Court. There did not seem to be much change in the number of Federal Taxation cases accepted. The number remained in single digits except for two terms

In Figure 3 we saw that the number of Economic Activity cases filed grew moderately. In Figure 4 we saw that the number of cases granted review in this category did not grow by the same margin. Although the Economic Activity category did not dominate the cases granted review as it did for the cases filed, the number in this category was the second or third largest for every term. As such, it is worth taking a closer look at this category.

FIGURE 5 ABOUT HERE

Figure 5 shows the number of cases filed in five select areas of Economic Activity plus an Other category for economic cases that did not fall into one of the five subareas. Again the

subareas are basically grouped as indicated in the United States Supreme Court Judicial Database. The Transportation subarea includes cases involving railroads, shipping, airlines, trucking, and pipelines. The Intellectual Property subarea includes cases involving trademarks, patents, copyrights, and computer processes. The Public Utilities subarea includes cases involving gas, oil, electric, and nuclear regulation, but also media such as radio, television, and telephone regulation. The Liability subarea includes cases where an individual or entity, including the government, is being sued for injuries of various sorts. The Liability subarea also includes issues involving the choice of remedies and punitive damages. Finally, the State Regulation subarea includes cases involving state taxes, state business regulation, or local zoning ordinances.

In looking at the distribution of the Economic Activity cases it is interesting that although there is variation for any given subarea across the 17 terms the subareas tended to maintain their size ordering. More specifically, the Liability subarea was consistently the largest of the five. The State Regulation subarea had the second largest number of case filings for every term. The Public Utilities subarea had the fewest number of cases filed. Intellectual Property had a consistent number of filings during the period. It had the third most filings for 15 of the 17 terms. Public Utilities had the fewest cases filed for five of the first six terms. The filings then increased so that the average during the first nine terms was about 22 and during the final eight terms was 30.5. In contrast, filings in the Transportation subarea decreased during the period. The average Transportation filings during the first nine terms was about 24, but down to 17 for the final eight terms.

The Other subarea is larger than any of the specified subareas for 16 of the terms. Although cases in the Other category were not in one of the specified subareas, many of these

cases certainly include important areas of Economic Activity. These include issues such as anti-trust, mergers, bankruptcy, environmental protection, consumer protection, and so on.

FIGURE 6 ABOUT HERE

Figure 6 shows the distribution of cases accepted for review involving economic issues during the Burger Court era. The first thing to note is the great variation in the total number of economic cases granted review. These numbers were included in Figure 4, but looking specifically at economic cases better shows the extent of the variation. We might expect an increase in economic cases granted review given the increased number filed in the first few terms and this is what we see for the 1969 through 1977 Terms, but there was a decreased number of economic cases granted review for final three terms of the Burger Court.

Unlike the subareas in case filings shown in Figure 5, there was less consistency in the number of cases from each subarea accepted by the Court over the 17 terms. Of the five subareas, State Regulation had the most accepted cases. This subarea began the period with a smaller number of cases accepted, then had an increased number for the middle of the period, but returned to a smaller number in the final four terms. The Liability subarea had the second largest number of accepted cases. Like the State Regulation subarea, the number of accepted Liability cases started relatively low, increased in the middle terms of the period, then faded back a bit. The Transportation subarea, which had a fairly small number of cases filed, had the most accepted in each of the first six terms. After that, however, the Court accepted fewer Transportation cases, including three terms when none were accepted. Interestingly, the Court accepted about one-third of the Transportation cases filed. That was almost double of any of the other subareas. Public Utilities cases had only 74 cases accepted, but its percentage of cases accepted was the second highest at 16.82%. The Intellectual Property subarea usually had more

cases filed than the Transportation subarea, but had the fewest cases accepted of the subareas at only 27, which included being shutout in four terms. Finally, the Other category had the most cases filed during the period at 3,024 and had 386 of them accepted for a rate of 12.76%.

Discussion

The purpose of this paper was purely descriptive. Although no statistical tests were performed the results nevertheless proved interesting and provided some additional context to the various factors examined in the prior papers in the series.

To the extent that the factors examined in prior papers provided cues or signals to the Court regarding the worthiness of reviewing a particular type of case, those cues are certainly not independent of the substantive aspects of the cases. Although not dealt with directly in this paper, clearly whether a case comes to the Court via a petition for a writ of certiorari or on an appeal makes a difference in whether it is granted review. Of course, the choice of whether to bring a case on certiorari or on appeal is not an arbitrary one but is based on particular legal criteria of which the Court is well aware. Similarly, certain types of substantive cases are closely related to the factors previously examined. For example, in the Transportation subarea there were 138 cases dealing specifically with railroads. In 41 of those cases the lower court was a federal district court. The Court granted review to 37 of those 41 cases (90.2%). That percentage for the railroad cases accounts for the much higher acceptance rate for the transportation cases and is consistent with the findings of the twelfth paper in the series.⁹ Thus, one must take care to keep in mind the relationship between cues or signals and the substantive aspects of the cases.

⁹ The paper is titled, “Agenda Setting on the Burger Court, Paper 12: Only a Single Lower Court as a Factor.”

On a related point, it was also interesting to see to what extent the distribution of the types of cases changed over this period in the Court's history, both in terms of the cases filed as well as those granted review. Court decisions as well as external factors (e.g., new legislation) can produce additional filings and new issues worthy of Supreme Court review. Even so, the results presented in the figures made it clear that there was no percentage requirement in terms of how many cases of any given type the Court accepted from its appellate docket.

Conclusion

The descriptive material presented here showed some consistencies with the findings of prior papers. One was the increasing number of cases filed during the Burger Court, particularly in the early 1980s. As much as the Burger Court granted review to an increased number of cases that number did not increase to the same extent as the number filed. That meant that the Court likely had to make harder choices in terms of the cases to review.

Part of those choices certainly involved the changing priorities as the Court moved away from the more liberal position of the latter Warren Court. Relatedly, to the extent the Burger Court seemed to prioritize certain types of cases it may have been a signal for those willing to file cases involving those issues. An example of this could be the reduced percentage of criminal justice cases accepted by the Burger Court (7.50%) versus the Warren Court (16.48%).

The number of cases filed continued to rise during the Burger Court. Although the Burger Court managed to accept and decide more cases than the Warren Court, there were limits and it will be interesting to take a closer look at how those two courts, as well as the Vinson Court, handled the increased workload in terms of the number of cases and types of issues.

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Figure 1: Cases Filed by Type and Term on the Burger Court

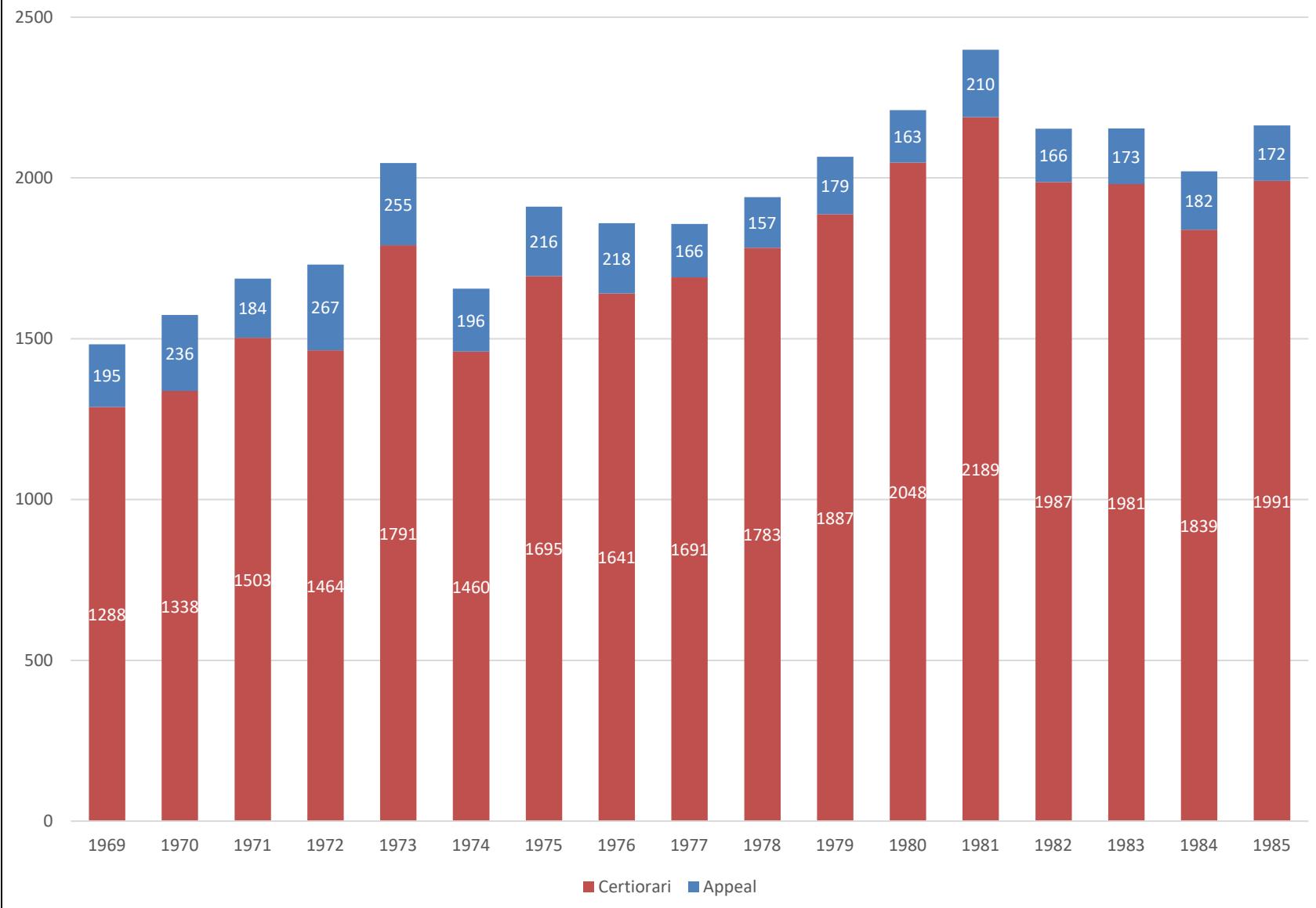


Figure 2: Cases Filed by Type, Whether Accepted for Review, and by Term on the Burger Court

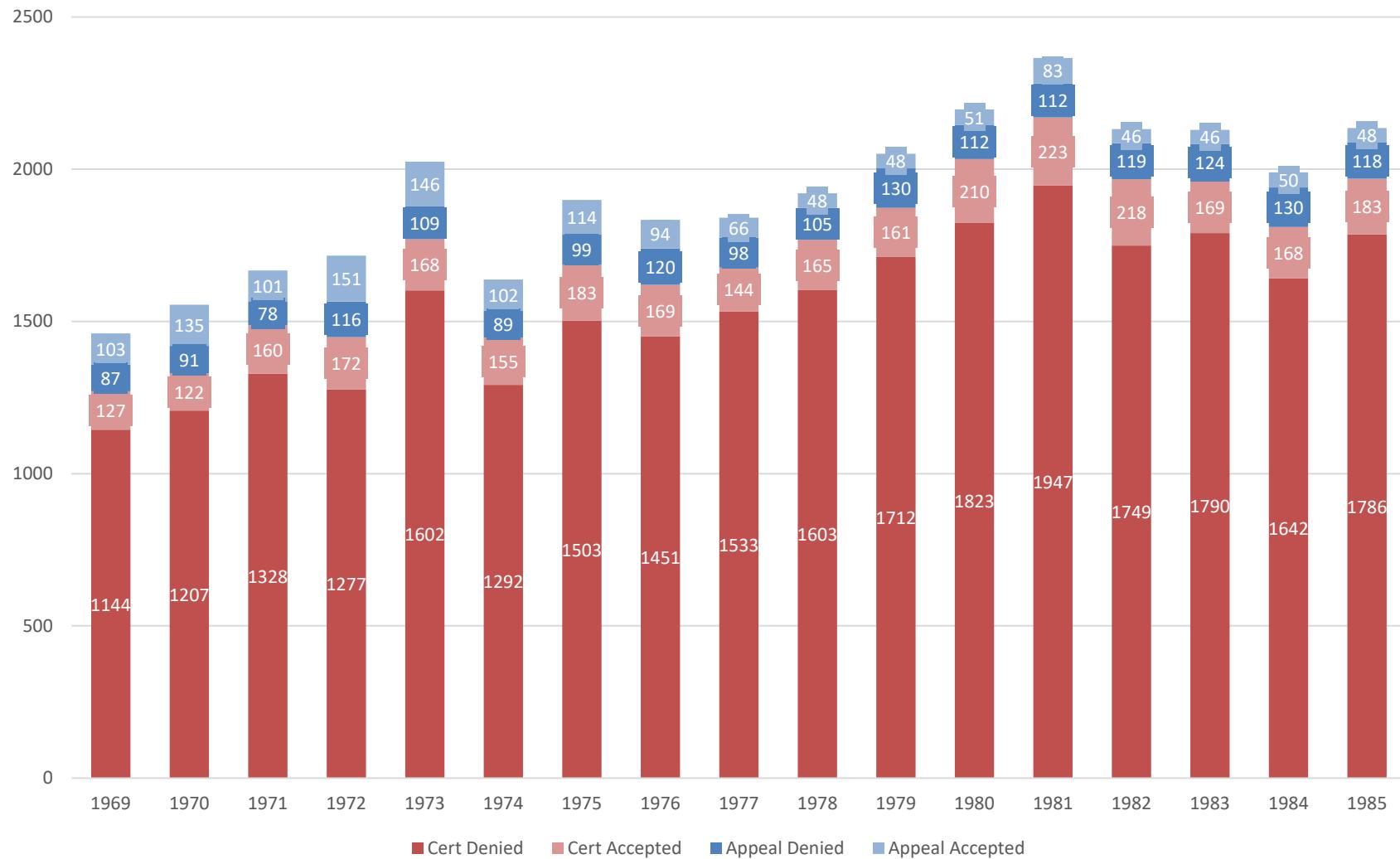


Figure 3: Distribution of Cases Filed by Broad Issue Area and by Term on the Burger Court

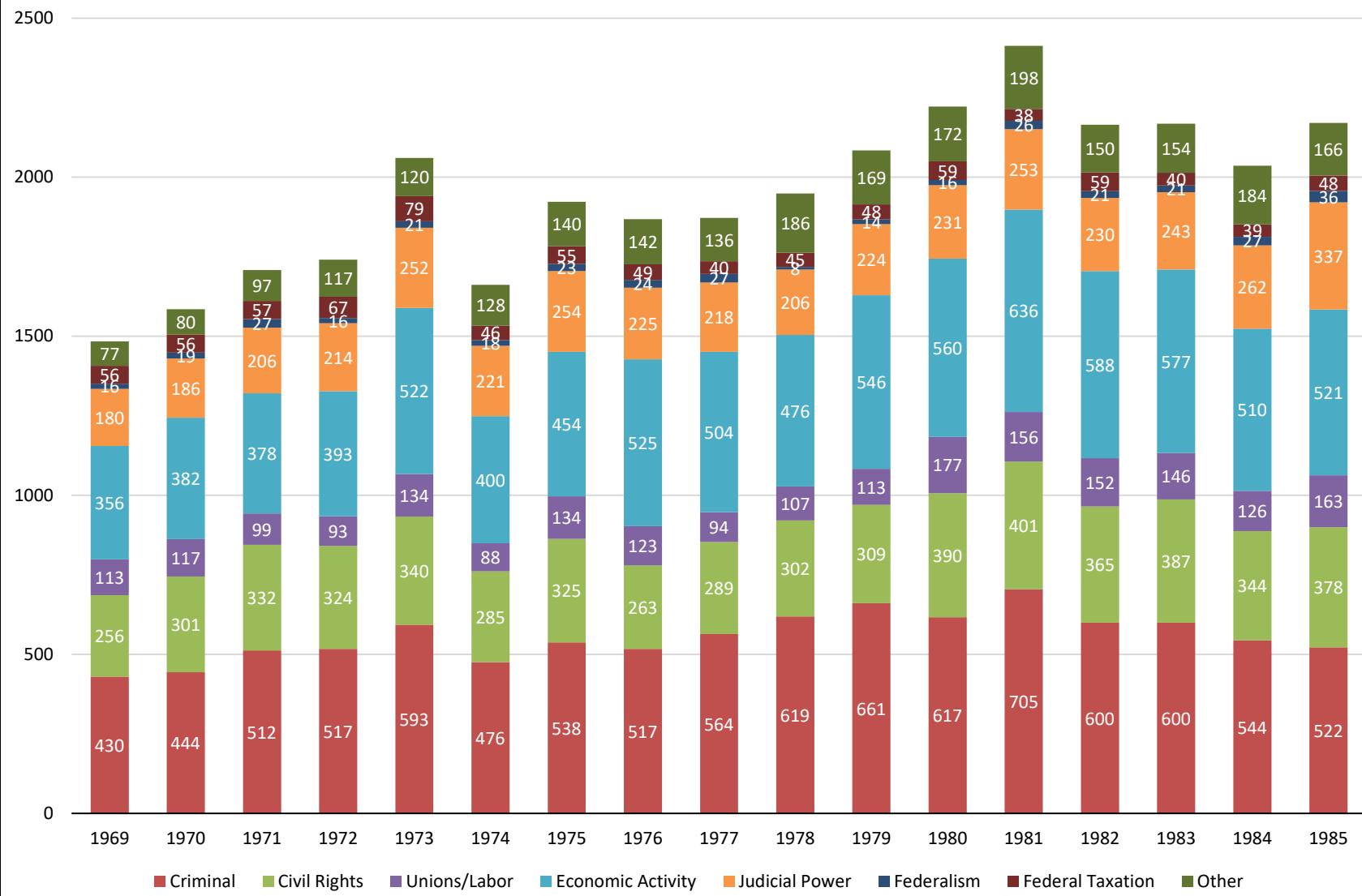


Figure 4: Distribution of Cases Granted Review by Broad Issue Area and by Term on the Burger Court

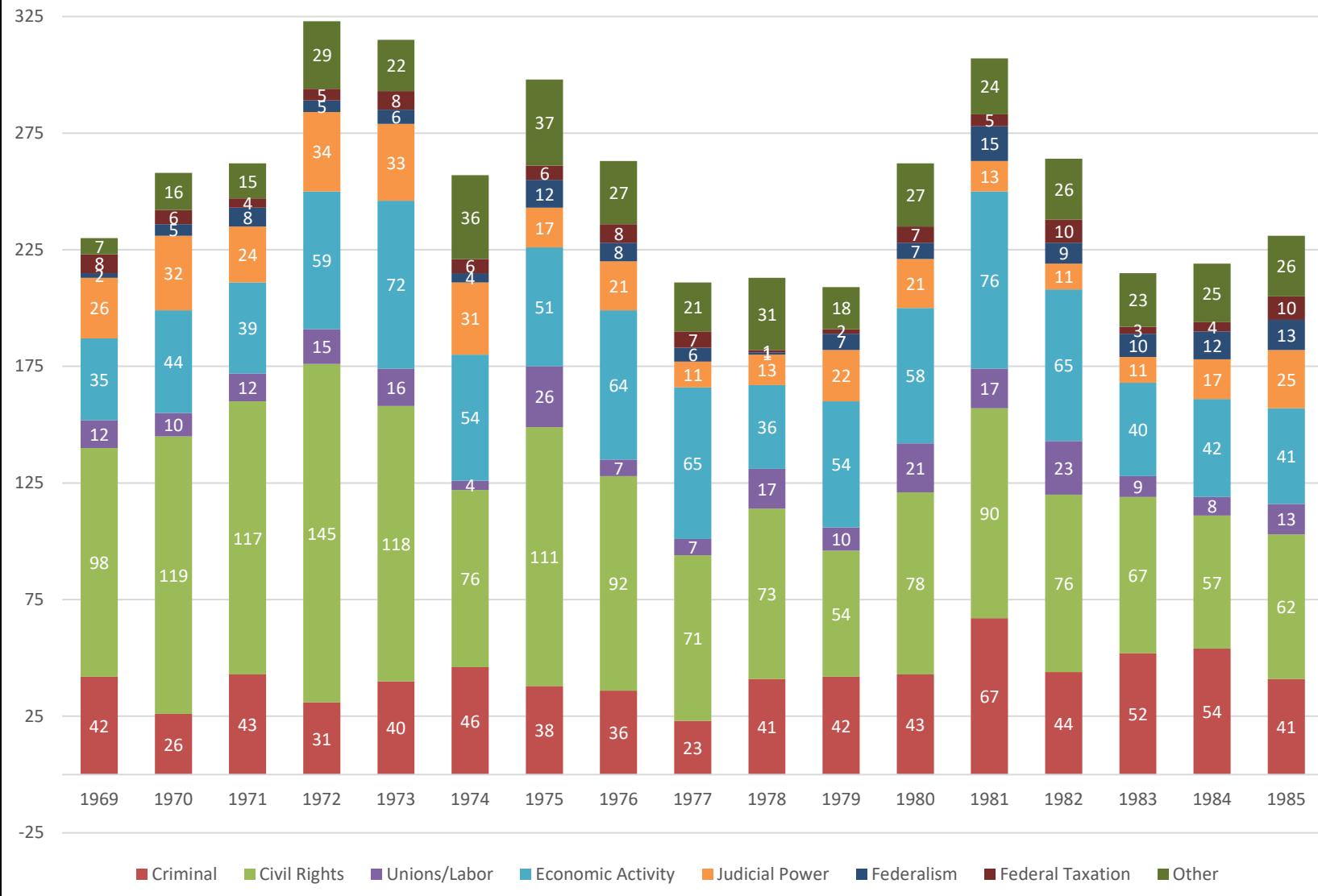


Figure 5: Distribution of Cases Filed in Select Economic Areas by Term on the Burger Court

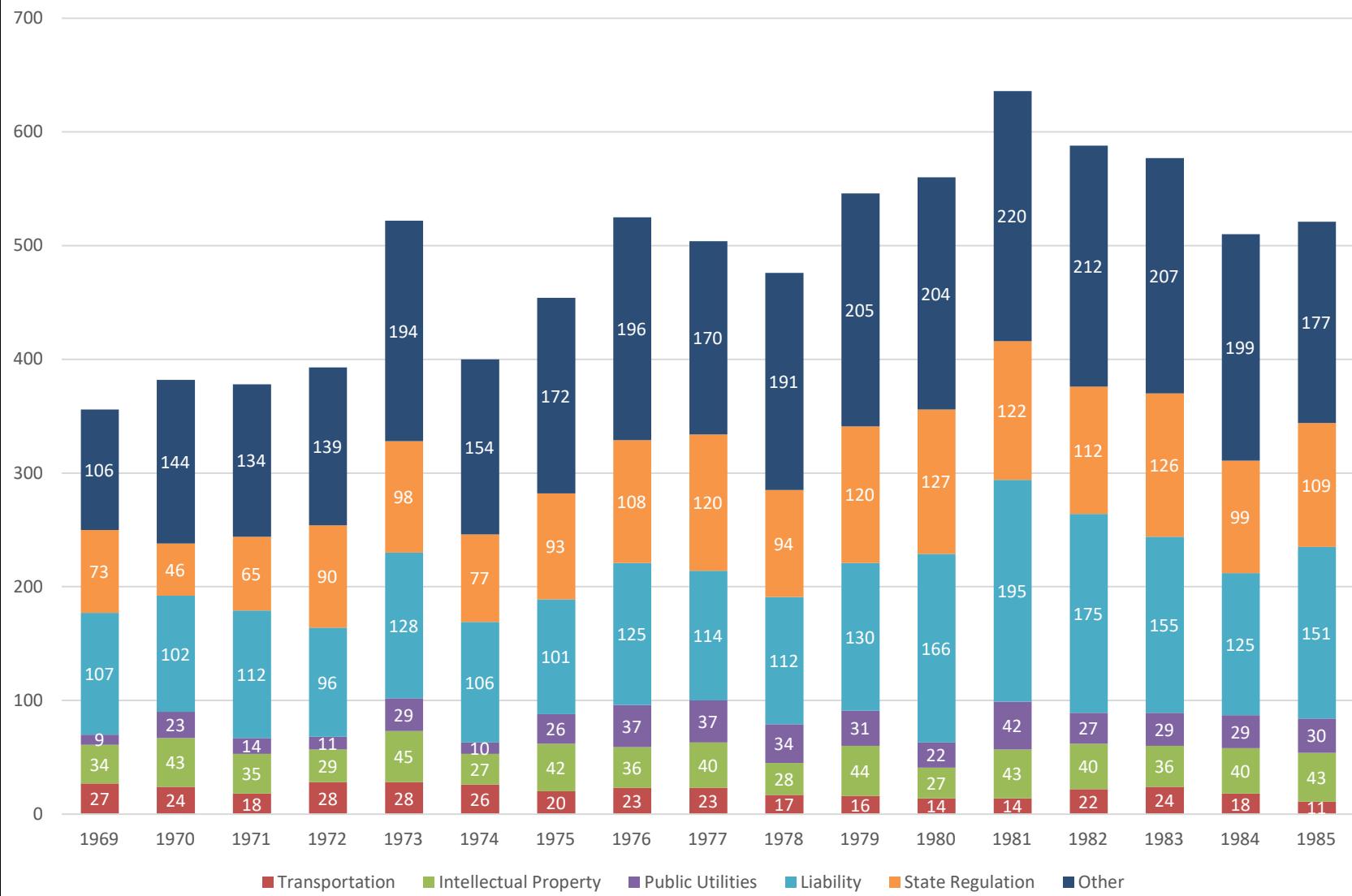


Figure 6: Distribution of Cases Granted Review in Select Economic Areas by Term on the Burger Court

