A Descriptive Portrait of State Judicial Oversight of State Agencies

Rick A. Swanson
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Studies of state judicial oversight of state agencies are practically nonexistent. This is the first study to offer a detailed description of the nature of this oversight. A dataset was constructed of 550 state supreme court cases involving judicial oversight of four types of agencies from 27 states for the years 1991 to 1993. The data show that state supreme court decisions reviewing state agency actions commonly occur, are typically unanimous, are generally supportive of the agency action, and are slightly more often liberal than conservative. Moreover, these trends are largely consistent across states.

One of the basic tenets of American government, at both the federal and state levels, is the principle of separation of powers. Thus, an important empirical question in evaluating American democracy is how the separation of powers plays out when different branches of government interact. One such interaction occurs when courts review the actions of bureaucratic agencies. This interaction has been extensively studied at the federal level, with many studies examining federal court oversight of the federal bureaucracy (Canon and Giles 1972, Handberg 1979, Hansen et al. 1995, Humphries and Songer 1999, Kilwein and Brisbin 1996, Sheehan 1992, Spaeth 1963, Tannenhaus 1960, Willison 1986). Shapiro (1992), however, in a
review piece outlining the then-current state of judicial politics research, lamented the myopic research focus on the federal courts, and the Supreme Court in particular, as if it were the only court in the United States or even the world. He encouraged research that might move outward and downward from the U. S. Supreme Court. Shapiro’s observation about the lack of scholarship on state courts applies with particular accuracy to the study of state court oversight of state bureaucracies. Very few such examinations exist, and we know exceptionally little about the relationship between state courts and state bureaucracies.

The only published research to empirically explore the issue of judicial oversight at the state level is Frank (1980). Frank examined 533 agency cases from four state supreme courts (California, Michigan, New York, and Pennsylvania) for the years 1970 through 1974. Frank’s exploratory study found over 85% of agency cases occurred within only seven issue categories: social welfare, legal professionalism, fiscal policy, professional licensing, public utility regulation, safety-health regulation, and labor-management. In addition, the supreme courts of the states studied supported agency decisions from a low of 51.3% (Michigan) to a high of 66.7% (New York) with an overall support level of 56.4%. Great variation occurred, however, within individual functional areas. For example, state supreme courts were most supportive of agency decisions involving regulation of the legal profession, supporting such actions at a rate of 78.3% (83/106). Toward the lower end of the support spectrum, state supreme courts supported social welfare agency decisions at a rate of only 42.3% (52/123), most of which involved an agency denial of a benefit to an individual.

Frank's research was groundbreaking in its study of state judicial oversight, yet remarkably it remains the only published state judicial oversight research to date. There is no analytic
analysis of such oversight, and numerous descriptive questions remain. Although analytic questions are important, addressing analytic questions before first describing the nature of this oversight would be to put the proverbial cart before the horse. A basic description is necessary so one can then decide what characteristics of this oversight warrant further, in-depth analysis. Among the countless descriptive questions left unanswered are: What are judicial support levels for agency actions in other states? How frequently do state courts review state agency actions? What are the policy areas and ideological nature of these agency actions reviewed? To what degree are state supreme courts unanimous or divided in their review decisions? Does court support vary between "liberal" or "conservative" agency actions? Does this support vary across policy areas? Finally, are any trends that exist consistent across states? This study addresses these questions by exploring the nature of state supreme court oversight of state administrative agencies and offering a descriptive portrait of such oversight.

**METHODS**

Data from a preliminary study conducted by the author revealed the five most frequently reviewed agency actions in state supreme courts were, in order, the issue areas of attorney discipline, social welfare benefits, taxation, environmental regulation, and public utility regulation. The latter four categories serve as particularly useful categories for studying judicial oversight of the bureaucracy. First, these issue categories tend to have ideological overtones and so most cases in these issue areas pose clear ideological choices for courts. Second, agency actions in these issue areas often have policy significance beyond the particular litigants involved. Thus, the latter four issue areas are both more interesting and more
important to study than attorney discipline cases. For the full study presented here, all signed opinions of agency oversight cases in the four selected policy areas which had an agency as a named party to the case were coded from 27 state supreme courts (AL, AR, AZ, CA, CO, FL, GA, IN, MD, MA, MI, MO, NJ, NM, NY, NC, ND, OH, PA, RI, TN, TX, VA, WA, WV, WI, and WY) for the years 1991-1993. Due to normal research

1 Memorandum decisions and per curiam decisions ("by the court" decisions that do not list an authoring judge) were not included. This was done for two reasons. First, the large majority of these types of decisions provide only minimal facts and analysis of the case involved (and sometimes no discussion at all), so that some of the factors examined in this study (such as standard of review) could not be accurately determined by reading the case. Second, the very reason such cases are decided as memorandum or per curiam decisions is because the issues are so straightforward, and often involve so little substance, that the cases are not very instructive to the purposes of this study. As some examples, many of the memorandum or per curiam decisions observed during coding resolved only simple procedural matters such as the ripeness or mootness of the appeal. Other cases simply reversed and remanded for reconsideration in light of a recently issued state supreme court case. Still others stated merely that the case was being affirmed for the reasons expressed in the intermediate appellate court opinion, and offered no further discussion or evaluation of the legal issues.

The observations in the study here were limited to cases in which a state-level administrative agency engaged in an independent action that was later challenged in court, and the agency was a named party. This was done for two reasons. First, in some states, certain types of agencies such as worker's compensation agencies do not take independent actions, but instead go directly to court where a trial court judge makes the decision whether and to what degree workers' compensation benefits should be awarded. Thus, there is never an independent agency action to review, and all that an appellate court reviews is the trial court decision. This type of case is largely useless to the study here which attempts to determine how courts oversee the actions of agencies, not simply the policy positions of those agencies.

Second, also under the administrative procedures of several states, interested parties may challenge an agency's action without involving the agency as a party to the case. For example, in the workers' compensation scheme in several states, once an agency makes a decision regarding benefits, the worker and employer may litigate against one another regarding the propriety of those benefits without any further involvement by the agency in that litigation. In such situations, the agency often believes its particular decision does not warrant the expense of litigation resources, and so the agency decides not to interject itself in the litigation. The inclusion of such cases might skew the results of the larger study in which agency actions are directly challenged.
constraints, a sample of 27 states was chosen rather than the full population of fifty states. Choices were guided by interests in providing geographic and population diversity as well as institutional variation such as methods of judicial selection and retention and judicial term length, as well as the presence or absence of an intermediate appellate court. The unit of observation consisted of an individual court case. All cases were accessed and read on the Lexis/Nexis on-line legal database. The final number of observations was 550 cases.

Variables were operationalized as follows: Cases in which the agency won were coded 1, otherwise 0. Regarding the ideological direction of a case outcome, judicial scholars have long accepted the convention of coding certain types of case outcomes as liberal or conservative (Segal and Spaeth 1993). For the sake of convenience and uniformity only, and consistent with general convention, conservative case outcomes are often coded 0 and liberal case outcomes are coded 1. The liberal-conservative coding is based on Spaeth's (1990) coding in the United States Supreme Court Database, with minor adaptations. The following coding scheme is used for the ideological direction of a court decision:

Social Welfare Benefits

1 = pro-worker's compensation claimant
      pro-public aid claimant
      pro-unemployment compensation claimant
      pro-retirement benefits claimant

0 = reverse of above

3 Cases with an unclear or mixed direction of support (such as affirmed in part and reversed in part) were coded 2.
4 Cases that had no discernible ideological direction or an unclear ideological direction were coded 2.
The liberal-conservative distinctions just noted are standard conventions in the judicial literature. The "liberal" position is deemed to favor social welfare benefits, favor higher taxes in order to provide those benefits, favor regulation of businesses, and favor protection of the environment. The "conservative" position is deemed to be the reverse of those positions. Agency actions with liberal outcomes are coded 1, and agency actions with conservative outcomes are coded 0. Liberal and conservative agency outcomes are defined in the same manner as is the ideological direction of the court's decision, just described.
RESULTS AND DISCUSSION

Agency Actions

The breakdown of the cases into agency categories is presented in the Table below. Almost half the cases were social welfare cases, comprising 48.4% overall of state supreme court cases overseeing state agencies. Social Welfare was comprised mostly of worker's compensation cases, but included cases involving unemployment benefits, retirement benefits, or public welfare benefits as well.

As the Table indicates, state agencies adopted a conservative position in 45.5% of the cases and a liberal position in 48.7% of the cases. When the agencies are broken down by category, obvious differences appear. An overwhelming 94.9% of tax agency actions that reached a state supreme court were the result of an individual or business challenging a tax assessment (coded as a liberal action) by the agency. On the opposite end of the spectrum, the agency action in social welfare cases was conservative in 79.4% of the cases; i.e. the agency denied or limited social welfare benefits to an individual. Of environmental agency actions, 74.2% involved liberal agency actions where the agency was attempting to restrict the activity of a person or business that might degrade the environment.

Actions by utility regulatory agencies were more evenly divided in their ideological leanings, with only 59.0% of utility cases involving agency actions that had liberal outcomes such as

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5 In only 5.8% of the cases did the agency action in question possess an ideological direction that could not be labeled as clearly "liberal" or clearly "conservative." For example, where a utility regulatory agency adjudicates a dispute between two electricity-generating companies over the degree to which each has the right to generate electricity, it is unclear whether favoring one company over the other is a "liberal" or "conservative" agency position.

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increased regulations or rate limitations being placed on utility companies.

Table 1

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Freq.</th>
<th>Freq. %</th>
<th>Liberal Agency Actions</th>
<th>Conserv. Agency Actions</th>
<th>% Agency Actions Liberal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soc. Welfare</td>
<td>266</td>
<td>48.4</td>
<td>52</td>
<td>201</td>
<td>20.6</td>
</tr>
<tr>
<td>Tax</td>
<td>139</td>
<td>25.3</td>
<td>131</td>
<td>7</td>
<td>94.9</td>
</tr>
<tr>
<td>Env’t</td>
<td>75</td>
<td>13.6</td>
<td>49</td>
<td>17</td>
<td>74.2</td>
</tr>
<tr>
<td>Utilities</td>
<td>70</td>
<td>12.7</td>
<td>36</td>
<td>25</td>
<td>59.0</td>
</tr>
<tr>
<td>Total</td>
<td>550</td>
<td>100.0%</td>
<td>268</td>
<td>250</td>
<td>51.7%</td>
</tr>
</tbody>
</table>

6 Totals for “liberal” and “conservative” cases are less than the total number of observed cases because only those agency outcomes possessing a clear, unambiguous ideological direction were classified as either “liberal” or “conservative.”
Table 1, cont'd

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>% Court Support (Liberal Actions)</th>
<th>% Court Support (Conserv. Agency Actions)</th>
<th>% Court Support (Overall)</th>
<th>% Court Outcomes Liberal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soc. Welfare</td>
<td>74.0</td>
<td>53.0</td>
<td>57.3</td>
<td>52.8</td>
</tr>
<tr>
<td>Tax</td>
<td>62.1</td>
<td>83.3</td>
<td>63.1</td>
<td>60.0</td>
</tr>
<tr>
<td>Env't</td>
<td>46.7</td>
<td>70.6</td>
<td>53.2</td>
<td>41.9</td>
</tr>
<tr>
<td>Utilities</td>
<td>68.8</td>
<td>69.6</td>
<td>69.1</td>
<td>51.8</td>
</tr>
<tr>
<td>Total</td>
<td>63.3%</td>
<td>56.6%</td>
<td>59.5%</td>
<td>53.2%</td>
</tr>
</tbody>
</table>

These differences in liberal and conservative outcome rates across policy areas are in all likelihood a function of the structure of the kinds of disputes occurring in these different policy areas rather than a result of ideologically-based behavioral influences on the part of agency decision-makers. That is, individuals will challenge only a denial or reduction of social welfare benefits (defined as a conservative agency outcome) but not an increase in such benefits. Similarly, individuals or business will challenge only an increase in taxes (defined as a liberal agency outcome) but not a reduction in taxes. Thus, structurally, social welfare agency outcomes challenged in court...
are inherently going to be largely conservative, while tax agency outcomes challenged in court are inherently going to be largely liberal.

**Frequency of Oversight Cases**

State supreme courts issued on average 20.4 signed opinions in agency oversight cases during the three-year period studied. This equates to 6.8 cases per year. However, individual states varied widely in their agency oversight caseloads. Some state supreme courts, such as the ones in North Dakota and Massachusetts, consistently heard a large number of oversight cases from year to year, issuing signed opinions in fifteen-to-twenty agency cases each year during the period studied. Other state supreme courts, such as the ones in Michigan or Georgia, were just the opposite, hearing only one or less oversight cases per year on average.

One possible explanation for some of the variation in oversight caseloads across states involves the presence or absence of an intermediate appellate court in the state. States with larger populations possess an intermediate-level appellate court, given that an intermediate appellate court helps address the higher number of cases being litigated within the state. An intermediate appellate-level court relieves much of the supreme court’s workload, because otherwise the state supreme court would need to hear all appeals within the state. Because of this, the presence of an intermediate appellate court also brings a greater degree of discretion to the state supreme court in choosing which cases it will hear being appealed from the intermediate appellate court. This increased docket discretion exists because there is less need for the state supreme court to hear any given case on appeal when the intermediate appellate court has already reviewed the trial court’s decision in that case.
for error. It might be the situation that appellate courts are able to resolve many agency oversight cases that would otherwise be sent to their states' supreme courts, so that state supreme courts in such states hear relatively fewer agency oversight cases.

To see if there is a relationship between the existence of an intermediate appellate court in a state and the agency oversight caseload of that state's supreme court, agency caseload for the three-year period studied was first converted to the percent of a supreme court's total discretionary docket allocated to agency cases. This was calculated by taking the number of agency review cases and dividing by the total discretionary docket. This controls for the fact that different state supreme courts have different total caseloads and different discretionary dockets, such that (for example) ten agency cases out of one court's discretionary caseload might not be the same resource allocation as ten agency cases out of another court's discretionary caseload. Then a t-test was performed between the different means of the percent of discretionary docket allocated to agency oversight cases with and without the presence of an intermediate appellate court. States without an intermediate appellate court were significantly more likely (p<.01) to allocate their discretionary docket to the oversight of agency actions. States without an intermediate appellate court allocated 7.7% of their total discretionary docket in the three-year period studied to cases involving agency oversight, versus 1.5% for states without an intermediate appellate court, a 6.2% difference.

The evidence tends to suggest that state supreme courts in states with intermediate appellate courts believe their limited docket discretion is better used by granting appeals to other implicitly more important or consequential types of cases. In

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7 The percent of state supreme court dockets that is discretionary is from State Court Caseload Statistics (1993), available from the National Center for State Courts.
other words, most agency actions involve adjudications which themselves probably appear to have little precedential value or consequence beyond the narrow facts and legal questions involved in the case. Thus, given a choice between granting an appeal in an agency oversight cases versus a case of seemingly more important or broader consequence and precedential value—such as a case involving the death penalty—a state supreme court which has discretion to choose is more likely to grant appeal in the latter case.

On the other hand, in states without an intermediate court, state legislatures generally believe that certain types of cases require at least one opportunity for judicial review for error, and thus review by the state supreme court is made mandatory in many agency cases. For example, in North Dakota, the state with the highest number of agency cases in the data here, the state legislature has given all litigants disputing an agency action a right of appeal to the state supreme court.8 In fact, of the eleven states without an intermediate appellate court, the supreme courts in five of those states—Delaware, Maine, Nevada, West Virginia and Wyoming—possessed no docket discretion whatsoever. In another three of those states—Mississippi, South Dakota and Vermont—the state supreme court had docket discretion in the single-digit percentiles. This probably explains, for example, why Wyoming recorded the second-highest frequency of agency review cases in the data here. West Virginia, the other state lacking an intermediate appellate court that was included in the study here, contributed 26 observations to the data, which still placed it in the upper 37th percentile of the examined states. Thus, states without intermediate appellate

courts possessed significantly higher frequencies of agency oversight cases, which was a reflection of the smaller discretionary docket those state supreme courts possess.

**Unanimity**

Fully 80% (440/550) of cases were decided by a unanimous vote; only 20.0% of cases overall were nonunanimous. This tells us that the most appropriate decisional outcome in agency oversight cases is rarely in such dispute that a court divides over that outcome. In the vast majority of cases here, a supermajority of state supreme court justices deciding a case coalesced around a single outcome which the justices on the court agreed was the most appropriate decisional outcome. Importantly, this obviously includes justices of opposite partisan and ideological leanings. This comports with the findings of Glick and Pruet (1986) who found the mean rate of nonunanimity across all 50 states for the years 1980-81 was 18.5 percent. Although a thorough analysis of the possible bases for unanimity goes beyond the scope of the discussion here, these data support proponents of the legal model of judicial decision-making, who assert that in most cases there exists a generally "correct" or "best" legal outcome which is reasonably determinable by reasonable people trained in the law applying reasonably objective legal standards.

**Ideological Direction of Judicial Outcomes**

Although state supreme courts differed in their tendency to reach liberal versus conservative outcomes across states, the tendency is noticeably skewed in favor of liberal outcomes, with 55.6% of cases overall reaching a liberal outcome. In states with more than one observation (Michigan reached 100% liberal outcomes with only a single observation), ideological tendencies ranged from 32.1% liberal outcomes in Rhode Island to 83% liberal outcomes in Arizona. In only seven out of 27 states—
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Alabama, Florida, New York, North Dakota, Rhode Island, Tennessee and Texas—did supreme courts reach a greater number of conservative than liberal outcomes. As the Table reveals, the tendency to reach a majority of liberal outcomes was true across agency types as well, with the exception of environmental cases. An examination of the possible causes of this slight overall liberal-leaning bias is beyond the scope of the study here; however, a natural potential suspect is the ideological leanings of state supreme court justices. Further studies need to examine whether the ideological leanings of state supreme court justices has a relationship with state supreme court review of state agency actions. What is undisputable, however, is that there appears to be a clear and generally consistent tendency for state supreme courts to reach a majority of liberal decisions when reviewing state agency actions.

Support for Agency Actions

Once an agency action reached a state supreme court, those courts were fairly equally divided in their overall treatment of liberal versus conservative agency decisions, as well as of different agency types. The Table demonstrates that state supreme courts supported agencies more often than not, with a 59.5% rate of overall support for the agency actions studied. This support rate was generally true across states. In only six out of 27 states—Colorado, New Jersey, Pennsylvania, Rhode Island, Tennessee, and Texas—did overall support for agency actions drop below 50%. Moreover, even in those five states, only New Jersey’s level of support was particularly low at 25%, whereas the other four states still supported agency actions at least 40% of the time. As the Table shows, this was consistent across agency types as well.
One thing is clear from these data: state supreme courts support a majority of the actions by state-level administrative agencies (approximately 60% overall), and this tendency to support more than half of agency actions occurs across most states and across ideological outcomes of agency actions. Studies of the U.S. Supreme Court and the U.S. Courts of Appeals, on the other hand, show that these federal courts uphold around 70% of agency actions (e.g. Sheehan 1992). One possible explanation for the lower support rate of state agencies might be the fact that state agencies tend to possess fewer resources than do federal agencies (Funk 1991). State agencies generally have fewer personnel (both technical and legal) and smaller funds to commission investigations and evaluations by independent experts. In either situation, a reviewing court is probably more likely to overturn agency conclusions, especially when those conclusions are rebutted by experts for the agency's litigation opponent.

A second possible reason for the difference in the level of federal court support for federal agencies and state supreme court support for state agencies is the type of agency actions most frequently litigated in appeals. By far the largest category of agency actions that were considered by state supreme courts in the cases observed involved adjudicatory actions, in which an agency decides the outcome of a dispute between the agency and a regulated entity. The large majority of these adjudications, moreover, involved an issue of statutory interpretation. In this category of administrative law cases, courts apply a de novo standard of review where courts decide the case "from new" without any presumption of correctness being given to the agency's interpretation of law. This is because interpreting statutes or other laws (such as Constitutions or treaties) is the precise nature of expertise that courts possess. They are the entity that is best in a position of legal knowledge and
experience to interpret laws, and courts regularly and expressly offer this justification for applying the de novo standard of review. Put simply, "an erroneous interpretation of a statute by an administrative agency is not entitled to deference" (Woods v. Executive Director of Communities and Development, 583 N.E.2d 845 ([Mass.1992]). The fact that the large majority of cases in the study here were reviewed by this standard of review probably accounts for why the overall level of support for agency actions is not higher.

On the other hand, only 7.1% of observed cases involved judicial review of rulemaking actions. These types of agency actions receive the greatest proclaimed deference from courts. In reviewing agency rulemaking actions, courts apply the "arbitrary and capricious" test, "substantial evidence" test or some other analogous standard of review that gives a high degree of deference to the technical and policy expertise of the agency. A common expression of deference was provided by the North Dakota Supreme when it declared, "This court exercises restraint and will not act as a 'super board' when reviewing administrative agency findings and determinations . . . We should not substitute our judgment for that of qualified experts in the administrative agencies" (Hins v. Lucas Western [and Job Service North Dakota], 484 N.W.2d 491, 494-95 ([N.D. 1992]).

The legal standard of review has been considered as a factor in only a single prior judicial study (Humphries and Songer 1999) which involved the federal Courts of Appeal, and the results here are inconsistent with those findings. In the data here, there was no statistically significant difference between the support rates in cases involving a deferential versus non-deferential standard of review. It should be emphasized that these findings are tentative only, and certainly call for additional study. A more detailed analysis of the bases for state court
support of state agencies is beyond the scope of the article here but is certainly a promising avenue of further research.

CONCLUSION

State supreme court decisions reviewing state agency actions are frequent, typically unanimous, and generally supportive of the agency action. Reviewing actions also more often result in liberal rather than conservative case outcomes, although this trend is only slight. Perhaps the most surprising result is that all these trends just mentioned are generally consistent across states, with relatively few exceptions.

The data here, however, raise as many or more questions for possible future study as they answer. What are the numerous causal factors that influence state supreme courts whether to rule in favor of state agencies? Is it the expertise of agency experts, or the lack of technical expertise by judges, or a combination thereof? Does this expertise by either agency employees or judges vary across policy areas? Is the degree of support for agencies also driven in part by the public's ideological attitudes within the state? In a related manner, to what degree do judges tend to favor agency outcomes that comport with those judges' own ideological leanings? And does the influence of the public's or judges' ideological makeup on agency oversight vary depending on the agency type or nature of the agency action in question as adjudicatory or rulemaking? Also, does the legal standard of review that is applied in a case affect the likelihood of support for the agency action at issue, and does this vary by agency type?

There is also the question of how institutional factors beyond the presence of an appellate court influence support for agency actions. How do such institutional features as judicial selection and retention mechanisms influence such support? For example, do elected judges respond to the public's attitudes in
overseeing agency actions, or do appointed judges respond to the attitudes of the governor or legislature in such cases? Does length of judicial term influence agency oversight in any manner, and if so to what degree? Also, in many states, there are constitutional or legislative mechanisms set up whereby the legislature or governor or both can review agency actions directly, especially rulemaking actions. How does such an institutional structure affect judicial oversight of agency actions? For example, do courts defer to the agency oversight expressly or impliedly performed by governors or legislatures? And does this vary by agency type or nature of the agency action in question, as adjudicatory or rulemaking? And how does the ideology of judges interact with all these institutional mechanisms when judicial oversight of agency actions occurs?

As can be seen, there is a plethora of these and many more unanswered questions surrounding state supreme court oversight of state administrative agencies that await future, more analytic studies. Nevertheless, the descriptive data here have begun to paint the broad outline regarding state supreme court oversight of state administrative agencies. It remains for numerous additional studies to add further detail to that portrait.

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