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 11: Administrative Action 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 addressed in this paper is whether cases involving administrative action were treated differently by the Court in terms of the review decision. The results show that cases with administrative action were more likely to be granted review by the Court. More specifically, cases with either federal or state administrative action had a higher acceptance rate than cases with no administrative action. At the federal level there were also some differences depending on the particular agency.

Agenda Setting on the Burger Court
Paper 11: Administrative Active as a Factor

This is the eleventh 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.

Administrative Action

In the seventh paper in this series I found that the presence of government parties in cases filed before the Supreme Court was related to the chances that a case would be accepted for review. In many instances there was an increased chance of acceptance, but in a few situations the chances were decreased. In particular, Table 3 in that paper showed that the chances were lessened when the government party was the appellee in the case.[3]

In the eighth paper in this series I began to look at specific types of parties and the focus of that paper was on law enforcement parties.[4] The ninth paper in the series then examined a different aspect of criminal cases by focusing on cases with criminal defendants.[5] Consistent with the findings of prior papers, comparisons with law enforcement parties or criminal defendants proved to have a higher acceptance rate in some instances and a lower rate in others.

In the tenth paper the focus changed to administrative parties.[6] As with the examination of cases with law enforcement parties the basic justification was the idea of importance noted by Perry as a criterion for acceptance (1991, 253-260). Of course, as also noted previously Ulmer, Hintze, and Kirklosky (1972) mention the role of the federal government as a petitioning party. It seemed reasonable, therefore, to believe that those factors would apply to an examination of administrative parties as it seemed to for law enforcement parties and the results confirmed this to be so, particularly when a federal administrative entity was the party.

Of course, not all cases with administrative parties involve administrative action. Although specifics of the data are described below, I will note that there are 1,554 cases in the

[3] The paper is titled, "Agenda Setting on the Burger Court, Paper 7: Government Parties as a Factor."
[4] The paper is titled, "Agenda Setting on the Burger Court, Paper 8: Law Enforcement Parties as a Factor."
[5] The paper is titled, "Agenda Setting on the Burger Court, Paper 9: Criminal Defendants as a Factor."
[6] The paper is titled, "Agenda Setting on the Burger Court, Paper 10, "Administrative Parties as a Factor."

database where there were administrative parties (federal, state, or local) but no administrative action related to the case. An example of this could be where a new law was passed and a lawsuit was filed to challenge it with the appropriate administrative unit as the defendant party. Conversely, there are also 2,033 cases with no named administrative parties, but administrative action. One possible scenario for such cases is when an employee sues an employer over benefits as determined by an administrative entity.

Just as the Court might view cases involving administrative parties as more worthy of review than those without such parties, so too might the justices view cases with administrative action as more worthy of review. Although the vast majority of cases with administrative parties will also have administrative action, it is still worth exploring possible differences from this slightly different perspective.

Unlike in prior papers where the focus was on a specific type of party, and whether that party was an appellant or an appellee, here I examine different aspects of administrative action.

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]

An additional note on the coding for this examination is necessary before proceeding. Defining "administrative action" is relatively straightforward, but there can be some cases more difficult to classify. In general, most actions by administrative entities would be considered administrative actions. That is why there is such a high correlation between cases with administrative action that also have administrative parties. Instances when the administrative entity simply filed a lawsuit would not generally be considered administrative action, unless it could be determined that the entity conducted some action that prompted the filing of the lawsuit. It is also possible for a governmental entity that is not considered administrative to engage in administrative action. The example used in the previous paper was if the FBI, a law enforcement agency, made a personnel decision and was sued over it. Not included in administrative action are instances when a legislative or executive body is making decisions within its regular powers. For example, a county board of supervisors that makes a zoning decision. On the other hand, if a county zoning commission made the same decision it would be considered administrative action.

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[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 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.)

In addition to coding the existence of administrative action, any such action is also coded based on whether the action was taken by a federal, state, or local administrative entity. As indicated in prior papers government parties are coded based on whether they are federal, state, or local (e.g., county, city, township) entities. The same three levels are coded for administrative action. Thus, for example, a personnel decision could be coded as federal, state, or local depending in which governmental level took the indicated action.

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]

Table 1 shows the comparison of those cases with administrative action with those cases that did not have administrative action. No distinction is made for the level of administrative action (federal, state, or local) for this table.

TABLE 1 ABOUT HERE

As can be seen from Table 1, a bit less than one-quarter of the cases filed before the Supreme Court involved administrative action at some level (8,624 of 32,761 cases for 26.3%). Of the 8,624 cases with administrative action the Court accepted 1,748 for review (20.3%). In contrast, of the 24,137 cases without administrative action the Court accepted 2,589 for review (10.7%). Thus, the Court was much more likely to accept cases with administrative action than those without and the difference is significant at the $p < .001$ level using a difference of means test (Wonnacott and Wonnacott 1972, 178).

[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.

The results shown in Table 1 were very close to those shown in Table 1 of the prior paper.[10] This is not surprising given the overlap between cases with both administrative parties and administrative action. More specifically, the 20.4% acceptance rate for cases with administrative parties was almost the same as the acceptance rate for cases with administrative action. Similarly, the acceptance rate for cases without an administrative party was 10.9% (Table 10-1), which was nearly the same as for the cases without administrative action shown here.[11]

TABLE 2 ABOUT HERE

The next step is to examine the different government levels that took administrative action. Table 2 shows the comparison between cases with federal administrative action and those cases without administrative action. Note that for Tables 1 through 5 the Without Administrative Action row is the same.

There were 5,325 cases with federal administrative action and the Court granted review to 1,118 of them (21.0%). Once again it should not be surprising that the Court was much more willing to review cases with federal administrative action. The results shown in prior papers strongly suggested that the Court was more likely to grant review to cases involving federal governmental entities (Tables 8-4 and 10-4). Although we are not looking at parties for this examination, that the federal government took action prior to a case being filed would suggest a higher level of importance that the Court would notice.

TABLE 3 ABOUT HERE

[10] To make it easier to refer to the tables of the prior papers from this point on I will use the notation indicating the prior paper number and the table number. For example, Table 1 of the Paper 10 will be indicated as 10-1, and so on.
[11] I can imagine a "Well, duh" comment about this result. Note, however, that there are 475 more cases with administrative action than administrative parties. Given that number, if the Court was treating such cases differently we would likely see more than the few tenths of a point difference in the two tables.

Table 3 shows the comparison of the combined number of cases with either state or local administrative action with those cases without administrative action. There were fewer cases with either state or local administrative action, only 3,299, and the Court accepted 630 for review (19.1%). This acceptance rate was less than two points below the rate for cases with federal administrative action but still reached a traditional level of statistical significance when compared with cases not involving administrative action.

TABLE 4 ABOUT HERE

Although the number of cases becomes smaller in each category, it is worth examining administrative action at the state and local levels separately. To that end, Table 4 shows the comparison of cases with state administrative action with cases without administrative action. There were 1,968 cases with state administrative action and the Court accepted 428 of them for review (21.7%). That acceptance rate was a bit above the rate for cases with federal administrative action as shown in Table 2. Although the number of cases with state administrative action was much smaller than those with federal administrative action, the comparison still reached statistical significance.

TABLE 5 ABOUT HERE

Table 5 shows the comparison of cases with local administrative action with cases without administrative action. There were only 1,331 cases with local administrative action and the Court accepted just 202 for review (15.2%). The acceptance rate for these cases was only a few points above the rate for cases without administrative action. Although there were fewer cases with local administrative action, and the acceptance rate was closer to the rate for cases without administrative action, it appears that the Court still was more accepting of them to a statistically

significant degree. Even if very important Supreme Court decisions involving local administrative action are less frequent they do occur.[12]

The next step is to compare the acceptance rates among the three governmental levels. These comparisons are shown in the next three tables.

TABLE 6 ABOUT HERE

Table 6 shows the comparison of the acceptance rate of cases with state administrative action with cases with federal administrative action. The rows for federal and state administrative action are the same as in Tables 2 and 4, respectively. As we saw from Tables 2 and 4, the acceptance rate for cases with state administrative action was 21.7%, which was less than a point above the acceptance rate for cases with federal administrative action, which was 21.0%. That this difference is not greater and in favor of federal administrative action, is surprising. Given past results we might expect that the acceptance rate for cases with federal administrative action would be higher than those with state administrative action. On the other hand, in Tables 10-4 and 10-7 we saw that the Court was more likely to grant review to cases with state administrative parties (25.0%) than cases with federal administrative parties (19.4%). There were additional differences based on whether the administrative parties were appellants or appellees. In particular, the Court was far more likely to grant review to cases with the federal administrative party as the appellant (73.6%, Table 10-5) than with the state administrative party as the appellant (41.3%, Table 10-8). The examination in this paper focuses on the action rather than the parties, but it is still interesting that the Court's acceptance rates for cases with state and federal administrative action are so similar.

TABLE 7 ABOUT HERE

[12] A famous case decided during the Warren Court era involving local administrative action that comes to mind is *Tinker v. Des Moines Independent Community School District* (1969).

Table 7 shows the comparison of the acceptance rates between cases with local administrative action and those with federal administrative action. Given what we saw previously in Tables 2 and 5, it is no surprise that there was more of a difference in the acceptance rates. This difference reached a traditional level of statistical significance despite the smaller number of cases with local administrative action.

TABLE 8 ABOUT HERE

To complete this set of comparisons, Table 8 shows the comparison of the acceptance rates of cases with local administrative action with cases that had state administrative action. Given that the acceptance rates for state and local cases with administrative action were so similar, as shown in Tables 2 and 4, it is no surprise that there was a fairly small difference between the acceptance rates for cases with local and state administrative action. Even so, difference in acceptance rates between cases with local versus state administrative action was statistically significant.

Specific Agency Action

In looking at the many cases with federal administrative action three particular agencies stand out: the Internal Revenue Service (IRS), the National Labor Relations Board (NLRB), and the Interstate Commerce Commission (ICC). In particular, of the 5,325 cases with federal administrative action, 879 involved IRS action, and 847 involved NLRB action, and 309 involved ICC action.[13] Given the number of cases involving action by the IRS, NLRB, and ICC it is worthwhile to consider their acceptance rates compared to other cases with federal administrative action.

[13] Administrative actions by a few other federal agencies were involved in over one hundred cases, such as the Federal Communications Commission (166), the Department of the Interior (124), the Federal Power Commission (119), the Selective Service System (119), and the Army (118).

TABLE 9 ABOUT HERE

Beginning with the IRS, Table 9 shows that there were 879 cases involving IRS administrative action and the Court granted review to 100 of them (11.4%). The comparison here is with cases involving action from another federal administrative unit. There were 4,446 such cases and the Court granted review to 1018 of them (22.9%). Not surprisingly, this large difference is statistically significant. We have seen previously that the Court was generally more likely to accept cases for review when a federal administrative entity was the appellant (Table 10-5) and less likely to do so when the federal administrative entity was the appellee (Table 10-6). This difference helps to explain the cases with IRS action. More specifically, 421 of the 879 cases with IRS action also involved the IRS as a party. There were 30 cases with the IRS as the appellant and the Court granted review to 16 of them (53.3%). In sharp contrast, there were 391 cases with the IRS as the appellee and the Court only granted review to 12 of them (3.1%). The nature of IRS cases is that once the IRS makes a determination the taxpayer makes the decision to go to court. The IRS would never be the original plaintiff. If a lower court sided in favor of the taxpayer, then the IRS could be the appellant when the case came before the Supreme Court. Given that the Court was far less likely to grant review to a case where the IRS action had been upheld in the courts below than when it had been overturned, it appears that the Court may have been showing respect to the determinations of a coequal branch of government.

TABLE 10 ABOUT HERE

In Table 10 we see the comparison of cases involving action by the NLRB with all other cases involving federal administrative action. There were 847 cases involving administrative action by the NLRB and the Court granted review to 118 of them (13.9%). There were 4,478 cases involving other federal administrative action and the Court granted review to 1000 of them

(22.3%). The difference in the acceptance rates is a little surprising. On the other hand, unlike the cases with IRS action, those with action by the NLRB provide a greater mix. Once the NLRB makes a decision or issues an order it may be the party to go to court to enforce it. Also, where the IRS decisions that end up in court will always be contrary to the interests of the taxpayer, NLRB decisions can be for the employer or for the employee or union. Thus, the mix of cases involving NLRB action does not provide as clear an indicator for the Court to distinguish them from the mix of other cases involving federal administrative action.

TABLE 11 ABOUT HERE

Table 11 shows the comparison of cases involving ICC administrative action with all other cases involving federal administrative action. There were 309 cases in which the ICC took administrative action and the Court accepted 160 of them for review (51.8%). In contrast, there were 5,016 other cases with federal administrative action and the Court accepted 958 of them for review (19.1%). This huge difference is not completely surprising. In the sixth paper in the series we saw that there was a very high acceptance rate if a case came directly to the Supreme Court from a federal district court (see Table 6-7).[14]

Without getting too deeply into the details, federal statutes in place during the first several terms of the Burger Court era required that most cases challenging an ICC order had to be heard by three-judge federal district courts. The decisions of these three-judge courts were subject to review by direct appeal to the Supreme Court.[15] In the second paper in the series we saw that the Court was more likely to accept cases on appeal as opposed to petitions for writs of certiorari, particularly when the case came from a federal court (see Table 2-2).[16] Of the 309 cases involving ICC action indicated in Table 11, 144 of them came to the Supreme Court directly

[14] The paper is titled, "Agenda Setting on the Burger Court, Paper 6: Court Level as a Factor."
[15] See Stern and Gressman 1969, 48-79, regarding appeal jurisdiction of three-judge district courts.
[16] The paper is titled, "Agenda Setting on the Burger Court, Paper 2: Certiorari and Appeal on the Burger Court."

from a federal district court, 131 of those were on appeal, and the Court accepted 127 of them for review.[17]

TABLE 12 ABOUT HERE

The last comparison involving federal administrative action or parties to examine involves cases were there was federal administrative action but the federal government was not a party to the suit. In Table 12 we see the comparison of cases involving federal administrative action that did not have a federal governmental party with all other cases involving federal administrative action. There were 681 cases with federal administrative action but no federal governmental party and the Court granted review to 250 of them (36.7%). There were 4,644 cases with federal administrative action but with at least one federal governmental party and the Court granted review to 868 of them (18.7%). The difference here is rather large suggesting that it made a difference in terms of the acceptance rate whether federal governmental entities were named parties in a case when federal administrative action had occurred.

Court Level

Given the finding from Table 11, it is worth taking an additional brief look at court level in relation to federal administrative action. In particular, the final two tables examine the acceptance rate for cases in which the first court to hear the case was the only one to do so before the case was appealed to the Supreme Court. As mentioned previously, for several terms cases involving challenges to ICC orders were usually heard by three-judge federal district courts and then appealed directly to the Supreme Court. There were also some instances when cases from single-judge federal district courts were appealed directly to the Supreme Court.

[17] All 144 cases were filed during or before the 1976 Term.

In addition to cases coming directly from a federal district court, there are two types of cases in which the first court to hear a case (the origin court) is also the last court to do so (the source court) before going to the Supreme Court. One type involves some federal specialty courts such as the Court of Claims. The second and more numerous example involves cases that come from certain federal regulatory agencies whose decisions are appealed directly to a federal Court of Appeals. For example, cases involving the NLRB generally go directly to a Court of Appeals. The same is true for agencies such as the Federal Trade Commission and the Securities and Exchange Commission. Without getting into the specifics as to why some cases are heard by only one lower federal court, the question is whether the Court treats these cases differently for purposes of granting review.[18]

TABLE 13 ABOUT HERE

In Table 13 we see the comparison between cases involving federal administrative action where the source court was also the origin court with all other cases involving federal administrative action. There were 2,478 cases involving federal administrative action and where the source court was also the origin court. Of these, the Court granted review to 651 (26.3%). There were 2,847 cases involving federal administrative action and where the source court was not the origin court. Of these the Court granted review to 467 (16.4%). That difference was very large, and statistically significant, but there is a bit of a catch. The number of cases where the source and origin courts were the same includes all the cases involving ICC administrative action that came from three-judge district courts on appeal. Although that group certainly qualifies for this comparison, we also know they form a distinct group. More generally, although there is no table for it, there were 318 cases involving federal administrative action that came to

[18] See Stern and Gressman 1969, Chapter 2, for details on the Supreme Court's jurisdiction on hearing cases from federal courts.

the Supreme Court directly from a federal district court and the Court granted review to 295 of them (92.8%).

Thus, to better isolate the question of whether the Court treats cases where the source court and the origin court were the same it would be better to only look at those cases that came from federal Courts of Appeals.

TABLE 14 ABOUT HERE

Table 14 shows the comparison of cases involving federal administrative action where the source court was also the origin court which was a federal Court of Appeals with all other cases involving federal administrative action where the source court was not the origin court. There were 1,948 cases in the former category of which the Court granted review to 342 of them (17.6%). There were 2,816 remaining cases of which the Court granted review to 457 of them (16.2%). The difference here is quite small, so it seems the Court did not have a strong preference for cases coming from the Courts of Appeals where it was the only lower court.

Discussion

The results of this examination clearly show that the Burger Court treated cases involving administrative action differently than other cases for purposes of granting review. This finding is consistent with the finding from the prior paper that examined acceptance rates for administrative parties. The finding is also not surprising given the large overlap between cases with administrative action and administrative parties.

As in prior examinations, it was important to drill down into various aspects of administrative action. In doing so we found that once again the Court was more accepting of cases with federal administrative action. This could represent some combination of the Court's

view that federal administrative action was important and the Court's willingness to oversee the federal system. Consistent with that finding, the Court was a bit less accepting of cases involving state and local administrative action. The argument here could be that the Court was more willing to let states handle their own affairs. This may be even more the case regarding local administrative action, which had a lower acceptance rate than state action when the two were examined separately. Although the Court certainly granted review to and decided some famous cases involving local administrative action, in general it would seem that the Court did not feel such cases had the reach or importance of cases with either state or federal administrative action. It is also worth keeping in mind that this examination does not classify the particulars of the administrative action. Thus, it could be that very few local administrative actions involve the types of substantive issues of interest to the Court.

The large number of cases with federal administrative action allowed for the examination of a few particular agencies. In examining the acceptance rates for the IRS, NLRB, and ICC we saw how the nature of the agencies and the cases involving their decisions can affect the acceptance rate. Cases involving IRS action will always begin with the taxpayer initially filing suit. This is because if the IRS makes a determination agreeable to the taxpayer then neither party will go to court. Thus, every case involving IRS action starts as a challenge to federal agency action. The IRS is usually the appellee when the case comes to the Supreme Court, but not if a lower court disagrees with the IRS action. As we saw in prior papers, the Court was less inclined to grant review to cases in which the federal administrative party was the appellee, and that finding was reflected in the data for Table 9 given the high percentage of cases involving IRS action in which the IRS was the appellee.

In contrast to cases with IRS action, the acceptance rate for cases involving NLRB action was well below that of other cases with federal agency action. As noted above, cases with NLRB action involve more of a mix in that the NLRB itself can be the party to initially file suit to enforce its decision. Also, unlike IRS actions which generally involve just the IRS and a taxpayer, NLRB actions generally involve two adverse parties, such as an employer and employee or employer and union. That means that regardless of the NLRB's action one of the parties might be sufficiently dissatisfied to go to court. The much lower acceptance rate may have been due to the more complex mix of cases involving NLRB action or because that mix did not provide the Court with clearer indicators that the cases were more or less worthy of review.

The third agency whose actions were examined was the ICC. In terms of substance, cases involving ICC action were more like those of the NLRB than the IRS, but the cases with ICC action presented a different aspect that caused those cases to have a much higher acceptance rate. More specifically, a large percentage of the cases with ICC action came directly from three-judge federal district courts and the Court granted review to a very high percentage of these cases. Needless to say, that skewed the acceptance rate for this group.

The unusual nature of the cases with ICC action that came directly from three-judge federal district courts raised the question as to whether the Court was more or less willing to hear cases where the first court to hear a case (the origin court) was also the only court to do so before being appealed to the Supreme Court (the source court). The cases from the three-judge courts presented a problem in addressing this question. Focusing instead on cases where a federal Court of Appeals was the origin and source court we found that the Supreme Court was only slightly more likely to accept such cases for review. Many of these cases involved administrative action by what are known as quasi-judicial agencies. Thus, it seems that the

justices during the Burger Court were just a bit more willing to grant review to cases involving these agencies even though they received only one level of judicial review before being appealed to the Court.

Conclusion

Once again, the findings presented here provide additional details on several aspects of the Court's agenda setting. It was particularly interesting to see the differences with the cases involving federal administrative parties (Paper 10) given the overlap between those cases and cases with federal administrative action. Of course, and as I have noted in prior papers, although these bivariate comparisons provide insight into the Court's agenda setting, more will need to be done to provide even more detail and in a multivariate setting.

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Table 1

Acceptance Rates for Cases With Administrative Action Compared With Cases Without Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Administrative Action	1,748	6,876	8,624	20.3%*
Without Administrative Action	2,589	21,548	24,137	10.7%
Column Total	4,337	28,424	32,761	13.2%

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

Table 2

Acceptance Rates for Cases With Federal Administrative Action Compared With Cases Without Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Federal Administrative Action	1,118	4,207	5,325	21.0%*
Without Administrative Action	2,589	21,548	24,137	10.7%
Column Total	3,707	25,755	29,462	12.6%

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

Table 3

Acceptance Rates for Cases With State or Local Administrative Action Compared With Cases Without Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With State or Local Administrative Action	630	2,669	3,299	19.1%*
Without Administrative Action	2,589	21,548	24,137	10.7%
Column Total	3,219	24,217	27,436	11.7%

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

Table 4

Acceptance Rates for Cases With State Administrative Action Compared With Cases Without Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With State Administrative Action	428	1,540	1,968	21.7%*
9,271	2,589	21,548	24,137	10.7%
Column Total	3,017	23,088	26,105	11.6%

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

Table 5

Acceptance Rates for Cases With Local Administrative Action Compared With Cases Without Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Local Administrative Action	202	1,129	1,331	15.2%*
Without Administrative Action	2,589	21,548	24,137	10.7%
Column Total	2,791	22,677	25,468	11.0%

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

Table 6

Acceptance Rates for Cases With State Administrative Action Compared With Cases With Federal Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With State Administrative Action	428	1,540	1,968	21.7%
With Federal Administrative Action	1,118	4,207	5,325	21.0%
Column Total	1,546	5,747	7,293	21.2%

Table 7

Acceptance Rates for Cases With Local Administrative Action Compared With Cases With Federal Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Local Administrative Action	202	1,129	1,331	15.2%*
With Federal Administrative Action	1,118	4,207	5,325	21.0%
Column Total	1,320	5,336	6,656	19.8%

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

Table 8

Acceptance Rates for Cases With Local Administrative Action Compared With Cases With State Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With Local Administrative Action	202	1,129	1,331	15.2%*
With State Administrative Action	428	1,540	1,968	21.7%
Column Total	630	2,669	3,299	19.1%

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

Table 9

Acceptance Rates for Cases With IRS Administrative Action Compared With Cases With Other Federal Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With IRS Administrative Action	100	779	879	11.4%*
With Other Federal Administrative Action	1,018	3,428	4,446	22.9%
Column Total	1,118	4,207	5,325	21.0%

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

Table 10

Acceptance Rates for Cases With NLRB Administrative Action Compared With Cases With Other Federal Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With NLRB Administrative Action	118	729	847	13.9%*
With Other Federal Administrative Action	1,000	3,478	4,478	22.3%
Column Total	1,118	4,207	5,325	21.0%

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

Table 11

Acceptance Rates for Cases With ICC Administrative Action Compared With Cases With Other Federal Administrative Action on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
With ICC Administrative Action	160	149	309	51.8%*
With Other Federal Administrative Action	958	4,058	5,016	19.1%
Column Total	1,118	4,207	5,325	21.0%

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

Table 12

Acceptance Rates for Cases With Federal Administrative Action but No Federal Party Compared With Cases With Federal Administrative Action and a Federal Party on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Federal Administrative Action Without Federal Party	250	431	681	36.7%*
Federal Administrative Action With Federal Party	868	3,776	4,644	18.7%
Column Total	1,118	4,207	5,325	21.0%

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

Table 13

Acceptance Rates for Cases With Federal Administrative Action and Source and Origin Courts are the Same Compared With Cases With Federal Administrative Action and Source and Origin Courts are Different on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Source and Origin Courts the Same	651	1,827	2,478	26.3%*
Different Source and Origin Courts	467	2,380	2,847	16.4%
Column Total	1,118	4,207	5,325	21.0%

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

Table 14

Acceptance Rates for Cases With Federal Administrative Action and Source and Origin Courts are Courts of Appeals Compared With Cases With Federal Administrative Action and Source and Origin Courts are Different on the Burger Court's Appellate Docket

	Accepted	Denied	Row Total	Acceptance Rate (%)
Source and Origin Courts the Same	342	1,606	1,948	17.6%
Different Source and Origin Courts	457	2,359	2,816	16.2%
Column Total	799	3,965	4,764	16.8%