Threshold Rules as Tools of Deference?: Circuit Judge Gatekeeping in Administrative Agency Cases*

Erin B. Kaheny and Kimberly J. Rice

Given the importance of the courts in monitoring agency decisions, the extent of deference they offer to agencies is very important. Thus, existing research on administrative agencies and the courts has naturally focused on the extent to which courts defer to agency decisions on the merits of legal claims. Previous scholars, however, have not systematically assessed whether deference is also achieved via the use of threshold rules. In this article, we investigate the extent to which threshold rules are raised in administrative agency litigation and explore the nature of their use. Although our analysis reveals that procedural questions of access are considered in a nontrivial number of administrative agency cases heard by the U.S. Courts of Appeals, the results do not suggest that circuit judges consistently use such rules to curb the consideration of all claims raised in a given case. In addition, circuit judges are not more likely to deny access in challenges against executive as opposed to independent or other agency types. The results do suggest, however, that both ideological considerations and litigant status may play a role in influencing circuit-judge threshold votes in this context.

Through judicial review of agency action, the courts play a critical role in exercising control over administrative agencies. The Administrative Procedures Act (APA) of 1946 states that "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" (5 U.S.C. §§ 702). While the federal courts are statutorily charged with the oversight of agency action, Supreme Court precedent, in particular, the precedent set by *Chevron U.S.A., Inc. v. NRDC* (1984),[1] suggests to lower courts that they should defer to agency expertise and, more important, agency interpretations of congressional legislation. This puts the federal courts in a precarious position where they are statutorily obligated to review administrative agency cases, but precedent directs the courts to defer to the agency in question.

While scholars have examined the extent to which the courts do, in fact, defer to agencies on the merits of legal challenges brought against them (see, e.g., Canon

* A portion of the funding for this research was supported by a Graduate Faculty Committee Award from the Graduate School at the University of Wisconsin-Milwaukee. Erin B. Kaheny is an assistant professor of political science at the University of Wisconsin-Milwaukee (ekaheny@uwm.edu). Kimberly J. Rice is a Ph.D. candidate in political science at the University of Wisconsin-Milwaukee (kjjt@uwm.edu).

[1] In *Chevron U.S.A., Inc. v. NRDC* (1984), the Supreme Court made its landmark decision, holding that when asked to review a statutory question in administrative law, a court must ask whether "Congress has directly spoken to the precise question at issue" (p. 842). If so, then the court must adhere to the explicit direction of Congress. If not, then the court must only ask if the agency's statutory interpretation is reasonable. Hence, the *Chevron* doctrine is often compared to the deferential arbitrary-and-capricious test for judicial review; as long as the agency's interpretation of the legislation is reasonable, the agency should be accorded deference (Cross and Tiller, 1998).

and Giles, 1972; Crowley, 1987; Humphries and Songer, 1999; Sheehan, 1990, 1992; Tanenhaus, 1960), courts can potentially defer to administrative agencies by way of other doctrinal and procedural rules of access (see, e.g., Mansfield, 1993:68-69; Smith, 1993:1570). In particular, judges can employ a number of threshold rules involving questions of standing, mootness, ripeness, exhaustion, jurisdiction, etc., to either narrow the claims considered in a given case or to refuse to consider any of the claims a litigant presents. Even if systematic deference is not the ultimate outcome of the use of such rules in the long run, their employment can foreclose important opportunities for litigants to challenge agency decisions.

Take, for example, the alleged injury of the California Association of the Physically Handicapped (CAPH) in *CAPH v. FCC* (1985). In this case, CAPH appealed the FCC's decision to approve a stock transfer at the request of a media company via a "short form application" (pp. 824-25). Members of this group held the company had not done enough to make sure its programming was accessible nor had it, in CAPH's opinion, engaged in "reasonable efforts to hire the handicapped" (p. 825). However, a majority of a D.C. Circuit panel concluded the group lacked standing to challenge the FCC's decision. As the majority held, "The Association . . . cannot fairly trace its ongoing injury—either in origin or in endurance—to the transfer in question" (p. 825). Because of the nature of the requested stock transfer, the majority explained, there would be no effective change in who ran the media company regardless of the FCC's decision (pp. 826-27). The majority did, however, allude to the possibility that the group might have standing to sue in a "license renewal proceeding" (p. 826). In dissent, Judge Wald argued the organization did have standing to pursue its claims and stated the court's decision served "to erect a new barrier to public participation in the broadcast licensing process" (p. 834).

But just how common is the application of such rules in agency litigation, and does their use have broader policy implications of the sort suggested by Judge Wald in her dissenting opinion? Indeed, although the use of threshold rules are justified for a number of reasons in the contexts of administrative and non-administrative agency cases, some scholars have raised special concern with respect to their use in the former category. As Mansfield (1993:88) argues, for instance, "Curbing access may be more important than upholding individual agency decisions because in the long-term closing the door will insulate numerous decisions." The employment of threshold rules also has larger consequences for the role of courts in the political system and for the litigants who use the courts (see, e.g., Smith, 1993:1576). The important position of courts as reviewing agents and the ability for citizens to access these venues to challenge the government is of concern if such rules are applied too rigidly (see, e.g., Smith, 1993:1576, reflecting on the courts' enforcement of the rule that certain actions are "committed to agency discretion").

Despite these concerns, scholars have not thoroughly investigated the use of threshold rules in administrative agency litigation. This study, thus, attempts to close

this gap in the literature by examining whether United States Courts of Appeals judges, who review a large proportion of administrative agency cases (Humphries and Songer, 1999:208; Songer, Sheehan, and Haire, 2000:18-19), regularly defer to administrative agencies by way of employing threshold rules. If such decisions do not appear to be driven by executive-branch deference per se, are they driven by other partisan or ideological factors? And are particular litigant types at a greater disadvantage in surpassing threshold challenges when they confront an administrative agency? By analyzing these and other related questions, we hope to determine whether circuit judges are using threshold rules in a way that compromises their noted role as important monitors of agency actions (e.g., Humphries and Songer, 1999:208; Songer, Sheehan, and Haire, 2000:18-19).

JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

There are many legitimate reasons for judicial deference to agency discretion. First, Congress, in the enacting legislation for an agency, often indicates that it intends for the agency to have broad discretion (Pierce, Shapiro, and Verkuil, 2004). Second, as Horowitz (1994) notes, agencies have superior knowledge of a given policy area over that of both legislators and judges. Heads of agencies are assigned and agency staff hired, presumptively, on the basis of their technical expertise, and it is commonly argued that judges should, when possible, defer to these experts. Third, deference shows recognition of the courts' limited role in the actual implementation of new policies. In fact, when a court overrules an agency, what it actually does is "begin the decisionmaking process again," a process that is slow and may not immediately result in better policies (Pierce, Shapiro, and Verkuil, 2004:124).

Unsurprisingly, a rather extensive literature has emerged to address the extent to which courts defer to administrative agencies, with many of these studies focused on deference attributed by the Supreme Court (see, e.g., Canon and Giles, 1972; Cohen and Spitzer, 1996; Crowley, 1987; Sheehan, 1990; Smith, 2005; Tanenhaus, 1960). Such studies suggest the Court does, indeed, defer to administrative agencies but that such deference might be related to the specific agency (Canon and Giles, 1972) or the general nature of the agency (e.g., economic/social, independent/executive) involved in the litigation (see, e.g., Crowley, 1987; Sheehan, 1990, 1992).

Additionally, other studies suggest that, while the agency type does matter, it does so in the context of the judges' attitudes toward agencies (Canon and Giles, 1972; Crowley, 1987). Tanenhaus (1960), Canon and Giles (1972), Crowley (1987), and Sheehan (1990) all examine and find at least some support for the theory that ideological preferences, or "policy values" as Sheehan (1990:884) calls them, matter to the level of deference. Specifically, Sheehan (1990) argues that the overall policy position of the agency in question (e.g., an agency known to be pro-labor) will contribute to the level of deference given by the Supreme Court. Edley (1990:49) maintains something

similar when he notes that "judges form a general assessment of an agency's reputation and this influences the scaling of deference." Thus, a judge's own policy preferences may align or conflict with his or her assessment of the agency as a whole or with a general evaluation of the agency's policy positions.

Judicial policy preferences also appear to play at least a partial role in explaining circuit-judge decisions in administrative agency cases. Humphries and Songer (1999:217), for example, report evidence of deference at the appeals-court level and conclude that in both the Supreme Court and the appeals courts, "political considerations" are strongly related to judges' decisions in administrative agency cases. On the other hand, their results also support the legal model insofar as these decisions at the appeals-court level appear to be based on a combination of ideological positioning and legal facts. Thus, they suggest that the courts, at least at the circuit level, are fulfilling their responsibility to review administrative actions (Humphries and Songer, 1999).

THRESHOLD RULES AS TOOLS OF DEFERENCE?

Much of the work examining judicial deference in agency litigation, however, has examined deferential behavior with respect to the *merits* of decisions involving administrative agencies. Although such studies have shed light on the extent to which the courts uphold or reverse agency decisions, it is important to consider the fact that judges may avoid reaching such decisions in the first place. In particular, judges can employ procedural or other threshold rules to avoid reaching the underlying merits of any dispute, including those involving challenges to the decisions or actions of administrative agencies (see, e.g., Mansfield, 1993:68-69; Smith, 1993:1570). Insofar as the use of these rules can determine whether claims will be addressed by a court, their use is an important form of judicial "gatekeeping" (see, e.g., Goldman and Jahnige, 1971:114).

Gellhorn and Levin (1997:342) note that judicial gatekeeping rules are "intended primarily to define the proper boundaries between courts and agencies—that is, to keep the courts from exceeding the limits of their institutional competence and intruding too deeply into the workings of the other branches of government." Thus, gatekeeping rules are designed, in part, to protect agencies from judicial interference (Gellhorn and Levin, 1997:342).

Some of the better known threshold rules that one might see raised in litigation involving administrative agencies include the requirements of standing, exhaustion of administrative remedies, final agency action, ripeness, and the bar against moot claims. In addition to these gatekeeping rules, one can also add the larger category of jurisdictional questions as well as a host of more specific procedural issues relating to the presentment of legal claims, including claim preclusion and collateral estoppel. Some litigants, moreover, will have difficulty having their claims reviewed if the court con-

cludes that the issue involved is "committed to agency discretion" (Gellhorn and Levin, 1997:353). Finally, although the APA creates an exception to the doctrine of sovereign immunity, thus permitting parties to sue federal agencies, damages claims can still be barred on sovereign-immunity grounds (Gellhorn and Levin, 1997:387). Accordingly, litigants will need to offer an alternative justification to underpin such claims, leaving the courts to decide whether the law these litigants invoke supports their advancement (Gellhorn and Levin, 1997:387).

Of course, at the circuit-court level, judges might be asked to consider threshold decisions made by lower-court judges, and they are also in the position to block or curb the merits of an appeal by invoking such rules. It is not surprising, therefore, to learn that a sizable proportion of circuit-court decisions involve threshold challenges (see, e.g., Cross, 2007:186-87). In his examination of the U.S. Courts of Appeals Database, Cross (2007:187), for example, noted the presence of threshold questions "in just over 10% of the cases." In addition, recent studies have also suggested that circuit-judge threshold decisions might be influenced, at least in part, by a judge's ideology, partisan affiliation, or both (Kaheny, 2010; Pierce, 1999). However, no study to date has provided a detailed focus on the extent to which such rules are employed across an array of administrative agency cases in circuit courts, nor have scholars systematically analyzed whether circuit-judge threshold decisions in this particular area are suggestive of executive-branch deference, a vital concern given the need for circuit judges to check agency authority.

RESEARCH EXPECTATIONS

If circuit judges are, in fact, turning to threshold rules to defer to the executive branch, certain patterns should be apparent in a descriptive analysis of administrative agency cases. The first stage of our study thus tests for the presence of such patterns. First, we expect threshold questions will be raised in a sizable proportion of administrative agency cases and that, when raised, they will be frequently used in a way that restricts litigants from having all of their arguments addressed by a court. Moreover, with respect to agency deference, previous research suggests the relevance of agency type, including "executive" and "independent regulatory agencies" (Sheehan, 1992:483). Insofar as the former "are primarily governed by policy standards set by the White House" (Sheehan, 1992:483) while the latter are known for their "greater independence from the White House" (Sheehan, 1992:483), it would seem that deference should be more evident in challenges to executive agencies.[2] Thus, one might hypoth-

[2] Please note that Sheehan (1992:485) actually offers the opposite argument in his analysis of agency success before the U.S. Supreme Court. He argues, for example, that key features associated with independent agencies might make the Court more likely to support those particular agencies as compared to executive agencies. We, however, are looking at the broader question of whether courts and, in particular, the circuit courts, are utilizing threshold rules to prevent judicial review of claims and are precisely interested in seeing whether their use advantages those agencies most identified with the executive branch.

esize that more threshold challenges would emerge in cases involving executive as opposed to independent agencies. Finally, attention in the descriptive analysis is paid to circuit-level differences in access policy, since it is also possible that some circuits might either be more deferential than other circuits toward agencies or more or less restrictive in their access behavior.

Although providing a descriptive portrait of the prevalence of such threshold rules in administrative agency litigation is an important foundational step, an investigation of the nature of such decisions is also important for assessing whether threshold rules are used to defer to administrative agencies. The second stage of our analysis, therefore, provides a focused examination of individual judge threshold decisions in cases in which a party is challenging an administrative agency. Here, we rely on previous research on judicial gatekeeping (Kaheny, 2010) to inform the development of a model of the likelihood of a pro-access vote in administrative agency cases in the U.S. Courts of Appeals. However, we broaden our analysis to consider as well those factors that might lead circuit judges to construe threshold rules in a deferential manner.

In particular, if deferential behavior is frequently achieved through restricting access, then deference to the executive branch would be best achieved through restricting access in cases challenging executive agencies more so than those involving independent agencies. However, a simple look at this particular dimension of agency type might not prove sufficient. Previous scholarship on agency success in the federal courts suggests the economic or social dimension of the agency type might also be important (Crowley, 1987). We can certainly propose that this dimension might be relevant in circuit-judge threshold decisions, if, for example, the nature of the cases such agencies are typically involved in are more likely to be subject to restrictive threshold decisions. And, to some extent, previous research suggests this might occur. In particular, some scholars have suggested that "regulated" entities might have an advantage meeting certain threshold challenges over other litigant types (e.g., "beneficiaries"), at least during certain time periods (e.g., *Harvard Law Review*, 2000:337; Mansfield, 1993:96-97, 1992:46-47; Wardzinski, 1990:43). Insofar as beneficiaries might be more likely to be involved in litigation challenging social agencies, we hypothesize that if threshold rules are used as tools of deference, circuit judges will be more likely to restrict access when litigants are challenging executive and social agencies than independent-economic or other agency types.

DATA AND METHODS

Descriptive Analysis. As noted above, the goal of our analysis is twofold. First, we seek to provide a descriptive examination of the extent to which threshold issues are considered in administrative agency decisions rendered by the courts of appeals. Second, we want to explore the nature of these decisions and, specifically, whether certain factors (i.e., agency deference) influence a circuit judge's decision to limit consideration of some or all of a litigant's claims in an agency dispute. To accomplish these

goals, we use two data sources. First, we provide a descriptive analysis of a data set of administrative agency cases collected across the Fourth, Ninth, and D.C. Circuits over an eleven-year time period (1985-95). Where necessary, we supplement this with analyses based on the sample of administrative agency cases coded in the U.S. Courts of Appeals Database (hereafter, courts of appeals database or Songer database).[3]

The former data set includes a random sample of thirty published decisions from the Fourth, Ninth, and D.C. Circuits for each year of the analysis in which one of a select number of agencies was listed as either an appellant or respondent.[4] By definition, therefore, all of the cases in the three-circuit sample involve an administrative agency in some fashion. Since previous research suggests that deference might be conditioned on agency type, we selected agencies that fell across four major categories identified as relevant in previous judicial scholarship (i.e., executive-social, independent-social, executive-economic, and independent-economic, see, e.g., Sheehan, 1992) on which to sample. This yielded a total of 330 "administrative agency" cases for this particular sample.

The selection of circuits and specific administrative agencies on which to sample for the purposes of developing this data set was made after an analysis of the courts of appeals database, with attention to the frequency of administrative agency litigation across the circuits. According to our analysis of the Songer database, a sizable proportion of administrative agency cases originated in the D.C., Fourth, and Ninth Circuits and, thus, we selected these circuits on which to sample in developing an additional data set. In addition, based on our review of this data source, we selected the following agencies on which to sample, as these agencies were frequent parties in courts of appeals cases and represented the four distinct agency types helpful for comparative purposes: Department of Health and Human Services (HHS), Immigration and Naturalization Service (INS), Department of Labor (DOL), National Labor Relations Board (NLRB), Equal Employment Opportunity Commission (EEOC), Environmental Protection Agency (EPA), Department of Agriculture (USDA), Department of Transportation (DOT), Department of Commerce (DOC), Interstate Commerce Commission (ICC), Federal Communications Commission (FCC), and the Federal Energy Regulatory Commission (FERC).[5]

[3] The U.S. Courts of Appeals Database, Donald R. Songer (Principal Investigator), NSF# SES-89-12678. The database and documentation are available at the Web site for the Judicial Research Initiative at the University of South Carolina, http://www.cas.sc.edu/poli/juri/appctdata.htm.

[4] Using the LexisNexis "name" and "court" field functions, we identified the universe of all published decisions involving the selected agency types as one of the parties in the case for each circuit-year of the time frame. Each case was assigned a number. Using a random-numbers table, we then selected 30 cases for each circuit-year.

[5] At times, these agencies were listed as parties in the case as sampled from LexisNexis, but the agency most directly involved in the litigation was a different, but related, agency. In these situations, we created a new agency code for categorization, yielding a total of 25 agencies. Please contact the authors for a list of all agencies found in the three-circuit data set, along with the number of cases raising at least one threshold issue in which the named agency was a party.

For each of the cases, basic information, including the procedural history of the case and key characteristics of the party types (e.g., individual, business, state/local government, national government, organization/group), were coded. Most important, in developing the data set, we coded whether any threshold issues were raised in the case (up to three issues) and, if so, whether the majority decision had the effect of granting access or limiting access to the litigant facing the threshold bar. If the majority, however, was pro-access with respect to one threshold challenge but limited the consideration of at least one other argument based on another rule, or if a bar was raised but it had the effect of limiting the consideration of only some, but not all, of the arguments presented, the case was coded as having a mixed or partial outcome with respect to access. Similarly, if some, but not all of the named litigants were denied access to press their claims, the case was coded as having a mixed or partial outcome on access as well. Thus, effort was made in developing an "overall" access coding to capture the general thrust of the majority's decision on the access issues presented in the case. A similar procedure was used for coding individual judge threshold votes as well.

As noted above, the Songer database itself is a useful resource for studies of agency litigation in the courts. This data set includes a sample of 30 cases from each circuit for the time period 1961-96 and 15 cases from each circuit from 1925-60, though not all cases in the sample involve administrative agencies. Importantly, however, one can identify in this data whether an agency was involved in the lawsuit, whether a threshold issue was raised in the case, the pro- or anti-access decision with respect to the threshold issue, and the conservative/liberal outcome of the substantive issue raised in the litigation. Consequently, when necessary to supplement our three-circuit data set, we turn to the Songer data set for the descriptive analyses outlined above. For our purposes, we confine our analysis of the Songer data set to the time period 1960-96, in the hopes of capturing more modern trends in circuit gatekeeping.

Modeling a Pro-Access Vote. Although a sizable proportion of the cases we coded for our three-circuit sample involved consideration of a threshold issue, due to concerns that the small sample size might limit statistical inference, we rely upon the larger sample of administrative agency cases drawn from the courts of appeals database in our efforts to model individual circuit-judge threshold decisions (the dependent variable) in this area of the law. This data set codes for whether a threshold issue was raised at either the trial or appellate levels and indicates whether the circuit court voted to support a restrictive or nonrestrictive access decision made by a lower-court judge or whether the circuit court itself issued a decision that curbed consideration of claims made on appeal. For our purposes, if a given circuit judge casts a vote suggesting that the lower court should not have barred (or correctly refrained from barring) access based on a threshold issue considered at the trial court level or a vote suggesting that the circuit should not bar access with respect to a threshold issue raised on appeal, we consider the vote to represent a "pro-access" decision (coded "1"). Circuit-judge threshold votes that serve to restrict litigant access (in terms of merit

considerations) at either the trial or appellate levels due to a threshold challenge are coded "0."[6]

Our main independent variables of interest in this model involve the type of agency being challenged. Because both the independent/executive and social/economic dimension of an agency can affect a circuit judge's decision to grant or deny access, we include two dummy variables to tap the nature of the agency involved in the litigation. First, we include a variable assessing whether the agency is an executive agency or not (coded "1" if the agency is executive in nature, "0" otherwise). Given our expectation that judges might use threshold rules to defer to the executive branch, we expect a negative coefficient on this variable. In addition, we include a dummy variable to account for whether an agency is social in nature (coded "1" if the agency is social in nature, "0" otherwise). Here, our expectation is also for judges to be less likely to grant access in challenges against social agencies as opposed to those involving economic or nonclassified agencies. Efforts were made to be as consistent as possible with previous research when assessing whether an agency was independent or executive in nature and whether the agency's mission was social or economic (see, e.g., Sheehan, 1992). When an agency type could not be confidently assigned as an executive/independent or social/economic agency, it was denoted as a "miscellaneous/other" agency.

Control Variables

Judicial Ideology. Of course, the type of agency involved in the litigation is but one factor that might influence a circuit judge's threshold vote and, thus, we must account for other possible influences on threshold votes in our model. For this purpose, we rely upon previous work modeling circuit threshold decisions beyond the administrative agency context (Kaheny, 2010), which suggests the potential influence of judge ideology, litigant resources, and legal policy trends on circuit-judge gatekeeping decisions. In addition, the present study is informed, in part, by Pierce's (1999) analysis of circuit-judge decisions to grant standing in environmental lawsuits and Rowland and Todd's (1991) analysis of standing decisions at the district-court level.

[6] It is possible, of course, for a judge to be unable to reach a clear decision on a threshold question or for a case to involve more than one threshold question and, thus, efforts were made at eliminating mixed-access decisions from the sample. To be consistent with previous work using the Songer data set (see, e.g., Kaheny, 2010), we drop all cases involving only one threshold issue if it was not associated with a clear pro- or anti-access decision. In cases in which a judge considers more than one threshold issue, we consider the decision as granting or limiting access based on the issue associated with a decisive ruling. Of course, an anti-access decision with respect to a threshold question raised in a given case indicates the court refused to consider the merits of the appeal or agreed with the lower court's denial of access (see U.S. Courts of Appeals Database Documentation, pp. 118-25) and, thus, the case is considered as one in which the circuit judge opted to restrict access (Kaheny, 2010). In addition, it is important to note that, in its original form, the appeals court database only denotes the majority's decision with respect to any threshold issue being raised. Thus, for the purposes of analyzing individual judge behavior, we separately examined panel decisions in which there was a dissent and, when necessary, recoded the dissenter's position with respect to the threshold issue (Kaheny, 2010).

First, as Kaheny (2010) indicates, procedural threshold decisions, even at the circuit level, are infused with ideological concerns, at least to some extent. Indeed, the study suggests partial support for the proposition that circuit-court judges consider the ideological outcome of the threshold vote when deciding whether to grant access, such that liberal circuit judges are more likely to grant access if that decision is associated with a liberal outcome (Kaheny, 2010).[7] Pierce's (1999) results also provide evidence that threshold decisions might have ideological roots. Namely, his study indicated a clear tendency on the part of Republican appointees to restrict standing in environmental cases at the circuit-court level (Pierce, 1999).

Although the present analysis is limited to threshold votes cast in administrative agency cases, and although we expect a fair amount of deference to agencies in these cases, a circuit judge's decision to curb access might still be contingent upon whether the ideological outcome associated with that decision is one the circuit judge personally favors. Of course, such a relationship might also indicate that a judge's tendency to defer to agencies is moderated by the judge's own policy preferences, a finding that would be interesting in its own right. Consequently, we include in our model a variable assessing the "ideological congruence" of a pro-access vote with the judge's policy preferences (Kaheny, 2010). Specifically, we employ the measure of ideological congruence suggested by Kaheny (2010), which is created by examining the liberal or conservative direction of a judge's vote in a case (with respect to the substantive issue raised) in relation to the judge's ideology and his or her threshold vote (pro- or anti-access).[8] Using this approach, judicial ideology is assessed with a proxy measure—the appointing president's common space NOMINATE score (Poole, 1998), with negative values indicating more liberal presidents and positive values indicating heightened conservativism (and more liberal and conservative judicial appointees, respectively). Like Kaheny (2010), we assume that liberal judges are more likely to cast a pro-access vote if the outcome with respect to the substantive issue raised in the case will also be liberal. Thus, in these cases, the measure of ideological congruence becomes the appointing president's NOMINATE score (negatively signed for liberal presidents) multiplied by negative one. We also ensure a positive sign on our ideological congruence variable in situations in which a conservative judge casts a pro-access vote resulting in a conservative outcome on the substantive issue raised in the case. Here, the value of the ideological congruence variable simply takes on the value of the president's NOMINATE score, which, as noted above, is positively signed for conservative presidents. If the ideological outcome associated with the access vote is not consistent with the

[7] Such results are consistent, moreover, with research conducted on Supreme Court gatekeeping decisions (see, e.g., Rathjen and Spaeth, 1983).

[8] In particular, we look at the substantive issue coded in the Songer database's first "casetyp" variable (i.e., casetyp1; U.S. Courts of Appeals Database Documentation, p. 77). This denotes, for example, whether the case raised an economic regulation issue, a labor issue, and so forth. We also adopt the coding conventions of this data set to assess whether the judge's vote was liberal or conservative with respect to the substantive issue of the case (see, e.g., direct1, j2vote1, j3vote1 in the U.S. Courts of Appeals Database).

judge's preferences, the congruence term is designed to take on a negative value (see Kaheny, 2010).[9] Given our expectation that ideological congruence with the outcome of a pro-access vote will make a pro-access vote more likely, we expect the associated coefficient of this variable to have a positive sign.

Party Capability. Along with a likely role for ideology, previous studies indicate judicial gatekeeping decisions might vary depending on the party seeking access and, hence, suggest the relevance of Galanter's (1974) work on party capability (e.g., Kaheny, 2010). Such work has found, for example, that governments and businesses often enjoyed advantages over individual litigants when facing a threshold challenge in the U.S. Courts of Appeals (Olsen, 2004; Kaheny, 2010). The potential relevance of litigant type is also evidenced in Rowland and Todd's (1991) analysis of standing decisions of U.S. District Court judges. Indeed, among their findings was a tendency on the part of Reagan judges to curb standing in "underdog" versus "upperdog" contests (Rowland and Todd, 1991:181-83).

There are certainly reasons to expect differential treatment with respect to gatekeeping decisions across various litigant types in cases involving administrative agencies. First, some litigants might simply be advantaged across the board in terms of their ability to deal with threshold questions as a result of having expert lawyers or due to issues of judicial bias (Kaheny, 2010). In the administrative agency context, differential treatment might also be a function of the noted concern that "regulated" entities seem to have the leg up with respect to at least some gatekeeping issues as compared to "beneficiaries" (see, e.g., *Harvard Law Review*, 2000:337; Mansfield, 1993:96-97, 1992:46-47; Wardzinski, 1990:43).

Given that individuals are, on average, likely to have fewer resources than groups, businesses, or state and local governments (see, e.g., Songer and Sheehan, 1992; Wheeler et al., 1987), one might expect that circuit judges will be less likely to grant access in cases where an individual faces a threshold bar against a federal governmental entity as opposed to cases in which businesses or state/local governments face such bars. As in studies of threshold decision making more generally (Kaheny, 2010), however, we are less certain whether groups would have an easier time surpassing threshold barriers than individuals in administrative agency litigation. If group litigants are perceived as outsiders with respect to the issues raised in the administrative process, they might encounter greater resistance toward the arguments or claims they put forward. Unlike (average) individual litigants, however, larger or better-funded groups might be more guarded against these potential roadblocks (Kaheny, 2010).

[9] A conservative judge voting to grant access in a case with a liberal outcome would indicate a lack of ideological congruence and, thus, the congruence term takes on the value of the appointing president's NOMINATE score (positively signed) multiplied by negative one, in this instance. An example of a liberal judge voting to grant access, with the vote associated with a conservative outcome, would also not be ideologically consistent. Because the NOMINATE scores of liberal presidents (and by extension, our measure of judicial ideology) are negatively signed, in this example, the ideological congruence term is simply the appointing president's NOMINATE score (see Kaheny, 2010).

Therefore, for the purposes of this analysis, we assess the influence of litigant type via dummy variables denoting if a business, state/local government, or a group/association encountered the threshold challenge in a suit involving an administrative agency.[10] Individual litigants, thus, serve as the reference category. Because we expect business and state/local governments to have an easier time meeting threshold challenges than individuals, we expect the coefficients on these two variables to be positively signed. Per the reasoning discussed above, however, the sign on the group dummy variable could be positive or negative and, thus, we consider this as yet another empirical test of group advantages (or disadvantages) with respect to threshold decisions (see Kaheny, 2010).

Legal and Other Institutional Influences

Circuit-judge threshold decisions cast in cases involving administrative agencies might also be a function of larger policy trends at the circuit-court or Supreme Court levels (see, e.g., Kaheny, 2010). Therefore, as suggested by previous work, we also include control variables to gauge the threshold policy of the circuit in which a given judge sits as well as that of the Supreme Court. Following Kaheny (2010), we employ three-year moving averages of pro-access decisions of the circuit courts (obtained from the U.S. Courts of Appeals Database) and of the Supreme Court (obtained from the Original United States Supreme Court Judicial Database) as measures of these policy trends.[11] Thus, for the measure of circuit-court access policy, we calculate the percentage of decisions (in the previous three years) in which a judge's circuit encountered a threshold issue in a case and construed the rule in a flexible manner. Increases in the percentage of such decisions on the part of a judge's circuit should be associated with a greater likelihood of a circuit judge voting to grant access in a given case.

As noted above, we also employ a comparable measure of access trends at the Supreme Court level. Again, we consider only the Court's recent decisions in which it considered threshold rules and, thus, develop a three-year moving average of pro-access Supreme Court decisions. We assume that circuit judges will be less restrictive in construing threshold rules if the Court's recent access decisions were less restrictive in nature and so hypothesize a positive relationship between increases in this measure of the Court's access policy and the likelihood of a circuit judge casting a pro-access vote. Pursuant to Kaheny (2010), the Supreme Court cases used to develop this

[10] Per Kaheny (2010), if the threshold issue was relevant at the district-court level (which is indicated in the courts of appeals database), we assume the plaintiff confronted the threshold challenge. Appellants, meanwhile, are assumed to confront threshold issues raised at the appellate level (again, as identified in the courts of appeals database). Cases are thus omitted if they involve threshold questions before the district and appeals courts. Moreover, cross-appeals are dropped from the analysis, as are cases in which both parties are not regarded as "real parties" in the litigation (see Kaheny, 2010, citing the U.S. Courts of Appeals Database Documentation, p. 62).

[11] The Original United States Supreme Court Judicial Database, 1953-1999 Terms, Harold J. Spaeth (Principal Investigator), NSF# SES-8313773 and SES-8812935. The database and documentation are available at http://scdb.wustl.edl/.

measure involve those coded as raising a "judicial power" issue in the Supreme Court Database (The Original United States Supreme Court Judicial Database Documentation, 1953-2007, pp. 50-51).[12] Opinions coded with a "pro-exercise of judicial power" outcome are operationalized as pro-access decisions (The Original United States Supreme Court Judicial Database Documentation, 1953-2007, p. 55).[13]

To further test the possible influence of other sources of legal and policy change, we also include three decade dummy variables to denote whether the threshold vote in an agency case was cast in the 1960s, 1970s, or 1980s (i.e., the 1990s is selected as the base category). Although the Supreme Court issued some restrictive threshold decisions in the 1980s (see, e.g., *Allen v. Wright*, 1984), the Court's opinions struck a more restrictive tone in terms of access in a line of decisions issued in the 1990s (see, e.g., *Lujan v. National Wildlife Federation*, 1990; *Lujan v. Defenders of Wildlife*, 1992; *Reno v. Catholic Social Services*, 1993; and *Ohio Forestry Association v. Sierra Club*, 1998). We expect, therefore, that circuit judges will be more likely to grant access in administrative agency decisions made in the 1960s, 1970s, or 1980s than in the 1990s.

Finally, we also include circuit dummy variables to account for other circuit-level institutional characteristics that might influence a given circuit judge to grant access in a case involving an administrative agency. Thus, eleven circuit dummy variables are included in the model, with the D.C. Circuit serving as the reference category.

We employ logistic regression to model circuit-judge threshold votes using the above predictors across votes in the Songer database between 1960 and 1996. For our purposes, we restrict the sample to threshold votes cast in (noncriminal) panel decisions in which an administrative agency was either the first-listed appellant or respondent, and the party claiming access was a business, a state/local governmental entity, a group or association, or an individual.

RESULTS

As noted above, a prerequisite to the use of threshold rules to curb access to challenges of administrative agencies is the presence of such issues being raised by the actors involved in the litigation. Thus, we first turn to providing a detailed look at the frequency and manner with which such rules are considered in administrative agency litigation in the U.S. Courts of Appeals.

A helpful point of departure might be to compare the presence of threshold issues across agency and non-agency litigation. Given that our three-circuit sample

[12] As noted in the associated codebook, "judicial power" issues involve a host of procedural doctrines, including standing, comity, jurisdictional issues, etc. (The Original United States Supreme Court Judicial Database Documentation, 1953-2007, pp. 50-51). They, thus, represent the issues most akin to the "threshold" issues coded in the appeals court database. Further, to best capture those decisions in which the Court is fashioning its access doctrines, we consider those decisions accompanied with a signed or per curiam opinion in developing this measure (see Kaheny, 2010).

[13] As suggested by Kaheny (2010), if a year of sample data contains no threshold or judicial power issues, we turn to cases in the previous year of sample data to develop the three-year moving average.

comprises only administrative agency cases, we employ the appeals court database (Songer database) for this particular analysis. In the time period 1960-96, about 22 percent of this data set's cases in which administrative agencies were a named party raised a threshold issue, while almost 32 percent of non-agency cases involved consideration of a threshold issue.[14] Thus, judicial gatekeeping via the employment of threshold rules is not unique to agency cases and does not dominate them. In addition, further analysis of those cases in which a threshold issue is raised in the appeals court database clearly indicates that the majority of threshold cases in this sample do not involve administrative agencies. Indeed, approximately 70 percent of the sample cases in the appeals court database involving consideration of at least one threshold issue did not involve an administrative agency as either the first-listed appellant or respondent. However, while the majority of threshold decision making thus occurs beyond the administrative agency context, the fact that nearly one-third of the database's threshold case sample in this time period involved agency litigation is of great interest.

Threshold issues were also raised in a significant number of cases in our three-circuit agency data set, which, again, includes eleven years of sample data drawn from administrative agency cases in the Fourth, Ninth, and D.C. Circuits. According to the analysis of this other data set, over one-third of all the agency cases in the sample raised at least one threshold issue in the 1985-95 time period (see Table 1). The results of this select sample, moreover, underscore the variation among circuits in the extent to which they consider such issues. For example, while nearly 45 percent of the sample agency cases drawn from the D.C. Circuit involved consideration of at least one threshold rule across the 1985-95 time period, the Fourth Circuit grappled with such issues in about 35 percent of the sample cases. The Ninth Circuit, however, was a closer rival to the D.C. Circuit over this time span, considering threshold issues in approximately 42 percent of its (sample) agency cases.

Clearly, this descriptive analysis lends support for the proposition that threshold rules have the potential to be used to curb access to challenges involving administrative agencies. However, the nature of such challenges is also an important concern. Namely, if threshold challenges tend to threaten full consideration of the merits of a case involving an agency, then their use is more likely to foster deferential behavior. In other instances, however, it is possible that such rules can be used to limit only some of the claims or arguments raised by the party challenging the government. Moreover, perhaps some, but not all, litigants named in a case will be permitted to press their

[14] These calculations and all of those reported below using the Songer database consider threshold issues raised in all noncriminal cases and consider the participation of most federal agencies listed in the appeals court database with the exception of courts, legislative units (e.g., committees, legislative agents), District of Columbia agencies, and the United States government in criminal cases. Federal agencies coded as "unclear or nature not ascertainable" were dropped from these analyses (U.S. Courts of Appeals Database Codebook, p. 50). Only agencies listed as either the first-named appellant or respondent were coded as being involved in the litigation.

Table 1
Percentage of Administrative Agency Cases Raising at Least One Threshold Issue
(Three-Circuit Sample, 1985-95)*

Circuit	1985-90	1991-95	1985-95
Fourth	36.67	34.00	35.45
Ninth	38.33	46.00	41.82
D.C.	43.33	46.00	44.55

* The number of cases per circuit in the first time period, 1985-90, is 60. The number of cases per circuit in the second time period, 1991-95, is 50. Thus, the three-circuit sample includes 110 cases for each circuit for the overall time period, 1985-95 (total number of cases across all circuits = 330).

claims on appeal. Although this "partial" denial of access to a hearing on all of the merits of a legal challenge might be a meaningful denial for the party involved (e.g., it may bar an argument or claim of some importance), it might also suggest circuit judges are not intentionally engaging in deference to the executive branch via judicial gatekeeping rules—at least not to the full extent they could.

When developing the three-circuit sample, care was taken to code whether the threshold challenge (if present in a case) pertained to all of the merits put forth or all of the parties involved in the litigation as opposed to only some arguments raised (or with respect to some, but not all, of the litigants involved) in the case. And, interestingly, nearly 43 percent of the cases raising threshold challenges in the three-circuit sample involved these sorts of "partial" threshold challenges. This figure alone suggests the circuits are not consistently employing procedural doctrines in an attempt to avoid consideration of *all* of the legal arguments brought before them in a given case. Nevertheless, in the majority of cases in which threshold rules were raised in the three-circuit sample (57 percent), there were challenges that threatened full consideration of all claims raised by the litigant or potentially barred all litigants in the case from having their claims addressed. And, as clearly suggested in both data sets analyzed for the study, threshold issues appear in enough administrative agency cases as to warrant further consideration of the nature of their use.

Indeed, we might additionally ask whether such issues are more likely to appear in certain types of administrative agency lawsuits. As discussed above, previous research examining agency success on the merits, for example, has differentiated between independent regulatory agencies and executive agencies, noting, of course, the extent of "presidential control" over the latter (see, e.g., Sheehan, 1992:483-84). Given the possibility of judges using threshold rules to defer to the executive branch, we might very well expect such issues to be raised more frequently in challenges of executive agencies as opposed to independent agencies, the latter of which should be less identified with "presidential politics" (Sheehan, 1992:485).

Interestingly, however, in terms of our three-circuit data set, our results indicate virtually no difference in the number of cases in which litigants faced threshold questions when they confronted executive as opposed to independent agency types in the Fourth, Ninth, and D.C. Circuits.[15] Specifically, 46 cases involving independent agencies in the sample included circuit consideration of at least one threshold rule, and 47 cases involving executive agencies included the consideration of such rules. We did find, however, a more notable distinction in this data set among those cases involving social or economic agencies. Specifically, litigants confronted threshold challenges in 57 cases involving agencies deemed "social" in nature and in 36 cases involving those deemed "economic." Thus, consideration of threshold bars seemed more prevalent in cases involving social agencies—at least, in this particular sample.

More support for the idea that threshold rules might be used more frequently in executive agency litigation was found in the larger U.S. Courts of Appeals Database. While approximately 18 percent of administrative agency cases raising threshold issues were those in which a nonfederal governmental litigant sought access to challenge an independent agency, about 25 percent of such cases involved an executive agency. However, the results concerning the social and economic agency types were consistent across samples. As in our smaller three-circuit data set, the sample of cases in the appeals court database suggests that threshold challenges are applied in a greater number of suits involving "social agencies." Indeed, analysis of the Songer data set from the 1960-96 time period revealed over twice the number of threshold challenges in cases involving social as opposed to economic agencies.[16]

In terms of the party types frequently subject to such challenges, analysis of the three-circuit data set revealed that individual litigants faced a larger number of threshold challenges. Insofar as individuals have been found as (relatively) disadvantaged litigants in legal contests on the merits (see, e.g., Songer and Sheehan, 1992), the fact they also confront more procedural challenges in this context is a potentially important finding. Further, although part of this finding relates to the frequency with which individual litigants participate in these cases, examination of the proportional rate at which the various litigant types faced threshold bars suggests individual litigants faced proportionally more threshold challenges than business litigants. While business and individual litigants appeared in near equal numbers in the three-circuit sample (business litigants were coded as present in 135 cases and individual litigants in 137 cases), individual litigants confronted threshold bars in more cases. In addition, looking at

[15] Those few cases in which a federal governmental entity squared off against another federal governmental entity were dropped from the analysis, as were those cases in which the (federal) government faced a threshold bar.

[16] Because our ultimate interest here is assessing whether threshold issues are raised against nonfederal entities claiming access against various agency types, we had to identify the party claiming access in the federal litigation. As detailed below, threshold issues can be raised at either the trial court or appellate level and, thus, we can use this information in the courts of appeals database along with who initiated the appeal to determine the party claiming access. This requires, however, that we eliminate all cases in which threshold issues are considered at both the trial court and appellate court levels and, thus, the statistics reported in this section reflect this exclusion.

the data in this manner also suggests that group litigants might face proportionally more threshold questions than individual litigants. Listed as either appellants or respondents in 62 sample cases, group litigants faced threshold questions in 27 cases in the three-circuit sample.

However, while the frequencies with which parties are subject to threshold questions is itself an interesting phenomenon, the ultimate success of such parties in surpassing threshold challenges is the greater test. Indeed, if deference via threshold rules is best achieved by restricting access, a critical examination entails the extent to which the circuits issue pro-, anti-, or mixed-access decisions in cases involving challenges against administrative agencies. Due to the desire to compare circuit tendencies across agency and non-agency cases, we again employ the Songer database as a point of departure in this particular analysis. Specifically, we limited that sample to only those cases in which an agency was either a first-listed appellant or respondent, a threshold issue was raised, and the party claiming access to the courts was not the agency.[17] Pro- and anti-access rates are then compared against those registered in non-agency cases.

When challengers to agencies confronted threshold bars in the sample of cases found in the Songer database, the appeals courts did tend to restrict access in over half of the cases, which lends credence to the idea that threshold rules have the potential to be used in a deferential manner. Indeed, approximately 39 percent of such cases involved "pro-access" decisions while almost 57 percent involved anti-access decisions. About 4 percent of these threshold decisions, meanwhile, were classified as "mixed" on the threshold issue. The circuits were slightly less inclined to restrict access in non-agency cases. Specifically, the circuits issued pro-access decisions in about 41 percent of cases not involving an agency on either side of the litigation and restricted access in about 53 percent of the non-agency cases. A slightly higher percentage of cases also resulted in mixed threshold decisions (about 6 percent).

The patterns of administrative agency threshold decisions in the Songer data square fairly well with the portrait of access behavior emerging from our three-circuit sample of administrative agency cases. Specifically, across all three circuits in the 1985-95 time period, almost 52 percent of the threshold decisions were anti-access in nature, and an additional 15 percent were coded as "mixed" access decisions. Approximately 34 percent of the threshold cases in the three-circuit sample were coded as having pro-access outcomes.

Further, although the number of cases raising threshold issues in the three-circuit sample is small within each circuit and one must generalize with caution, the descriptive results suggest some possible differences in circuit-court-access behavior.

[17] See n. 10 for details regarding the operationalization of the party claiming access in the Songer data set. Note that agency cases involving threshold questions do not involve criminal issues for the purposes of this study. We do, however, examine the pro- or anti-access decision making of the circuits across all issue areas in non-administrative-agency cases.

Table 2
Circuit Court Decisions on Access, Administrative Agency Cases
(Three-Circuit Sample, 1985-95)

	4th Circuit	9th Circuit	D.C. Circuit	All Circuits
Anti-Access	57.14% (16)	38.24% (13)	58.97% (23)	51.49% (52)
Pro-Access	35.71% (10)	47.06% (16)	20.51% (8)	33.66% (34)
Mixed	7.14% (2)	14.71% (5)	20.51% (8)	14.85% (15)
# of cases	28	34	39	101

For example, the Ninth Circuit was the only circuit in the sample with an apparent pro-access bias (see Table 2). Of the 34 cases in the Ninth Circuit in which a nonfederal governmental litigant confronted a threshold question, the circuit granted access in about 47 percent of the cases and limited access in about 38 percent of the cases. Meanwhile, both the Fourth and D.C. Circuits tended to restrict access in these types of cases. The D.C. Circuit, for example, voted to restrict access in about 59 percent of the cases in which threshold challenges were raised and granted access in only 20.5 percent of the cases.

In summary, the foregoing descriptive analysis suggests that circuit courts employ threshold rules in a number of administrative agency cases, perhaps more so in those involving "social" agencies, and that individuals might be more likely to confront such challenges than other litigant types. However, the mere consideration of procedural rules does not necessarily mean that the circuits are using such rules to protect agency decisions or actions. In addition, the mere fact that individual litigants face threshold challenges in a greater number of lawsuits might not necessarily translate into less success in having all of their arguments addressed by a court. To get at these and other possibilities, we model the likelihood of a pro-access vote cast by a circuit judge in an administrative agency case (i.e., a case in which an administrative agency is either a first-listed appellant or respondent). Due to concerns that small sample size might limit our ability to engage in statistical inference, we resort to threshold votes cast in the courts of appeals database for the purposes of the following analysis (see Table 3).

There is no evidence that circuit judges in the sample used threshold rules to defer to certain agency types, thus casting doubt that such rules are systematically used by circuit judges to defer to the executive branch (see Table 3). Neither the executive nor social agency variables were statistically significant and in the expected direction. Thus, according to these results, circuit judges are not less likely to grant access when a litigant is challenging an executive as opposed to an independent agency.

Moreover, while both indicators were rough surrogates for access policy, neither the circuit court nor the Supreme Court legal-trend measures reached conventional

Table 3
Model of the Likelihood of a Pro-Access Vote in an Administrative Agency Case, 1960-1996 (U.S. Courts of Appeals Database)

Independent Variable	*MLE(Robust SE)*†
Executive Agency	0.1150 (0.2351)
Social Agency	0.2150 (0.2179)
Judge Ideol. Congruence	0.3081 (0.1453)*
Circuit Court Access Policy	-0.8118 (0.6870)
SCT Access Policy	-0.3028 (1.0188)
Business	0.6342 (0.1790)**
Group/Association	0.4948 (0.2206)*
State & Local Government	-0.0674 (0.4301)
1960s	0.0707 (0.2256)
1970s	0.4920 (0.2645)*
1980s	0.5105 (0.2294)*
Intercept	-0.6707 (0.6201)
n	986
% Classified Correctly	62.47%
% ROE	4.41%
Wald Chi Square	73.37, 22 df, prob> χ^2= 0.0000

*p <.05 **p < .001

†Robust standard errors clustered on the judge reported in parentheses

All tests are one-tailed, with the exception of those used to assess the group/association variable and the circuit dummy variables, which are two-tailed. Eleven circuit-court dummy variables were also included in the model, with the D.C. Circuit selected as the excluded category (results not shown). Judges casting votes in the Third, Tenth, and Eleventh Circuits were all more likely (to a statistically significant degree) than judges in the D.C. Circuit to grant access. Meanwhile, judges in the Fourth Circuit were less likely (to a statistically significant degree) than judges in the D.C. Circuit to grant access. Utilizing two-tailed tests, none of the other circuit dummy variables were distinct from the patterns of D.C. Circuit judges at conventional levels of statistical significance.

levels of statistical significance. On the other hand, the results do suggest that circuit judges were more flexible in their gatekeeping behavior in challenges involving administrative agencies in previous decades as opposed to the 1990s. In addition, some circuit-level variation in gatekeeping behavior more generally is apparent in the results of the circuit dummy variables (not shown in Table 3). Specifically, judges casting votes in the Third, Tenth, and Eleventh Circuits were all more likely (to a statistically significant degree) than judges in the D.C. Circuit to grant access. Meanwhile, judges in the Fourth Circuit were less likely (to a statistically significant degree) than judges in the D.C. Circuit to grant access.

In addition, the results do suggest that threshold decisions in this field are not ideologically neutral. As seen in the context of circuit-judge threshold decisions more generally (Kaheny, 2010), judicial ideology appears to play an important role in circuit-judge gatekeeping in administrative agency cases. However, as evidenced by the positive and significant coefficient on the congruence variable, its role is mediated by way of the ideological outcomes that threshold votes generate. Flexible access decisions in administrative agency cases are more likely to be made when the outcomes generated comport with the judges' liberal or conservative leanings.[18]

Importantly, the results also indicate that not all parties are on equal footing in their attempts to have all of their claims heard by a circuit judge when challenging an administrative agency, a finding that reveals the significance of threshold decisions in this context. According to the results, businesses and groups tend to encounter less resistance than individuals claiming access in administrative agency cases. To put this in some context, consider the hypothetical D.C. Circuit judge casting a threshold vote in the 1980s. Based on the results of the present model, if we were to also hold the continuous variables (e.g., circuit-court access policy, Supreme Court access policy, and the judge-ideology congruence term) constant at their mean values and the agency dummy variables (social agency, executive agency) constant at their modal values, we find the probability of a hypothetical D.C. Circuit judge voting to grant access to a business to be approximately 0.50, the probability of such of a judge granting access to a group or association to be about 0.46, and the probability of the judge granting access to an individual to be only 0.34. These results are consistent with previous work on threshold decision making across all circuit-court decisions and, thus, provide additional support for the proposition that the importance of litigant status and resources extends beyond merits considerations (see, e.g., Kaheny, 2010).

[18] We also found support for the hypothesis that liberal judges are more flexible in their gatekeeping practices than their conservative colleagues. To test this proposition, we modeled circuit-judge threshold votes in our sample as a function of judge ideology, using the judge's appointing president's NOMINATE score as a surrogate measure. The coefficient on the judge ideology variable was in the expected direction and was significant at $p < .001$. Unsurprisingly, the partisan affiliation of the judge's appointing president was also related to the likelihood of a judge granting access in a similar model (again, a logistic regression model in which the appointing president's partisan identification is used to predict the threshold vote). Those appointed by Democratic presidents (coded "1") were more likely than those appointed by Republicans (coded "0") to grant access in administrative agency cases ($p < .005$). We ran a similar analysis using the data from the three-circuit sample. Our model predicting the overall position of the judge on access (i.e., pro- or anti-access) as a function of the NOMINATE score of the judge's appointing president resulted in a negative coefficient on the ideology variable and, hence, was in the expected direction. However, the variable failed to reach statistical significance. Similarly, our model predicting these votes as a function of the appointing president's partisan affiliation (Democratic appointees = 1) was positively signed in the three-circuit sample, but it, too, did not reach statistical significance. Due to the possibility that these results were a function of the small number of cases in the three-circuit sample raising threshold issues and the need to tap the ideological consequences of a judge's decision to grant access (see Kaheny, 2010), we focus our analysis on the broader concept of ideological congruence and test its influence in the larger sample of threshold votes found in the U.S. Courts of Appeals Database.

DISCUSSION

Existing research on the relationship between administrative agencies and the courts has largely focused on the extent to which courts defer to agency decisions on the merits of legal claims or the extent to which they use a deferential standard of review. These studies, however, have not examined another possible form of deference that could take place with the use of threshold rules. As in other areas of litigation, judges can refuse to consider the claims of litigants against the actions or decisions of administrative agencies if such litigants are not deemed proper parties, if the court feels it lacks the authority to reach the merits, if the claim is not properly presented to the court, or on the basis of a number of other technical or procedural rules of access. These rules, therefore, give judges the opportunity to protect administrative agency decisions from challenge, or they can be used to narrow the scope of claims raised by litigants when challenging administrative actors. Given the courts' role in monitoring administrative agency decisions (Humphries and Songer, 1999:208; Songer, Sheehan, and Haire, 2000:18-19), the invocation of such rules has serious implications.

In this article, we present a descriptive analysis based on two samples of administrative agency decisions in the courts of appeals to see the extent to which threshold rules are raised in agency litigation and to explore the nature of their use. Although our analysis reveals that procedural questions of access are considered in a nontrivial number of administrative agency cases heard by the U.S. Courts of Appeals, the results do not suggest that circuit judges consistently used such rules to curb the consideration of all claims raised in a given case. The analysis, for example, did not reveal an overwhelming tendency on the part of circuit courts to engage in gatekeeping in a way that would block all purported claims. Many of the threshold challenges, we found, related to only one or a few arguments raised on appeal or to some, but not all, litigants. Moreover, while one might surmise that a strategy of using these types of rules as a form of executive-branch deference might make their use more frequent in litigation involving executive agencies, support for that proposition was mixed across the two samples analyzed for this study.

Systematic deference via threshold decision making should also be evident in individual judge decisions to grant access in cases where a litigant is challenging an administrative agency. While we hypothesized that executive deference might lead judges to be more likely to curb access in the context of challenges to executive agencies as opposed to independent or unclassified agencies, such a relationship was not evident in the data. Namely, litigants challenging executive agencies were no more likely to be denied access than those challenging independent agencies. On the other hand, the data did indicate that judicial ideology was a relevant influence in such decisions, as was litigant status. In particular, individual litigants seemed to encounter more restrictive gatekeeping practices in their efforts to challenge agencies than businesses or groups. Further, all litigants were more likely to prevail on threshold challenges in this context if the decisions to grant access yielded political outcomes consistent with the judges' policy preferences.

In summary, the present analysis fills an important gap in studies of judicial decision making more generally and in studies of administrative agency deference. Although recent circuit-court studies have started to systematically analyze the nature of circuit-court gatekeeping decisions and although several scholars have focused on the extent to which judges defer to administrative agencies, few studies have connected the two areas of research in a systematic fashion. The present analysis thus provides a point of departure, we hope, for future studies of procedural gatekeeping in administrative agency cases. In particular, given that both samples used in this study were drawn from *published* decisions of the U.S. Courts of Appeals, it will be important for scholars to investigate the use of such rules in *unpublished* decisions where they might also have a notable presence (Kaheny, 2010). Since threshold rules can be used to curb merits considerations, judges might be more apt to apply them in unpublished administrative agency decisions as compared to published decisions. By logical extension, moreover, such decisions might be more restrictive in this particular context as well. Thus, to understand the full extent of agency deference engaged in by the federal appellate courts, a thorough review of threshold decisions across both opinion types would likely prove very useful. **jsj**

REFERENCES

Canon, B. C., and M. Giles (1972). "Recurring Litigants: Federal Agencies Before the Supreme Court," 25 *Western Political Quarterly* 183.

Cohen, L. R., and M. L. Spitzer (1996). "Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test," 69 *Southern California Law Review* 431.

Cross, F. B. (2007). *Decision Making in the U.S. Courts of Appeals*. Stanford, CA: Stanford University Press.

Cross, F. B., and E. H. Tiller (1998). "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals," 107 *Yale Law Journal* 2155.

Crowley, D. W. (1987). "Judicial Review of Administrative Agencies: Does the Type of Agency Matter?" 40 *Western Political Quarterly* 265.

Edley, C. F., Jr. (1990). *Administrative Law: Rethinking Judicial Control of Bureaucracy*. New Haven, CT: Yale University Press.

Galanter, M. (1974). "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Review* 95.

Gellhorn, E., and R. M. Levin (1997). *Administrative Law and Process*, 4th ed. St. Paul, MN: West Publishing Company.

Goldman, S., and T. P. Jahnige (1971). *The Federal Courts as a Political System*. New York: Harper and Row.

Harvard Law Review (2000). "The Supreme Court, 1999 Term, Leading Cases," 114 *Harvard Law Review* 179.

Horowitz, R. B. (1994). "Judicial Review of Regulatory Decisions: The Changing Criteria," 109 *Political Science Quarterly* 133.

Humphries, M. A., and D. R. Songer (1999). "Law and Politics in Judicial Oversight of Federal Administrative Agencies," 61 *Journal of Politics* 207.

Kaheny, E. B. (2010). "The Nature of Circuit Court Gatekeeping Decisions," 44 *Law and Society* 129.

Mansfield, M. E. (1993). "The 'New' Old Law of Judicial Access: Toward a Mirror-Image Nondelegation Theory," 45 *Administrative Law Review* 65.

— (1992). "Standing and Ripeness Revisited: The Supreme Court's 'Hypothetical' Barriers," 68 *North Dakota Law Review* 2.

Olsen, E. K. (2004). "The Nature and Impact of Circuit Court Threshold Decisions." Ph.D. dissertation, University of South Carolina.

Pierce, R., Jr. (1999). "Is Standing Law or Politics?" 77 *North Carolina Law Review* 1741.

Pierce, R., Jr., S. A. Shapiro, and P. R. Verkuil (2004). *Administrative Law and Process*, 4th ed. New York: Foundation Press.

Pooole, K. T. (1998). "Recovering a Basic Space from a Set of Issue Scales," 42 *American Journal of Political Science* 954.

Rathjen, G. J., and H. J. Spaeth (1983). "Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976," 36 *Western Political Quarterly* 71.

Rowland, C. K., and B. J. Todd (1991). "Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts," 53 *Journal of Politics* 175.

Sheehan, R. (1992). "Federal Agencies and the Supreme Court: An Analysis of Litigation Outcomes, 1953-1988," 20 *American Politics Quarterly* 478.

— (1990). "Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes," 43 *Western Political Quarterly* 875.

Smith, J. L. (2005). "Presidents, Justices, and Deference to Administrative Action." Paper for Presentation at the Law and Positive Political Theory Conference: Legal Doctrine and Political Control, Northwestern University.

Smith, L. A. (1993). "Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication," 61 *George Washington Law Review* 1548.

Songer, D. R., and R. S. Sheehan (1992). "Who Wins on Appeal? Upperdogs and Underdogs on the United States Courts of Appeals," 36 *American Journal of Political Science* 235.

Songer, D. R., R. S. Sheehan, and S. B. Haire (2000). *Continuity and Change on the United States Courts of Appeals*. Ann Arbor: University of Michigan Press.

Tanenhaus, J. (1960). "Supreme Court Attitudes toward Federal Administrative Agencies," 22 *Journal of Politics* 502.

Wardzinski, K. (1990). "The Doctrine of Standing: Barriers to Judicial Review in the D.C. Circuit," 5:2 *National Resources and Environment* 7.

Wheeler, S., B. Cartwright, R. A. Kagan, and L. M. Friedman (1987). "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970," 21 *Law and Society Review* 403.

STATUTES AND CASES CITED

Administrative Procedures Act (1946). 5 U.S.C. §§ 702.

Allen v. Wright, 468 U.S. 737 (1984).

CAPH v. FCC, 778 F.2d 823 (1985).

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Ohio Forestry Association v. Sierra Club, 523 U.S. 726 (1998).

Reno v. Catholic Social Services, 509 U.S. 43 (1993).