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Federal Circuit Courts and the Implications of the Doctrines of Procedure, Jurisdiction, and Justiciability

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FEDERAL CIRCUIT COURTS AND THE IMPLICATIONS
THE DOCTRINES OF PROCEDURE, JURISDICTION AND JUSTICIABILITY

by

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Under the Direction of Robert Howard

ABSTRACT

Political scientists have conducted much work examining a court's decision on the merits of a case. We have concluded that ideology has a strong influence on the outcome on the merits of a decision. Furthermore, courts seek to render a decision that is closest to their own policy preferences. However, federal circuit courts within the judicial hierarchy are constrained by other actors according to the strategic model. There is an abundance of evidence showing that superior actors constrain courts' ideological preferences when such courts render decisions on the merits. However, there is a dearth of scholarship regarding judicial decision making on threshold issues. I argue that federal circuit courts set their judicial agendas by transforming their mandatory appellate jurisdiction into one that is discretionary. They achieve this goal by

controlling the type of litigants who gain access to the courts by deciding cases on threshold grounds. I also argue that federal circuit courts are responsive to changes in Congress's ideology because Congress has power to control threshold issues through various mechanisms. I seek to establish that the grounds upon which a case is dismissed -- jurisdictional, justiciable, and procedural -- defines the parameters that constrain federal circuit courts.

INDEX WORDS: Federal circuit courts, Rules Enabling Act, Procedural rules, Class action litigation, Standing

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DEDICATION

I would like to dedicate this dissertation to my mother and father, Peggy and Robert Brazelton. Thank you for your love and support throughout the years. I would also like to dedicate this work to the loving memory of my grandfather, John H. Cunningham.

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CHAPTER 1: INTRODUCTION

1.1 Setting the Judicial Agenda

The U.S. Supreme Court possesses an almost entirely discretionary docket whereby the justices choose which appeals will be reviewed. Losing parties may file a writ of certiorari asking the Court to hear their case; while the Court receives approximately 9,000 writs a year, it grants only about one percent of them. Political scientists argue that justices of the U.S. Supreme Court use the writ of certiorari as a mechanism to control the Court's docket and set the judicial agenda (Boucher and Segal 1995; Caldeira et al. 1999; Baird 2007). Legal scholars argue that the Supreme Court renders certiorari decisions based on legal considerations such as Rule 10 of the Rules of the Supreme Court, which provides grounds to grant certiorari if a conflict exists among lower courts or if an important legal question is presented (see Perry 1991). However, other scholars have shown that justices cast certiorari votes primarily on ideological and strategic grounds, indicating that agenda control is largely based on personal policy preferences (see Segal and Spaeth 1993, 2002; Boucher and Segal 1995; and Caldeira et al. 1999).

Alternatively, federal circuit courts have mandatory jurisdiction over appeals from federal district courts, therefore making it more difficult for circuit courts to set their own agendas. Yet, lower federal courts *do* have a mechanism whereby they can deny an appellant's request to review a claim on its merits: they can dismiss a case on a threshold issue. Threshold issues are matters that a court must decide before it hears the merits of a litigant's claim. Such issues include procedural rules, jurisdictional questions, and issues of justiciability. Procedural rules primarily govern the discovery and pleading stage of litigation. Jurisdictional questions govern whether Congress has given federal courts the power to adjudicate the claim. Justiciable issues address whether the litigant's claim is viable for adjudication. Constitutionally, federal

courts' power to adjudicate cases is limited to justiciable issues. Although the appellate jurisdiction of federal circuit courts is mandatory, circuit courts use threshold issues as a discretionary mechanism to control the type of litigants that can appeal the merits of an adverse decision and the type of claims that courts can render decisions on the merits. I study federal circuit courts because these courts serve as the final court of adjudication for the vast majority of appellants. Since the Supreme Court grants certiorari in only one percent of cases, federal circuit courts have an enormous influence on shaping the federal judicial agenda.

The impact of decisions on threshold issues is important because a court can prevent a party from litigating the merits of a claim. In certain instances, a court will dismiss a litigant's claim seeking relief with prejudice, permanently barring that party from litigating the merits of their particular claim. Decisions on these issues can thus prevent a court from ever rendering a decision on the merits of the claim and, accordingly, a litigant from ever obtaining redress for his or her grievances. Furthermore, if a court refuses to hear the claim, a litigant is without recourse in the judicial system. As a result, the implications of a court declining to reach the merits of a litigant's claim are immense because a litigant will never have his or her "day in court." The impact of a negative decision on a threshold issue is fatal not only for the litigant, but also for similarly situated litigants. If courts bar certain types of litigants from bringing lawsuits on the merits by ruling against those litigants based on a threshold issue, courts can effectively shape policy by discouraging and preventing potential plaintiffs from bringing similar lawsuits. Courts can therefore discourage litigation from entire classes of plaintiffs and/or types of claims.

To further understand the grave consequences of decisions rendered on threshold grounds, anecdotal evidence is instructive. For example, in *Warth v. Seldin* (1975), the Supreme Court decided a case where the petitioners sought an injunction of a city's ordinance that had the

effect of excluding low to moderate-income families from residing in a town. The Supreme Court, in a 5-4 decision divided primarily on ideological lines, held that a non-profit organization, taxpayers, and low-income residents lacked standing to bring their suit pursuant to the Fair Housing Act, thus dismissing it completely. Because the Supreme Court held that the petitioners lacked standing to sue the town, this had the effect of barring low-income individuals from even *filing a lawsuit* seeking affordable housing within the town. Not only did the Court fail to address the merits of the plaintiffs' claims, but the decision also bars similarly situated litigants from filing a lawsuit seeking affordable housing. Accordingly, this case had the substantive effect of barring other plaintiffs with similar grievances from gaining access to the courts.

In *Lujan v. Defenders of Wildlife* (1992), the Supreme Court held that the Defenders of Wildlife, an environmental group, lacked standing to sue the federal government seeking enforcement of an endangered species act. The vote in *Lujan* was divided largely on ideological lines, with the conservative justices joining Justice Scalia's majority opinion, and the more liberal Justices O'Connor, Blackmun, and Stevens dissenting. Protection for the environment is primarily viewed as a liberal issue, while conservatives have not been its chief promoters. *Lujan* had the effect of barring plaintiffs seeking enforcement of similar environmental regulations and discouraging plaintiffs with similar interests from *filing a lawsuit* seeking enforcement.

More recently, in *Massachusetts v. Environmental Protection Agency* (2007), the Court held that the State of Massachusetts had standing to sue the EPA. In *EPA*, various states and municipalities sued the EPA seeking enforcement of standards regulating emissions of carbon dioxide from automobiles. Because the State of Massachusetts argued that it had standing to compel the EPA to enforce environmental regulations, we would expect that the liberal justices

would confer standing, while the conservative justices would deny standing to enforce such regulations. The justices' ideological preferences can explain the 5-4 vote. As anticipated, Justices Breyer, Ginsburg, and Souter, as the Court's liberals, joined Justice Steven's opinion. Additionally, Justice Kennedy, as the Court's median justice, joined the liberal justices of the court. The conservatives of the Court, Justices Scalia, Thomas, and Alito, and Chief Justice Roberts, dissented on the grounds that Massachusetts lacked standing. The liberals of the Court were able to gain a majority to render a pro-environmental decision. Unlike the decision in *Lujan*, the liberals of the Court in *EPA* were able to gain a majority to render a pro-environmental decision which expanded access to plaintiffs seeking enforcement of EPA regulations. Because the Court held that the State of Massachusetts had standing, other states now have the ability to *file a lawsuit* seeking enforcement.

Issues regarding access are also evident in cases involving procedural rules. In *Bowles v. Russell* (2007), the Supreme Court, in a 5-4 decision, held that a convicted defendant was barred from appealing his sentence on the grounds that his appeal was untimely filed, despite the fact that the district court provided him with an incorrect date. The district court inexplicably gave the defendant, who was sentenced to fifteen years to life imprisonment for murder, a date for filing a notice of appeal that was beyond the time prescribed by statute and the Federal Rules. The court held that it had no equitable powers to extend the time for filing the notice of appeal. One would expect that the conservative justices would rule against the convicted and the liberal justices would rule in favor. As expected, the conservative justices, Chief Justice Roberts and Justices Thomas, Alito, Scalia, and the median justice Kennedy, comprised of the majority, while liberal justices Ginsberg, Breyer, Souter, and Stevens dissented. *Bowles* also illustrates the grave consequences of an appellate court dismissing an appeal on threshold grounds. Because the

lower court dismissed the appeal, Bowles can never challenge the district court's decision determining that his sentence did not violate the Constitution in an appellate court. Even though the law may clearly entitle Bowles to relief, he will never obtain that relief because the Court has held that his appeal was untimely. However, the aforementioned cases only provide anecdotal evidence of courts using threshold issues to bar certain litigants from gaining access to the courts.

I present a theory explicating how federal circuit courts use threshold issues to set their judicial agendas by dismissing cases on threshold grounds. I argue that federal circuit courts decide cases on threshold grounds to further their own policy preferences. I also argue that federal circuit courts are responsive to changes in Congress's ideology because Congress has the power to control threshold issues through various mechanisms. In this chapter, I first discuss the literature regarding attitudinal and strategic theories of judicial decision making and how these theories apply to decisions in the federal court system. I then discuss how the institutional constraint of increasingly large caseloads of the federal circuits may impact decisions to dismiss on threshold grounds. Last, I discuss my theory explaining how circuit courts control their agendas by dismissing appeals on threshold grounds. I end by providing a brief overview of the remaining chapters.

1.2 Theoretical Foundations

1.2.1 Theories of Judicial Decision Making

Political scientists have provided well-documented evidence of the effects of ideology on judicial outcomes. The attitudinal model, the predominate theory of judicial decision-making in political science, states that justices of the Supreme Court decide cases according to their personal policy preferences without constraint from Congress or the president (Segal and Spaeth

1993, 2002). Proponents of the attitudinal model state that justices are free to decide cases according to their ideological preferences because justices are appointed for lifetime tenure, generally have no other ambition to seek higher office, and have little political accountability.

However, scholars find evidence that place the tenets of the attitudinal model into doubt at least to the extent that justices consider other things in addition to their personal preferences. The strategic model of judicial decision making argues that justices do not solely vote their sincere policy preferences, but seek to maximize their policy preferences in view of the preferences of other players (Epstein and Knight 1998; Spiller and Gely 1992). In particular, this model provides that justices of the Supreme Court cast their votes in view of Congress's power to override their decisions and, therefore, justices make strategic choices in order to maximize their policy preferences in view of any possible retaliation from external political actors (Epstein and Knight 1998). This also model provides that justices craft opinions considering the preferences of other justices in order to gain a majority vote (Maltzman, Spriggs, and Wahlbeck 1999; 2000).

Walter Murphy (1964) was among the first pioneers to recognize that the justices of the Supreme Court do not decide cases unencumbered. He argued that the Court has political constraints of which it must be aware, including the president's power to ignore a decision of the Court by not enforcing it and his power to nominate jurists who share his ideology. Testing the strategic model has always been somewhat problematic, as it is difficult to distinguish strategic considerations from sincere preferences (Segal and Spaeth 2002; Baum 1978). However, there have been several attempts to test the validity of this theory through what are known as separation-of-powers models. Building upon Murphy's work, scholars provide a more nuanced theory considering subsequent scholarship explaining the interaction between the political

branches of government and the Supreme Court. Among these is Eskridge (1991b) who builds on Murphy's qualitative analysis. In a formal model named the Court/Congress/President game, Eskridge states the Court must be cognizant of the Congressional committee whose jurisdiction governs the requisite subject matter, Congress if the bill goes to the floor, and the President as he has the power to veto legislation. Because the Court is aware of this game, Eskridge states, the Court seeks to maximize its policy preferences while also adopting a policy that will not risk retaliation by these other actors (Eskridge 1991b). While Eskridge finds Congressional committees relevant, Spiller and Gely (1992) argue that the Court seeks to place its decision between the preferences of the House and Senate. They also find that the Court responds to interest groups that are likely to lobby Members of Congressional committees. Ferejohn and Weingast (1992b) continue to modify previous separation-of-powers games by asserting that the Court, acting as a sophisticated honest agent, considers the policies of the current Congress by interpreting a statutory provision on the ideal point of the chamber that is closest to the Court's own precedent, which is the status quo. King (2007) also finds evidence supporting the strategic model. He finds that the Supreme Court decides cases raising issues involving statutory interpretation on constitutional grounds rather than statutory grounds when circumstances are favorable for a Congressional override. Therefore, the threat of a Congressional override is a check against a majority's unfettered power to use its own policy preferences. Also, Spiller and Gely (1992) find that the Supreme Court crafts its opinions considering Congressional preferences regarding decisions involving the National Labor Relations Board.

Much of the scholarship examining the strategic model focuses on the U.S. Supreme Court. However, scholars have also studied the effects of strategic decision making within federal circuit courts. In particular, scholars have studied whether circuit courts are responsive to

changes in Congressional ideology. In examining cases involving health and safety issues, Revesz (2001) finds no evidence of DC Circuit judges' acting in response to changes in the party of the president or in Congress. Hume (2009) also finds no evidence that circuit panels consider Congress's ideological preferences when deciding cases challenging the reasonableness of an agency's decision. Although, Cross (2007) finds no evidence that circuit courts are responsive to changes in the liberal filibuster-veto point in Congress, he finds evidence that circuit courts do respond to changes in the conservative filibuster-veto point.

Although scholars do not agree on the influence of Congressional preferences on circuit court decisions, circuit courts have another principal to whom they must respond: The U.S. Supreme Court. Songer et al. (1994) find that circuit court panels both follow Supreme Court mandates (responsiveness) and modify decisions in conformity with the Supreme Court (congruence). Interestingly, Cross (2007) finds that circuit courts follow Supreme Court precedent from prior Courts rather than the current Court. However, Klein and Hume (2003) find that circuit courts are not responsive to Supreme Court preferences based on the evidence that circuit courts are not more likely to decide "certiorari worthy" cases consistent with Supreme Court preferences. This evidence indicates that circuit courts do not seek to shelter themselves from reversal.

In addition to considering the preferences of outside actors, circuit courts must be cognizant of the preferences of their colleagues sitting on their court. Circuit courts are unique insofar as judges who sit on those courts render decisions in three-judge panels. Public law scholars have studied the impact of decision making in this context, providing a theory called panel effects. The theory of panel effects provides that a judge's colleagues sitting on a panel influences that judge's vote (Cross 2007). Empirical evidence provides support for this theory.

Cross and Tiller (1998) find evidence that DC Circuit Court judges who sat on panels with a judge appointed by the opposition party (split panels) were more likely to vote according to the preferences of the opposition-party judge than judges who sat on panels who were all appointed by members of the same party (unified panels). Beyond ideology, Kastellec (2013) finds that the presence of an African American judge sitting on a panel increases the likelihood of the panel upholding an affirmative action policy.

District court judges behave in a similarly ideological fashion as other judges who sit on the federal bench (Rowland and Carp 1996). Regarding their place in the judicial hierarchy, circuit courts are less likely to reverse a district court's decision on the merits when the judge's preferences are consistent with the panel's preferences (Haire et al. 2003). Moreover, Randazzo et al. (2006) finds that district court judges constrain their ideological preferences when they anticipate a negative response from a circuit court. Furthermore, as the ideological distance between the district judge and the circuit panel increases, the likelihood of reversal also increases. We know that district court judges have an interest in seeking a higher office and, as a result, seek to protect their professional reputation by minimizing the number of reversals (Klein and Hume 2003).

1.2.2 Theories of Judicial Decision Making and Agenda Control

While considerable scholarship focuses on the extent to which justices decide cases according to their personal policy preferences, public law scholars also argue that justices rely on their preferences at the agenda setting stage. The Supreme Court controls access by screening cases through certiorari review (Baird 2007). Although Rule 10 provides that the Supreme Court may grant certiorari in cases where a conflict exists among lower courts or an important legal question is presented, this procedural rule exerts little constraint on a majority that seeks to

implement its own policy preferences. Even more, justices have proactively used this Rule to further their own policy goals. For example, Ulmer (1972) was among the first to determine that justices use certiorari to further their own agendas, finding that justices grant certiorari in cases they want to reverse. A few years later, Baum (1978) found that justices grant the writ when a lower court decision significantly departs from their own ideological preferences.

Later researchers have also supplied evidence that courts use certiorari to further their own ideological preferences. Brenner and Krol (1989) find that justices who voted to grant certiorari are more likely to reverse than affirm the lower court decision at the merits stage. Perry's (1991) qualitative research shows that justices act strategically by defensively denying certiorari when that justice's preferred position is unlikely to prevail at the merits stage. Since the Court has a tendency to reverse cases it grants certiorari, justices are cautious in casting certiorari votes because of the risk of establishing precedent that is incongruent with their policy preferences. Perry's research also shows that justices "aggressively grant" certiorari in cases they believe would not only prevail on the merits, but also further ideologically congruent legal doctrine or overrule unfavorable precedent. Caldeira et al. (1999) provide empirical evidence supporting Perry's qualitative findings. They find evidence of both "aggressive grants" and "defensive denials." However, Boucher and Segal (1995) find that justices vote to "aggressively grant" certiorari in cases they seek to affirm, but do not "defensively deny" when they want to reverse. Although certiorari is a procedural tool, the substantive implications are evident to both litigants and members of the Court.

Recently, scholars have considered the impact of Congressional preferences on the Supreme Court's decisions to grant certiorari. Extending Eskridge's theory, Epstein, Segal, and Victor (2002) argue that the Supreme Court renders decisions to grant certiorari based on

Congressional preferences. They find that justices are more likely to either deny certiorari or decide the case on constitutional grounds if believe that their preferences in statutory cases are incongruent with Congressional preferences. Epstein et al. argue that justices of the Supreme Court are just as attentive to Congressional preferences when deciding cases at the merits stage, as they are attentive to those preferences at the agenda-setting stage. They further argue that justices seek to invite less scrutiny by acting strategically at the agenda-setting stage than inviting more attention and scrutiny at the merits stage. Extending Epstein's et al. theory, Harvey and Freidman (2009) argue that the Court is not as insulated as previously believed from Congressional retaliation when it renders decisions on constitutional grounds. They find that the Court is less likely to grant certiorari seeking to review the constitutionality of a Congressional statute as the policy preferences of the median justice becomes farther from Congressional preferences. That is, the Court is constrained by Congressional preferences and acts strategically even at the certiorari stage.

1.3 Threshold Issues

Scholarship provides evidence that justices of the Supreme Court decide to cast certiorari votes according to attitudinal and strategic considerations, but also such influences are evident in justices' decisions on threshold issues. Political scientists have yet to provide substantial scholarship examining implications of ideology on threshold decisions. Of the few studies, Rathjen and Spaeth (1979) provide evidence of the effects of ideology in cases decided on threshold grounds. They find that justices of the Burger Court used threshold issues either as a gatekeeping function to manage its caseload, exercise judicial restraint, or veil ideological decision making. Although Rathjen and Spaeth examine a variety of threshold issues, the majority of scholarship regarding such issues focuses on justiciability, and particularly standing.

Among these is Segal and Spaeth (1993, 2002), who provide summary statistics that indicate ideological decision making in standing decisions of justices of the Supreme Court. They surveyed cases from 1953 to 2000 that the Supreme Court questioned a litigant's standing to sue. They find that the Warren Court conferred standing in 68.9 percent of cases, while the Burger and Rehnquist Courts held plaintiffs had standing in 42.7 and 38.6 percent of cases, respectively (2002, 233). The decline from the Warren Court through the Rehnquist Court is significant. However, the Supreme Court addressed the issue of standing in only a small number of cases. Within the terms examined, only 174 cases within that period addressed standing. Of those 174, the Court held that the litigant lacked standing in 90 cases.

There is also empirical work regarding the effects of threshold issues and ideology within lower federal courts. Similar to scholarship studying the U.S. Supreme Court, much of the scholarship studying lower federal courts is devoted to the issue of standing. Staudt (2004) finds that both policy preferences and legal rules impact decisions in cases involving taxpayer standing at all levels of federal courts. Pierce (1999), in examining both standing and ripeness decisions in the federal circuit courts, finds that conservative judges are more likely to deny standing to plaintiffs asserting environmental claims than liberal judges. Additionally, Cross (2007) examines ideology and threshold issues in the federal circuit courts. He finds that as Congress becomes more conservative, circuit courts are more likely to reach a conservative decision on the threshold issue. However, Cross does not distinguish among different types of threshold issues. Kaheny (2010) finds that federal circuit court judges are more likely to decide issues in conformance with their own ideological preferences when deciding whether the litigant is the proper party to bring the action. Kaheny's scholarship is also limited insofar as she only distinguishes threshold issues on the basis of the proper party to bring the action and the proper

forum of the court. Fix and Randazzo (2010) employ a qualitative analysis finding support that federal circuit courts decide cases on threshold grounds in order to avoid reaching the merits because they desire to defer to the preferences of the president in cases involving national security. However, their theory may be confined to cases of national security because of the dire consequences for second-guessing the president's judgment in this issue area.

Furthermore, there is little scholarship regarding district court decision making on threshold issues. Rowland and Todd (1991) find that the ideology of a district court judge impacts standing decisions. Judges who were appointed by President Reagan were slightly less likely to confer standing to litigants classified as "underdogs" than President Carter-appointed judges. Moreover, Braman (2006) finds experimental evidence that legally-trained participants acting as district court judges looked to the merits of a case to ascertain their ideological preferences when determining their decision to confer standing to a litigant. Therefore, the evidence tends to establish that district court judges decide threshold issues in a manner that is most congruent with their preferences on the merits of the case. Rendering a judgment on a threshold issue as opposed to the merits of a case provides an opportunity to control the substantive outcome without reaching the merits.

However, empirical evidence also shows that Congress seeks to control threshold issues to produce results congruent with their own policy preferences (Lindquist and Yalof 2001). Curry (2007), in testing the likelihood of the House passing legislation modifying diversity jurisdiction, finds that as the workload of federal district courts and the ideological distance between the federal judiciary and the House increase, the likelihood of Congress limiting diversity jurisdiction increases. Smith (2006) finds that liberal Members of Congress are more likely than conservative Members to support statutory provisions that provide a private right of

action for environmental regulatory provisions. That is, Members change judicial procedures to allow plaintiffs to bring suits that are ideologically congruent with their own position. Also, Democrat-controlled committees are more likely to confer standing to such plaintiffs than Republican-controlled committees. Additionally, Smith finds that Members of Congress are more likely to support standing provisions when those Members are more ideologically aligned with federal district courts. One could surmise that Members believe courts that are closer to their ideological preferences are more likely to render decisions more favorable to their policy position. Additionally, Frymer (2003) provides qualitative evidence that Congress gave the federal courts authority to amend the Federal Rules of Procedure to aid plaintiffs in asserting civil rights claims. This literature provides support that Congress is aware that threshold rules have substantive implications and Congress amends such rules for courts to render decisions in conformity with their preferences.

1.4 Legal Considerations

Many proponents of the attitudinal and strategic models often argue that the law exerts little restraint on a judge's ability to render a decision based on his or her personal policy preferences. Nevertheless, more recent scholars find evidence that legal considerations serve as a constraint on judges' preferences. Tiede (2007) finds evidence that federal district court judges changed their sentencing behavior after Congress enacted the Sentencing Guidelines. Furthermore, Randazzo and Waterman (2006) find that judges sitting on the federal circuit courts changed their voting behavior when Congress enacted statutes to curb their ideological inclinations. Concerning the Supreme Court, Bailey and Maltzman (2008) find that justices are constrained by legal doctrines such as precedent when deciding issues of the First Amendment. Although other scholars have found evidence that legal doctrines influence decision making (see

Epstein and Koblka 1992; George and Epstein 1992; Songer and Lindquist 1996; Corley et al. 2013). However, other scholars have found evidence that legal doctrine serves as a weak constraint on attitudes (Howard and Segal 2004). Likewise, I argue that legal factors serve as a weak constraint on attitudes as doctrines explicating threshold issues generally are within the discretion of the court.

1.5 Theory

In this dissertation, I argue that federal circuit courts set their judicial agendas by transforming their mandatory appellate jurisdiction into one that is discretionary. They achieve this goal by controlling the type of litigants who gain access to the courts by deciding cases on threshold grounds. Because conservatives tend to favor business interests while liberals tend to favor individuals litigants (Howard and Brazelton 2014 forthcoming), I argue that conservative panels are more likely than liberal panels to rule against individuals when appealing a judgment disposing a case on threshold grounds. However, I argue that federal circuit courts are not free to vote their sincere policy preferences. They must act strategically because Congress has the power to constrain federal courts by enacting legislation governing threshold issues. Consequently, federal circuit courts do not want to invite retaliation from Congress and, therefore, curb their ability to decide threshold issues in conformance with their own policy preferences.

Generally, Congress's ability to override an incongruent statutory decision is piecemeal; such change takes place one statute at a time and typically affects one issue area. In contrast, Congress's ability to control threshold issues is vast. A change in a threshold rule can impact a number of issues areas. More importantly, any Congressional change in a threshold rule will impede federal courts' ability to set their own judicial agendas. Congress enacting a law

modifying threshold issues is akin to Congress controlling the Supreme Court's certiorari review (see Boucher and Segal 1995; Caldeira et al. 1999; Baird 2007). As Epstein, Segal and Victor (2002) argue that justices of the Supreme Court seek to invite less scrutiny by acting strategically at the agenda-setting stage than the merits stage, I likewise argue that federal circuit courts seek to invite less scrutiny at *their* agenda-setting stage than at the merits stage. I further argue that federal circuit courts view Congressional regulation of threshold issues as a substantial threat to their power to set their own agendas. Because they seek to invite less scrutiny, they are more responsive to Congressional preferences regarding threshold issues than issues presented at the merits stage. Therefore, I argue that federal circuit courts seek to maximize their policy preferences, but act strategically because they are constrained by Congressional preferences.

I derive my theory from the literature establishing that federal courts are responsive to Congressional preferences (Eskridge 1991b; Cross 2007). Because federal circuit courts must be cognizant of the Judiciary Committees that act as gatekeepers for any bills seeking to modify laws regulating the power of federal courts dismiss on threshold grounds (Eskridge 1991b), I argue that federal circuit courts are cognizant of who sits on Congressional committees. Accordingly, federal circuit courts act strategically by not deciding cases outside of the confines of Congressional committee preferences. Unlike the literature that provides that federal circuit courts generally are not responsive to Congressional preferences (Revesz 2001; Hume 2009), I argue that federal circuit courts are very keen to Congressional preferences on threshold issues.

I argue that federal circuit courts set their judicial agendas by transforming their mandatory appellate jurisdiction into one that is discretionary by rendering decisions on the threshold grounds of procedure, jurisdiction, and justiciability. I delineate between these three types of threshold issues because the degree which circuit courts are constrained depends on the

type of threshold issue presented. Federal courts have the power to create procedural rules, but federal courts do so subject to Congressional oversight. Congress solely controls the jurisdiction of the federal courts, providing courts with little power to control their jurisdiction. Article III of the Constitution provides that federal courts can only adjudicate justiciable issues. Because justiciability is generally a constitutional question, federal courts possess discretion for deciding which cases are justiciable. However, a subset of justiciable issues falls outside of the requirements of the Constitution. This subset is called prudential standing. That is, federal courts have created the common-law doctrine of prudential standing that goes beyond the requirements of constitutionally justiciable cases. Under the doctrine of prudential standing, courts can deny standing when a plaintiff challenges a Congressional statute. Federal courts are interpreting that Congressional statute to determine if Congress intended to confer a private right of action under the statute. However, Congress can confer prudential standing to the class of litigants when courts have previously denied standing. Congress has the power to do so because federal courts are interpreting Congressional statutory intent rather than standing pursuant to Article III. Because Congress has some control over each type of threshold issue, I argue that federal circuit panels act strategically to shield themselves from an adverse Congressional action.

However, I must account for an alternative theory to my main contention that federal circuit courts use threshold issues to set their agendas. Another important institutional constraint is the ever-increasing caseload of the federal courts. Large caseloads allow less time to address the merits of a case. That is, large caseloads strain scarce judicial resources, which may encourage panels to use the more expedient method of disposing cases on threshold grounds. Scholars have noted the effects of heavy caseloads within the federal judicial system. Large dockets create an environment where judges are overworked. Therefore, heavy caseloads lead to

inconsistencies in the law, delay in redressing grievances and, as a result, decreased confidence and legitimacy in the judicial system (O'Scannlian 1999). O'Scannlain (1999) finds that heavy caseloads for the Ninth Circuit, which carries almost 20 percent of the federal docket, have contributed to its failure to adequately resolve legal conflicts within the Circuit. Scott (2006, 341) finds that of the cases that the U.S. Supreme Court granted certiorari from 1985 to 2005, the Supreme Court reversed the Ninth Circuit an average of 14.48 times, with the Fifth Circuit having the next highest rate of 5.14 reversals per term. Even more, the Supreme Court reversed many unanimous decisions appealed from the Ninth Circuit. This is compared to an average reversal rate of about 3.5 percent of appeals from other circuit courts. These studies provide some evidence that because the Ninth Circuit carries the largest caseload, heavy caseloads impede that Circuit's ability to render quality decisions and to alleviate its large caseload. The Ninth Circuit's high reversal rate may lend support to this notion.

Not only could large caseloads impede a circuit court's ability to render quality decisions, large caseloads may constrain ideological decision making. For example, Hall (1985) finds that the ideology of justices of the Supreme Court of the State of Louisiana was curbed in cases that were appealed pursuant to that court's mandatory jurisdiction. Because the mandatory jurisdiction is comprised of 80 percent of that court's caseload, justices may be inclined to gather a consensus in order to avoid incurring the costs of crafting a dissent (1985, 253; but see Corley et al. (2013) finding no support that decreasing caseloads allow for greater opportunity for dissensus among justices of the Supreme Court.). Hall's finding lends support that heavy caseloads curb ideological voting to preserve scarce judicial resources lending support for the notion that heavy caseloads limit scarce judicial resources. Circuit courts may not dispose of cases on threshold ground to further their policy preferences, but may do so to provide a more

expedient manner of disposing cases. Similarly, heavy circuit court caseloads may not only impede ideological voting on the merits but also could encourage disposition of cases on threshold grounds to preserve scarce judicial resources. I therefore control for the caseload of federal circuit courts as they may be more inclined to dispose of cases on threshold grounds to alleviate the burden of increasingly large caseloads.

1.6 Chapter Outline

This dissertation proceeds as follows. In Chapter 2, I discuss how federal circuit courts set their agendas by deciding cases on grounds of procedural rules to control which types of litigants that gain access to federal courts. Federal courts have power to promulgate procedural rules, which governs rules for filing claims and pleadings. I examine a commonly raised procedural rule, Rule 11 of the Federal Rules of Civil Procedure, which governs sanctions for parties and attorneys when they file claims on objectionable grounds. I show how the ideology of the panel affects decisions to sanction parties based on whether the party is a business or an individual litigant. However, the panel's ability to render these decisions in conformance to their ideology is not unfettered. Congress can override any rules promulgated by the federal courts. Because this unique conferral of power resembles the conferral of power Congress has given to bureaucracy agencies, I draw on bureaucracy literature to examine judicial decision making in this context. Since Congress maintains oversight, I examine whether circuit courts are responsive to changes in Congressional preferences. I end by discussing the consequences of the denial of access on procedural grounds.

In Chapter 3, I examine how circuit courts control access by deciding cases on jurisdictional grounds. Particularly, I examine decisions to certify a class in class action lawsuits. Conservatives who are traditionally aligned with business interests are arguably more likely to

deny class certification for plaintiffs seeking to sue businesses and corporations. As an example, I discuss the recent Supreme Court case of *Wal-Mart v. Dukes* (2011), where a conservative majority denied an entire class of plaintiffs the ability to proceed as a class to sue Wal-Mart for discrimination on the basis of gender. I then empirically test whether conservative circuit courts use jurisdictional issues to limit access for plaintiffs seeking class certification. I argue that federal circuit courts seek to maintain control over jurisdictional decisions to control which litigants can gain access to the courts through certification decisions and, therefore, set their own judicial agendas. However, I argue that federal circuit courts are keenly aware of Congressional preferences and seek to maximize their preferences within the confines of Congressional preferences. I test my theory by examining whether circuit courts are responsive to changes in Congressional ideology since Congress controls the jurisdiction of the federal courts. I then discuss the implications of the denial of access to the courts in certification decisions.

In Chapter 4, I discuss how circuit courts control access in decisions to grant prudential standing. Unlike Article III standing, federal courts have further limited plaintiffs' ability to bring suits challenging a federal statute under the doctrine of prudential standing. If a court denies prudential standing, Congress can later confer standing to the class of plaintiffs. I also argue that federal circuit courts seek to control access by rendering decisions to maximize their policy preferences within the preferences of Congress. I examine decisions to confer prudential standing to plaintiffs seeking to enforce the Fair Housing Act of 1968. This Act creates a right of action for persons alleging discrimination in the housing market. I discuss the Supreme Court's decision in *Warth v. Seldin* (1975) to deny plaintiffs seeking redress under the Act. Using quantitative analysis, I test theory by examining panels' decisions to grant or deny prudential standing to plaintiffs.

I conclude in Chapter 5 with thoughts examining the mechanisms that circuit courts use to set their agendas. I explore the implications of federal circuit courts using threshold issues to control the type of litigants that gains access to the courts. I argue that my findings highlight how circuit courts achieve this objective. I then discuss the broader implications of federal courts denying certain litigants access to the courts. I end by discussing plans for future research in federal and state courts' use of threshold issues to set their judicial agendas.

CHAPTER 2: IDEOLOGICAL IMPLICATIONS OF THE FEDERAL RULES OF PRACTICE AND PROCEDURE

2.1 Introduction

In 1999, Keith Bowles was convicted in state court of murder and sentenced to fifteen years to life imprisonment. After exhausting his appeals in state court, Bowles's only recourse was to file a habeas corpus petition in federal court. Bowles subsequently filed a habeas petition and a federal district court denied his petition on the merits. After additional pleadings, the federal district court entered an order that purportedly stated the last date for filing a notice of appeal. However, the district court made a clerical error and provided Bowles with an incorrect date, which was three days beyond the time stipulated by Federal Rules of Appellate Procedure and by statute. Bowles filed his notice of appeal before the date provided by the district court but after the time stipulated by the Rules. Bowles then appealed to the Sixth Circuit and that Court dismissed Bowles's appeal as untimely. Bowles then petitioned the U.S. Supreme Court for review of the Sixth Circuit's decision dismissing his appeal as untimely.

In a 5-4 decision, the Supreme Court held that the Sixth Circuit lacked jurisdiction over Bowles's appeal because it lacked discretion to extend the time period for filing a notice of appeal. All of the conservatives ruled against Bowles, stating that federal courts are without discretion in extending the time for filing a notice of appeal as provided by statute and the Federal Rules. The conservative majority characterized the Rule as jurisdictional and, therefore, held that it could not modify the jurisdiction of the federal courts. However, the Court's liberals dissented, arguing that time standards are not jurisdictional; rather, time standards are procedural rules devised by federal courts to conduct their business. In Justice Souter's dissent, he argued that the Court has power to extend the time for filing a notice of appeal especially since the

appellant relied on the date the district court provided him. Justice Souter also stated that it is unjust to deny Bowles's appeal given he relied to his detriment on the date provided to him by the district court. The split decision on ideological lines suggests that the conservatives of the court used time standards to bar this convicted criminal defendant from appealing an adverse decision on the merits, while the liberals sought to provide him with the opportunity to appeal the decision.

The issues presented in this case leads to my research question: Do federal courts use procedural rules to control the type of litigants who can gain access to the courts in order to set their judicial agendas? The issue underlying this research question is demonstrated in the *Bowles* case. A court was required to decide whether Bowles's notice of appeal was timely filed before it reviewed the decision of the district court denying his habeas petition. Because the Supreme Court held that Bowles's appeal was untimely, a federal appellate court will never review the decision of the district court denying Bowles's habeas petition. Consequently, the conservatives of the Court denied Bowles access to appeal the denial of his habeas petition, while liberals sought to grant him access. The consequences of the *Bowles* decision are grave as Bowles can never challenge the constitutionality of his sentence in a federal appellate court. I discuss *Bowles* as an example of the dire consequences of courts denying a litigant access based on a procedural rule. However, cases like *Bowles* are not the norm in that federal courts do not ordinarily provide litigants with the wrong deadline for filing appeals. I therefore test my theory by examining a subset of cases of rules for filing claims that are more frequently litigated in federal courts: circuit court decisions governing sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

In this chapter, I demonstrate that courts decide cases presenting questions of procedural rules according to their personal policy preferences. I argue that the federal circuit courts do so to set their judicial agendas. I specifically examine whether federal circuit courts use the Federal Rules of Practice and Procedure to control which type of litigants gain access to the courts. These Rules are unique insofar as Congress has delegated its authority to devise these Rules to the federal courts pursuant to the Rules Enabling Act. Drawing from the bureaucratic literature, I set forth a theory explaining the relationship between Congress and the federal judiciary regarding procedural issues. I then test my theory by examining circuit court cases involving Rule 11.

2.2 The Rules Enabling Act

2.2.1 A Historical Perspective

In 1934, Congress enacted the Rules Enabling Act transferring power from the Attorney General to the Chief Justice of the Supreme Court to promulgate the Federal Rules of Practice and Procedure. The Act states that any promulgation of the Rules cannot "abridge, modify, or enlarge any substantial right" 28 U.S.C. § 2072(b). Congress transferred power on the premise that the Rules were to have no substantive implications, but were to assist federal courts in conducting their business (Bone 1999).

In 1958, Congress transferred this rulemaking function from the Supreme Court to the Judicial Conference of the United States. The Conference, chaired by the Chief Justice of the United States, is comprised of chief judges of all the federal courts of appeals and a district judge within each circuit. The district judge is elected by a majority of the judges within the circuit. The Judicial Conference appoints Advisory Committees on the Rules of Appellate Procedure, Bankruptcy, Civil Procedure, Criminal Procedure, and Evidence. These committees consider

suggestions regarding changes to the Rules from the bench, bar, and members of the public. If an advisory committee finds that a suggestion to change a rule has merit, it then drafts a proposed rule, publishes the proposal, and submits the proposal to the Standing Committee on Rules of Practice and Procedure for approval. If the Standing Committee approves the proposed rule, the proposal is published for public comment. If the Standing Committee approves the proposed rule after a notice and comment period, it then transmits the proposal to the Judicial Conference. If the Judicial Conference approves the proposal, the Conference submits the proposed rule to the Supreme Court for further review. If approved, the Supreme Court must issue an order by May 1 promulgating the rule to take effect no earlier than December 1. After the Supreme Court promulgates the rule, Congress has until December 1 to override the rule before it takes effect.

As early as 1938, the Supreme Court amended the Rules allowing plaintiffs to more easily assert and support their claims in federal court (Frymer 2003). In particular, the discovery requirements were liberalized allowing plaintiffs to request a substantial amount of information from defendants to support their claims. Additional rule changes also allowed more liberal requirements for those seeking to certify members of a class action lawsuit. These changes were advocated by the American Bar Association to render it easier for the general public to gain access to the courts. Although Frymer (2003) finds no qualitative evidence that the 1938 amendments were promulgated on ideological grounds, he finds that rule changes in the mid-1960s and 1970s were enacted to help facilitate filing civil rights claims. As an example, Rule 53 conferred authority to special masters to enforce consent decrees between unions and civil rights plaintiffs. As Frymer concludes, the intent and/or effect of these rule changes were substantive in nature, creating an environment conducive to successfully litigating civil rights claims. The Supreme Court did not amend the Rules again until it amended the Rules of Evidence in 1972.

Congress believed that the Supreme Court exceeded its authority by creating Rules that had substantive implications (Burbank 2004). For the first time, Congress prevented the Rules from taking effect. Congress enacted legislation that substantially revised the Federal Rules of Evidence (McCabe 1995).

In 1988, Congress again revised the procedure to amend the Federal Rules. One of the changes that Congress incorporated was to open the amendment process to the public. Similar to the notice and comment period required for rules promulgated by administrative agencies pursuant to the Administrative Procedure Act (APA), the goal of the notice and comment period is to provide the public with an opportunity to participate in the rulemaking process. Certain interest groups are active in the notice and comment process as procedural rules can have substantive implications for certain litigants (McCabe 1995). Another major reform revising the Federal Rules was the enactment of the Civil Justice Reform Act of 1990. The purpose of this Act was to streamline trials and decrease costs and delays in federal district courts (McArthur 1999). The Act required district court judges to appoint an advisory committee to promulgate local rules and report cases that were on a court's docket for an extended period of time.

Even more changes were proposed when Republicans gained a majority in the House in 1994 with its "Contract with America," having tort reform as one of their top legislative priorities. Republicans then introduced several bills seeking to modify the Federal Rules to render it more difficult for plaintiffs to succeed in court. For example, Republicans introduced legislation to change the American Rule, which provides that each party pays their own attorney's fees, to the English Rule which states that the losing party pays the winner's attorney's fees (Rowe 1997). House Republicans were successful in passing the Attorney Accountability Act requiring a party to pay opposing party's attorney's fees if that party rejected a settlement

offer and was subsequently awarded a smaller judgment than the settlement offer. The aforementioned legislation demonstrates that political parties recognize the substantive implications of procedural rules and how these rules can grant or deny litigants access to federal courts.

2.2.2 Rule 11 and Sanctions

Rule 11 of the Federal Rules of Civil Procedure has been subject to much political debate. Pursuant to Rule 11, attorneys must attest to the following regarding any lawsuits filed:

> "(1) [the claim] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information." Rule 11(b)(1)-(4), Federal Rules of Civil Procedure. A party may move a court to

sanction an alleged violator, whether party or attorney, if there is cause to believe that the Rules have been violated. Additionally, a court may impose a sanction on its own initiative if it deems that an attorney or party has violated the Rule.

In 1983, the Supreme Court amended Rule 11, removing a court's discretion to find an attorney or party in violation by requiring courts to impose sanctions against a noncompliant party. The change may have been prompted by the growth of litigation due to the proliferation of laws conferring a private right of action (Schwarzer 1994). However, the impact of the Rule disproportionally affected plaintiffs. According to a study conducted by the Federal Judicial Center, plaintiffs who were civil rights litigants were sanctioned at a higher rate than those who asserted tort or contractual claims (Schwarzer 1994). Some argue that the amended Rule was a

direct attempt to curb plaintiffs' ability to assert substantive claims in court by limiting a plaintiff's ability to assert broad claims at the pleading stage (Redish and Amuluru 2005).

In 1993, the Judicial Conference sought to address some of the concerns and disparities that arose as a result of the changes to the 1983 amendment. Particularly, the Rule was changed to allow plaintiffs to assess the merits of claims after discovery and, therefore, giving the attorney an opportunity to develop and revise pleadings as they discovered evidence. Some argue that the change in this Rule created an environment that is more conducive to plaintiffs asserting substantive rights (Redish and Amuluru 2005). The Rule provided plaintiffs more leeway to further develop their substantive claims to conform to newly discovered evidence.

The amendment also required parties to give notice to opposing counsel when a party filed a motion for sanctions. It provided an alleged violator with an opportunity to remedy any objectionable conduct. The most significant amendment to Rule 11 was a provision that required courts to sanction a party when it found them in violation of the Rule. Although the Rule required sanctions, the drafters stated that courts could devise novel methods of sanctioning violators including monetary or nonmonetary sanctions (Federal Rules of Civil Procedure, Comment to 1993 Amendment). Nonmonetary sanctions could range from finding the violator in contempt or dismissing the violator's case. Monetary sanctions included paying the opposing party attorney's fee and costs. The drafters emphasized that the purpose of the amended Rule was to deter objectionable conduct rather than to reward the opposing party. As such, the Comments provide that monetary fines should be paid to the opposing party only in "unusual circumstances." This is a change from the prior Rule, which courts routinely awarded attorney's fees to the opposing party when a violator was sanctioned (Schwarzer 1994).

The 1993 changes were not well-received by the new Republican House. As previously mentioned, they advocated sweeping tort reform in its Contract with America. In response to the liberalization of Rule 11, they sought to amend many of changes that were made. Particularly, they introduced legislation that required sanctions once a court found a violation as provided in the 1983 Rules. Republicans also introduced legislation that eliminated the "safe harbor" provision to allow attorneys to correct objectionable conduct as a remedy to a violation. House Republicans specifically opposed the drafter's primary purpose of deterring sanctionable actions to compensating opposing counsel and parties by requiring the violator to pay opposing party's attorney's fees and costs (Rowe 1997). Although the foregoing bills were unsuccessful, Congress passed the Private Securities Litigation Reform Act of 1995, which required courts to make a written finding whether any party or attorney had violated Rule 11 in a class action securities lawsuit. Sanctions for violations are mandatory having a presumption of an award of an attorney's fees in certain instances. See 15 U.S.C. § 77z-1(c). President Clinton vetoed the legislation, but Congress successfully overrode the veto. In 2004, House Republicans again sought to amend Rule 11. They sought to change the provision to remove courts' discretion to impose sanctions when a party is in violation. The amendment would reinstate the provision in the 1983 rule that required courts to sanction a party when the court finds a party in violation of the rule (Redish and Amuluru 2005).

2.3 Congress as a Model of Control

Scholarship regarding the bureaucracy can provide insights for judicial decision making as the two institutions have similar structures and oversight in regards to procedural rulemaking. Just as Congress has delegated its authority to the judiciary to promulgate rules of procedure, Congress has similarly delegated its authority to the bureaucracy to promulgate rules and

regulations. Because this auspicious oversight is similar, theories regarding Congressional oversight of the bureaucracy are instructive in studying judicial decision making. I use literature explaining bureaucratic oversight to theorize that Congress is able to curb judicial discretion when courts apply procedural rules.

Agencies possess knowledge and expertise in their requisite areas and, therefore, Congress delegates its legislative power to the bureaucracy to promulgate rules and regulations. Congress, acting as the principal, imposes monitoring mechanisms to ensure that its agent, the bureaucracy, will not stray too far from its preferences. McCubbins and Schwartz (1984) present a theory of Congressional oversight by explaining it in terms of police patrols and fire alarms. Police patrols entail direct oversight; the principal proactively audits the agent (97). However, oversight by a fire alarm is indirect oversight as it establishes procedures encouraging third parties to alert the principal when the agent strays from the principal's directives (97).

In order to limit agency loss, principals devise mechanisms to limit the discretion of an agent (Shipan 1997, 7-8). This is important because as McCubbins, Noll, and Weingast (1989) show, once the policy preference is moved it is very difficult for the coalition enacting the policy to return the policy to its original position. Shipan notes that this principle applies when a court or an agency moves the policy. He further argues that there are actors who may prefer the new policy to the old policy and will therefore act to impede the majority's ability to return to the old policy. Furthermore, bureaucratic oversight in the form of reducing budgets and enacting legislation is costly (Balla 1998).

Scholars have argued that the most effective mechanism for oversight is implementing procedures (McCubbins, Noll, and Weingast 1987). Congress enacted the APA to establish bureaucratic oversight without incurring the costs of direct monitoring. According to McCubbins

et al., procedures can reduce the costs of obtaining information from the agent by equipping requisite constituents with vested interests to monitor agencies. They further theorize that political officials seek outcomes that are favorable to their constituents. They argue that the Administrative Procedure Act creates an environment that simulates political pressures that constrain agency policy making and render agencies more likely to render a decision according to the principal's preferences.

Agencies must provide notice of a proposed rule or regulation and a period for public comment, publicize the proposal to solicit participation from a wide variety of interests, render decisions based on the evidence and provide a rationalization for the decision. McCubbins et al. further argue that these procedures curb agency discretion by making its decision-making process public. Agencies cannot promulgate rules in secret. Also, a public rulemaking process forces agencies to consider political interests by involving interest groups to create an opportunity to comment. Interest groups have greater incentives to become more involved if the proposed rule has political implications. Therefore, groups with similar interests of those in Congress will be represented. Accordingly, those groups will provide political information for the agency to consider. The open structure of the process allows Congress, as the principal, to more easily acquire information. McCubbins et al. argue that agencies preferences are curbed because agencies no longer have information advantage to render decisions that are most favorable to the agency. Because information is public, interest groups have an incentive to "sound the alarm" when preferences stray too far from Members of Congress or the President. Accordingly, Congress "stack[s] the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency" (McCubbins et al., 261).

Bureaucratic scholars (i.e., Epstein and O'Hallaron (1994)) find empirical support for the notion that agencies are responsive to Congressional preferences. Weingast and Moran (1983) argue that Congress and in particular, Congressional committees, have a strong influence on bureaucratic outcomes. According to the Congressional Dominance Theory, Congress imposes controls, such as administrative procedures, to create an incentive for bureaucratic actors to align themselves with Congressional preferences. Shipan (2004) finds empirical evidence that, under certain conditions, the Food and Drug Administration renders decisions that are responsive to Congressional preferences: as the Congressional committee becomes more liberal, the agency becomes more activist. Likewise, as the committee becomes more conservative, the agency becomes less activist. Agency preferences are constrained when committee preferences are opposite of the agency.[1]

Just as the APA solves the problem of asymmetry of information with regards to bureaucratic oversight, the Rules Enabling Act solves a similar problem. Congress has delegated some of its legislative powers to the federal courts, particularly its authority to promulgate the Rules of Practice and Procedure, just as Congress has delegated legislative powers to bureaucracy agencies. Because Congress has delegated its authority to the federal judiciary, it has devised a similar mechanism, the Rules Enabling Act, for Congressional oversight. The structure of the Rules Enabling Act is similar to the APA. Both Acts have provisions that open its rulemaking process to the public. The notice and comment period of the Rules Enabling Act is structured so that constituents will be more likely to "sound the alarm" if the institution strays too far from the preferences of its principal, Congress (McCubbins et al. 1987). Because

[1] Scholars have debated the influence of the President versus Congress. See Woods and Waterman (1991) finding evidence that bureaucracies are subject to both presidential and Congressional control. However, Moe (1987) that congressional-dominance theorists ignore the role of the president and his powers as head of the executive branch (i.e., appointment of agency heads, agency budgets, etc…).

bureaucratic scholarship has shown that the APA acts as a constraint for bureaucratic outcomes, I expect the Rules Enabling Act to likewise constrain judicial preferences. My expectation is grounded on the aforementioned theories explaining bureaucratic control. Just as Congress is able to control bureaucratic outcomes by aligning similar interests via the APA, I argue that Congress controls judicial outcomes regarding procedural rules via the Rules Enabling Act. I argue that federal circuit courts are particularly aware of Congressional preferences because any adverse action can place in peril federal courts' ability to control their judicial agendas. I also argue that federal circuit courts are keenly aware of who sits on the House and Senate Judiciary Committees (see Eskridge 1991b), because these committees act as gatekeepers having jurisdiction over any bills seeking to amend the Federal Rules. Unlike statutes governing a specific subject matter where scholars have found that circuit courts are not responsive (see Revesz (2001); Hume (2009)), procedural rules cover all aspects of litigation. For example, Rule 11 governs all pleadings in civil litigation. Accordingly, any legislation seeking to limit or expand the discretion of federal courts in Rule 11 sanctions applies to litigation in *all* practice areas and, therefore, would substantially curb judicial discretion in all areas. Because any retaliation from Congress can significantly hinder federal courts' ability to control their appellate jurisdiction, federal courts are acutely attuned to Congressional preferences. Furthermore, I do not expect to find that circuit courts are responsive to Supreme Court preferences, as Klein and Hume (2003) find that circuit courts are not more likely to decide "cert. worthy" cases in conformance with Supreme Court preferences. However, I do expect to find that circuit courts are responsive to the ideology of the Judicial Conference as it serves as a gatekeeper for proposals seeking to amend the Federal Rules.

2.4 Hypotheses

Judges render decisions according to their personal policy preferences. The application of procedural rules can have ideological implications as illustrated in the discussion regarding Rule 11. Amendments to the Rule have been highly politicized with Republicans seeking to limit plaintiffs' claims by requiring mandatory sanctions when a violation has occurred. Galanter (1974) argues that individuals are disadvantaged when litigating against the government and businesses because they lack resources and incentive to create a sustained litigation strategy. Later empirical research confirms that individuals are in fact disadvantaged (Songer and Sheehan 1992, Songer et al. 2000; Kaheny 2010). I expect that individuals are further disadvantaged when litigating against businesses as conservatives have traditionally favored business interests (Howard and Brazelton 2014 forthcoming). Accordingly, I expect that conservative circuit panels will rule against individuals in decisions appealing sanctions under Rule 11. Therefore,

H1: Conservative panels are more likely than liberal panels to rule against individual litigants in an appeal challenging a Rule 11 sanction.

Because scholarship has shown that federal courts are responsive to Members who sit on Congressional committees (Eskridge 1991b). However, scholarship shows that agencies as well as other actors are many times responsive not to Congress as a whole, but rather to the committees with jurisdiction on the particular issue (Eskridge 1991b). Here, the House and Senate Judiciary Committees have jurisdiction over bills seeking to amend the Rules, and so the composition of these committees may influence judicial decision making. Therefore, I expect the following:

H2a: As the ideology of the House Judiciary Committee becomes more conservative, the individual is less likely to prevail on a Rule 11 sanction.

H2b: As the ideology of the Senate Judiciary Committee becomes more conservative, the individual is less likely to prevail on a Rule 11 sanction.

While these are the committees with jurisdiction over amending the Rules, the Chairs of the House and Senate Judiciary Committees act as gatekeepers for all bills introduced seeking to amend those Rule; the Chairs thus have the power to essentially kill a bill by never scheduling it for a hearing or markup (Oleszek 2013). As a result, the ideology of the Chair alone may influence how judges decide Rule 11 cases. Therefore, I expect:

H3a: As the ideology of the Chair of the House Judiciary Committee becomes more conservative, individuals are less likely to win.

H3b: As the ideology of the Chair of the Senate Judiciary Committee becomes more conservative, individuals are less likely to win.

2.5 Data and Methods

Data for this project was collected by examining cases published in Lexis/Nexis Academic. I coded cases from 1980 to 2005 for the First through Eleventh Federal Courts of Appeals and the D.C. Court of Appeals. I searched for all cases that included the term "Rule 11" and "Civil Procedure." The dataset includes all published and unpublished cases where a party appealed the decision of the district court finding a violation of Rule 11 or where a party appealed the denial of their Rule 11 motion seeking to find the opposing party in violation. Given my interest in understanding how circuit courts treat individual plaintiffs, I included only cases involving individuals and businesses, for an overall N of 307.

My dependent variable is whether the individual won the appeal. I coded "1" if the individual won and "0" if the individual lost. My independent variables include the median ideology of the circuit court panel. I used the Giles, Hettinger, and Pepper nominate scores (GHP

scores) for this project (Giles et al. 2001). The GHP scores are an ideological measure of judges who sit on the Federal Courts of Appeals. Giles, Hettinger and Peppers use the Poole (1998, 2009) and Rosenthal Common Space scores of the nominating Senator, considering the strong influence of senatorial courtesy. If one home-state Senator is from the president's party, the Senator's Common Space score is used. If both home-state senators are from the president's party, the average of the two scores is used. Finally, if the judge is from a state where there is no Senator who is a member of the president's party, the president's score is used. Because there are many vacancies on the Courts of Appeals, many of those vacancies are filled with district court judges who sit on circuit court panels by designation. Accordingly, I used Christina Boyd's ideology measures of district court judges for those judges who sat by designation (Boyd 2010). To ascertain the ideology of the district court judge, she used the method employed by Giles, Hettinger, and Peppers (2001) and the extension by Epstein, Martin, Segal, and Westerland (2007). Additionally, I controlled for the median ideology of the Judicial Conference using each member's GHP score as this Conference acts as a gatekeeper submitting recommendations for amendments to the Rules. I controlled for the ideology of the Supreme Court by using the median judicial common space score for the Court. I control for the ideology of the Supreme Court because it has power to reverse decisions of circuit courts. Although some scholarship has found that circuit court panels are not responsive to Supreme Court (Klein and Hume 2003), other scholarship has shown that circuit courts follow Supreme Court mandates (Songer et al. 1994). I also controlled for the influence of Congress by using the median Poole and Rosenthal Common Space scores for the House and Senate Judiciary Committees, their respective Chairs.[2] I also controlled for the president as he has the power to veto legislation passed by Congress. I

[2] (See Epstein et al. (2007) using a bridging method placing common space scores on the same scale; see also Bailey and Chang (2001) using a similar method.)

estimated a probit model because the dependent variable is dichotomous. For all independent variables, I measured the distance of the median ideology of panel to each of the independent variables by subtracting the absolute value of the median ideology of the panel from the absolute value of the ideology of the requisite independent variable. Also, in this model I used robust standard errors and clustered on the circuit to account for the possibility that residuals may not be independent within each circuit. Therefore, my model provides as follows:

$$\textbf{Sanction} = \beta_0 + \beta_1 \textbf{ Panel Ideology} + \beta_2 \textbf{ Circuit Median} + \beta_3 \textbf{ Judicial Conference} + \beta_4 \textbf{ Supreme Court} + \beta_5 \textbf{ House Judiciary Committee} + \beta_6 \textbf{ Senate Judiciary Committee} + \beta_7 \textbf{ House Chair} + \beta_8 \textbf{ Senate Chair} + \beta_9 \textbf{ President} + \varepsilon$$

2.6 Results and Discussion

The summary statistics are below in Table 2.1.

Table 2.1: Summary Statistics

Variable	Mean	Standard Dev.	Minimum	Maximum
Individual Winning	.375	.48	0	1
Panel Ideology	.067	.289	-.532	.559
Circuit Median	.063	.182	-.385	.507
Judicial Conference	.113	.166	-.290	.530
Supreme Court	.145	.154	-.188	.462
House Judiciary Cmt	-.030	.166	-.405	.366
Senate Judiciary Cmt	.098	.163	-.274	.556
House Chair	-.116	.422	-.449	.659
Senate Chair	-.095	.342	-.470	.407
President	-.328	.185	-.715	.087

Table 2.1 shows that individuals won at a rate of 38 percent, providing some evidence that individuals are disadvantaged when litigating against businesses. Businesses have superior resources and incentive to carry out a sustained litigation strategy. However, if judicial ideology does not influence Rule 11 decisions, individual litigants should be equally disadvantaged when

litigating before liberal and conservative panels. The results of the probit model testing my theory are presented in Table 2.2.

Table 2.2: Probit Model of the Individual Winning

Variable	Coefficient	Standard Error
Panel Ideology	-.854*	(.299)
Circuit Median	-.433	(.514)
Judicial Conference	1.721*	(.806)
Supreme Court	-1.162	(1.005)
House Judiciary Cmt	6.444	(3.820)
Senate Judiciary Cmt	-4.178	(3.005)
House Chair	-2.161*	(.978)
Senate Chair	-1.421	(1.443)
Constant	-.283	(.324)
N=307 Log Likelihood = -190.940		* = p > .05; χ^2 = 72.64*

As hypothesized, the median ideology of the panel has a statistically significant effect on the likelihood of the panel ruling in favor of the individual when litigating against a business. These results indicate that I can reject the null hypothesis. The results provide support that the more conservative the panel, the less likely the panel will rule in favor of the individual. However, probit coefficients do not provide information regarding the effects of the magnitude of the independent variable (Zelner 2009). In order to ascertain the magnitude, I estimate the predicted probability of the individual winning. The results of that estimation are presented in Table 2.3.

Table 2.3: Predicted Probability of the Individual Winning by Panel

Panel Ideology	***Probability***	***Confidence Intervals***
Mean	**.36**	**(.33, .38)**
Minimum	**.57**	**(.41, .72)**
Maximum	**.22**	**(.15, .29)**

This estimation is constructed with a 95 percent confidence interval with all variables except Panel Ideology held at their mean. When Panel Ideology is held at its mean, the likelihood of the individual winning a Rule 11 appeal is 36 percent. However, when Panel Ideology is held at its minimum, i.e., when the panel is most liberal, the likelihood of the individual winning increases to 57 percent. When Panel Ideology is held at its maximum, i.e., when the panel is most conservative, the probability of the individual winning decreases to 22 percent. The confidence intervals indicate that the results of this estimation are statistically significant. Estimating first differences, the individual is 34 percent less likely to win as the ideology of the panel changes from minimum to maximum. The results of this estimation are depicted in Figure 2.1 below.

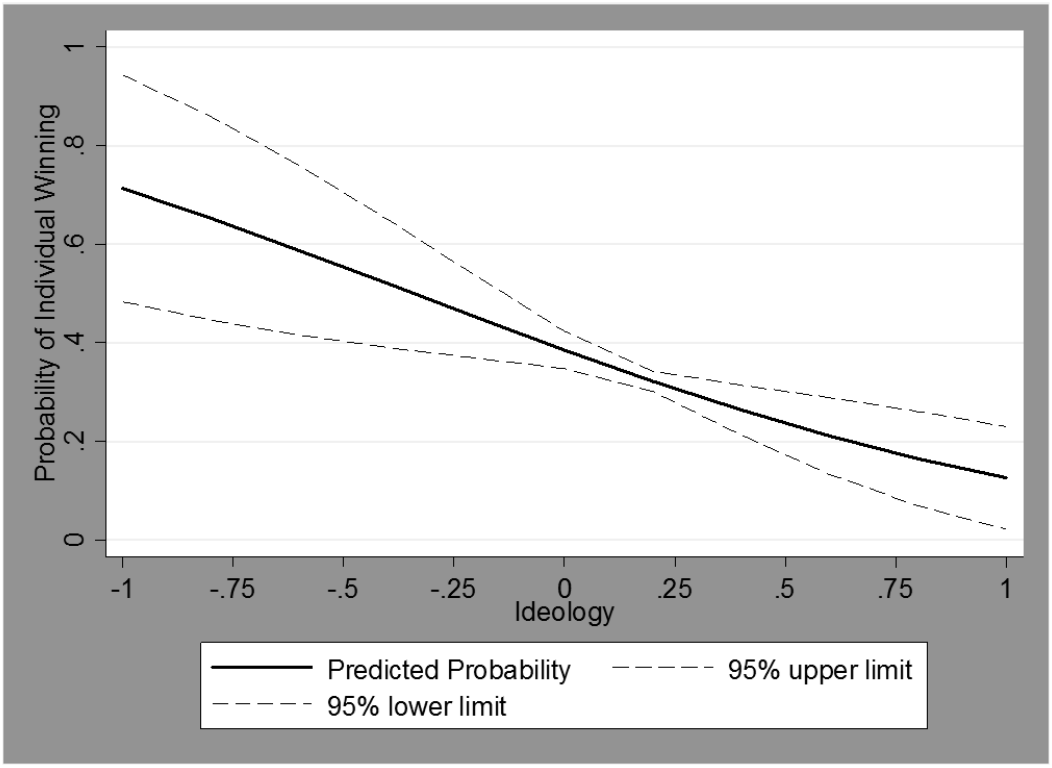

Figure 2.1: First Differences of Panel Ideology & the Likelihood of the Individual Winning

When individuals litigate against businesses, conservatives are more likely to find that individual litigants violated Rule 11 and are susceptible to dismiss their case on the grounds that the claims are frivolous. The evidence suggests that conservative panels are sanctioning individuals because of their status. This places individuals at a substantial disadvantage in the litigation process when they litigate against businesses. Galanter's theory provides that individuals are disadvantaged because they often lack resources to hire better attorneys, do not have the incentive to maintain the high costs of sustained litigation, and lack long-term goals of shaping legal precedent to their advantage. My results provide evidence that individuals are disadvantaged not only because of their status, but also because their status prompts ideological decision-making that is detrimental when litigating before a conservative panel. The substantive implications are important for individual litigants. Adverse decisions against individual litigants prevent them from "having their day in court" because the merits of their claims are not addressed. If conservative panels are more likely to uphold a Rule 11 sanction for individual litigants and, therefore, prevent a court from hearing the merits of the case, then business litigants are not only able to shape precedent, but may also deter individual litigants from filing lawsuits in jurisdictions with conservative panels or from filing lawsuits altogether.

The hypotheses testing the effects of Congress have mixed results. First, I fail to reject the null hypotheses regarding the effects of the House and Senate Judiciary Committees. The third hypotheses regarding the Chairs of those committees also have mixed results, with no effect found for the ideology of the Chair of the Senate Judiciary Committee. However, I do find that as the ideological distance between the House Judiciary Committee Chair and the circuit panel grows, the individual is less likely to win.

Table 2.4: Predicted Probability of the Individual Winning by House Chair

House Chair Ideology	*Probability*	*Confidence Intervals*
Median	**.36**	**(0.33, 0.38)**
Minimum	**.76**	**(0.46, 1.05)**
Maximum	.11	(-0.04, 0.25)

The estimation of the predicted probability is presented in Table 2.4. This estimation is also constructed with a 95 percent confidence interval with all variables except House Chair held at their mean. When House Chair is held at its median, the likelihood of the individual winning a Rule 11 appeal is 36 percent. However, when House Chair is held at its minimum, i.e., when the panel is most liberal, the likelihood of the individual winning increases to 76 percent. When Panel Ideology is held at its maximum, i.e., when the panel is most conservative, the probability of the individual winning decreases to 11 percent. The confidence intervals indicate that the results of the estimation holding House Chair at its median and minimum are statistically significant, but the estimation holding House Chair at its maximum is not statistically significant.

These results may be a reflection of House Republicans' activity in this area. House Republicans have been introducing legislation seeking to amend Rule 11 to discourage trial lawyers from filing claims that may be considered frivolous. If an attorney was unsure whether their arguments are grounded in law, they would be discouraged from asserting novel arguments on their plaintiffs' behalf because they would not want to risk a court finding that their "novel" arguments was in fact frivolous.

Furthermore, the Chair is a powerful gatekeeper for bills introduced. This finding lends some support for the theory that circuit courts are responsive agents of their principal, namely Congress. This finding also lends some support for the deck-stacking theory providing that the Rules Enabling Act sufficiently influences the outcome of judicial decisions. Because of the

unique provisions of the Rules Enabling Act which subject the Federal Rules of Practice and Procedure to Congressional review and public scrutiny, circuit courts may be particularly receptive to changes in Congressional ideology, namely the Chair of the House Judiciary Committee, in order to prevent a Congressional action incongruent with their preferences.

2.7 Conclusion

The models provide evidence that circuit panels transform its mandatory appellate jurisdiction into one that is discretionary by deciding procedural rules to set their judicial agendas. The evidence provides that the ideology of the circuit panel has a significant effect on the likelihood of a litigant's success, depending on the litigant's status. Particularly, conservative panels are more likely to rule against individual litigants when appealing the grant or denial of a Rule 11 sanction. These results have significant implications for granting litigants access to the courts. Courts have power to dismiss a litigant's claim as a sanction pursuant to Rule 11. In certain instances, a court can dismiss a litigant's claim seeking relief with prejudice, thus barring the litigant from litigating the merits of that claim. Consequently, these issues often present an absolute bar, preventing a court from deciding the case. Accordingly, the litigant can never obtain redress from his or her grievances. As a result, the implications of a court declining to reach the merits of a litigant's claim are immense. A litigant is without recourse in the judicial system if a court refuses to hear their claim. Because of this, a litigant's ability to comply with procedural rules is of the uttermost importance.

Furthermore, there is some support that circuit panels are responsive to changes in the ideology of Congress. While circuit panels seem not to respond to Congress as a whole, the evidence suggests that circuit panels render decisions based on the ideology of the Chair of the House Judiciary Committee. Given that the House Judiciary Committee is likely the principal

gatekeeper for bills seeking to amend Rule 11, these results indicate that circuit panels are cognizant of Congress's power to override their decisions. More broadly, these results suggest that federal judges do take into account Congressional preferences, thus constraining their ability to freely decide according to their sincere policy preferences.

In the next chapter, I examine whether federal circuit courts set their judicial agendas by transforming their mandatory appellate jurisdiction into one that is discretionary by deciding cases on jurisdictional grounds. Particularly, I examine whether federal circuit courts achieve this goal in controlling access by rendering decisions to grant or deny motions seeking to certify a class in civil rights class action lawsuits. I seek to demonstrate how federal courts deny certification to control which litigants obtain access to the courts on a class-wide scale.

CHAPTER 3: JURISDICTIONAL IMPLICATIONS OF CERTIFICATION DECISIONS IN CLASS ACTION LAWSUITS

3.1 Introduction

In 1994, Wal-Mart hired Betty Dukes as a cashier earning a wage of $5 an hour. After five years of no advancement, she decided to sue Wal-Mart for discrimination on the basis of her gender. She, along with six other named plaintiffs, sued Wal-Mart as a class, alleged that Wal-Mart discriminated against women by denying promotions and providing wages at a lower rate than men. Wal-Mart challenged the certification of the class, alleging that their complaints did not specifically allege the wrongs committed by Wal-Mart and that the potential class was too large to certify. A federal district court certified the class and the Ninth Circuit upheld the district court's decision. Wal-Mart then appealed the decision certifying the class to the Supreme Court.

In a split 5-4 decision, the Supreme Court held that a group of women comprised of potentially 1.5 million plaintiffs was too large to certify as a class in an employment discrimination claim. Justice Scalia, writing for the Court, stated that the plaintiffs could not prove that Wal-Mart had a corporate-wide policy of discrimination in pay or promotion, and that the potential of class of 1.5 million women was too numerous to set forth a common claim of gender discrimination needed for class certification. All of the conservatives of the Court joined the majority opinion in favor of Wal-Mart, while the liberals of the Court dissented. In response to the Supreme Court's decision in *Dukes*, Senator Al Franken (D-MN) and Rep. Rosa DeLauro (D-CT) introduced the Equal Employment Opportunity Restoration Act of 2012 to overturn the decision by conferring jurisdiction to the federal courts for class action lawsuits having a large number of plaintiffs.

The *Dukes* decision practically denied 1.5 million potential plaintiffs the opportunity to gain access to the courts. The vast majority of potential plaintiffs are very unlikely to hire an attorney to bring a discrimination claim against Wal-Mart, as they lack the time and resources to pursue their individual claims. Therefore, most of these 1.5 million women will never obtain even the possibility of seeking redress from the alleged discrimination committed by Wal-Mart. This case highlights the research question I address in this chapter: Do federal courts use the jurisdictional threshold issues to control access to the courts?

In this chapter, I theorize that federal circuit courts use class certification to control access to the judicial system. Specifically, I argue conservative panels seek to control access by denying potential plaintiffs class certification. Because conservatives favor business interests, I argue that conservative panels are more likely to deny certification to potential plaintiffs. However, courts do not decide cases in a vacuum; I argue that federal circuit courts are responsive to changes in Congress's ideology. Because Congress possesses the ability to expand or restrict federal court jurisdiction, I argue that federal panels are responsive to Congressional preferences. First, I discuss of the jurisdiction of the federal courts and class action lawsuits. Next, I provide a review of the literature regarding the jurisdiction of the courts, and then explicate my theory and hypotheses. Finally, I present my empirical tests, examining all employment discrimination cases between 1980 and 2000 where circuit courts considered motions to certify a class and permitted a class action suit to proceed.

3.2 Jurisdiction, Congress and Courts

Constitutionally, federal courts can only hear cases that arise under their jurisdiction. In order for a federal court to adjudicate a case, a court must have subject-matter jurisdiction over the claim. Pursuant to Article III, Congress has the power to establish, modify, remove, or add to

the subject-matter jurisdiction of the federal courts but for the original jurisdiction conferred to the Supreme Court pursuant to the Constitution. Subject-matter jurisdiction gives federal courts power to adjudicate cases on two grounds: jurisdiction by federal question or by diversity (Baude 2007).

Pursuant to Article III of the Constitution, Congress has the power to determine the areas of law that raise a federal question and, therefore, confers jurisdiction over those areas to the federal courts. Recently, Congress has used its powers controlling the jurisdiction of the federal courts that raise a federal question for political reasons. Members of Congress have introduced bills seeking to strip the jurisdiction of the federal courts in cases pertaining to the constitutionality of the pledge of allegiance, certain abortion cases, and marriage (see Mayer-Cesiano 2006; Miller 2009). Congress's most recent action regarding removing federal courts' jurisdiction is in the area of military law. In response to recent decisions by the Supreme Court, Congress passed the Military Commissions Act of 2006, stripping the jurisdiction of federal courts from hearing habeas corpus petitions from enemy combatants. It responded to the Supreme Court's decisions in *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004), holding that detainees and U.S. citizens who were held at Guantanamo Bay had a right to petition for habeas corpus relief.

Article III also provides federal courts with power to adjudicate cases under the diversity jurisdiction, which constitutes controversies "between Citizens of different states," and grants Congress the power to determine its requirements. Specifically, Congress through the Judiciary Act of 1789 specified the requirements of diversity jurisdiction, conferring to the federal judiciary jurisdiction over cases involving residents from different states (Baude 2007). Plaintiffs and defendants must be domiciled in different states and they must meet the requirement for the

amount in controversy, which is set by Congress. That is, parties can litigate claims that only implicate a cause of action arising under state law if the requirements for diversity jurisdiction are met. Over the years, Congress has modified the domiciliary requirements and has increased the amount in controversy, which is presently $75,000. When a state law claim is implicated, parties may remove the case from state court to litigate the claim in a federal court. The principle supporting diversity jurisdiction provides that litigants have a neutral forum to litigate their state law claims and no litigant will enjoy a "home-state advantage" by litigating against an out-of-state party in the litigant's home state.

3.3 Class Action Lawsuits in Federal Courts

Because Congress controls the jurisdiction of the federal courts, Congress controls the jurisdictional boundaries of class action lawsuits. Generally, federal courts have jurisdiction to adjudicate class action lawsuits if the requirements for diversity jurisdiction are met or if the plaintiff presents a claim arising under federal law. Class action lawsuits permit the consolidation claims of all plaintiffs presenting similar claims against a defendant. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, there are four elements that federal courts must consider when plaintiffs file motions seeking certification. First, the potential class must satisfy the numerosity requirement. According to the Rule, a class may be certified if the members of the class are so numerous that treating them as co-plaintiffs in a traditional lawsuit is impractical. Second, there must be common questions of law and fact among members of the class. Next, the claims or defenses of the representatives of the class action must be typical of members of the class. Last, the representative parties of the class action lawsuit must fairly and adequately represent the interests of the class (Rule 23, Fed.R.Civ.P.).

Class actions originated in courts of equity to more efficiently adjudicate a number of similar claims. The procedural mechanism was codified as Rule 23 of the Federal Rules of Civil Procedure in 1938 shortly after the enactment of the Rules Enabling Act (Rabiej 2004). The Supreme Court amended Rule 23 in 1966, promulgating a number of changes. First, the Rule was amended to provide greater judicial discretion in certifying lawsuits as class actions. Prior to this amendment, federal courts could certify class actions only if the numerosity, commonality of law and fact, typicality of claims, and fairness of adjudication as a class action were met (See Rule 23(a), Fed. R. Civ. Pro). The amendment to the Rule provided a catch-all provision, which states that courts can certify a class if plaintiffs present common questions of law and fact, and if a class action is a superior method of adjudicating claims (see Rule 23(b)(B)(3), Fed. R. Civ. Pro). Legal scholars argue that the purpose of the amendment was to facilitate greater access to the courts for plaintiffs who otherwise would not meet the requirements pursuant to Rule 23(a) (Burbank 2005). The Rule was specifically amended to provide a greater opportunity for civil rights claimants to file class action lawsuits (Frymer 2003).

While the Supreme Court amended Rule 23 to expand potential plaintiffs' ability to bring class action lawsuits, the Court limited access in *Zahn v. International Paper Company* (1973). In *Zahn*, the Supreme Court held that all members of a class action lawsuit were required to meet the amount in controversy requirement pursuant to the requirements of diversity jurisdiction. As with the vote in *Wal-Mart v. Dukes*, the vote was divided on ideological lines with three liberals of the Court dissenting. Plaintiffs who did not meet the amount in controversy, which was $10,000 at the time of *Zahn*, could not join the class. The impact of this decision severely limited the plaintiffs' ability to bring lawsuits as they were each required to file a lawsuit as an individual plaintiff. In 1990, Congress codified the Supreme Court's decision in *Zahn*. Congress

passed with President George H.W. Bush's signature, the Jurisdiction Improvements Act which, in part, provided that federal courts could not exercise supplemental jurisdiction in class action lawsuits over claims that did not meet the requirement for the amount in controversy (Murphy 1995).

Another important amendment to Rule 23 occurred in 1998, when the Supreme Court amended the Rule to permit interlocutory appeals for decisions regarding class certifications. Ordinarily, appellate courts do not have jurisdiction over cases appealed from a non-final judgment. Generally, a court must decide all issues presented in order for a litigant to appeal the judgment. Because the issue of class certification generally is a threshold issue,[3] the Rules required courts to rule on a certification motion and adjudicate the merits of a claim before a litigant could appeal the ruling on class certification. In 1998, the Supreme Court amended the Rules rendering rulings on class certifications interlocutory and, therefore, permitting litigants to appeal the ruling before a decision is made on the merits of a claim (Rabiej 2004).

In 2003, the Supreme Court again amended Rule 23 permitting courts to certify a class any time before a final judgment is rendered on the merits. Second, the Rule was amended to allow plaintiffs to request certification of a class if there were common issues of fact. Other amendments to the Rule did not affect certification. As a result of these amendments, plaintiffs were aided in their ability to meet the requirements and the number of class actions grew at a fast

[3] In a study conducted by the Federal Judicial Center, they examined motions seeking class certification in federal district courts. According to this study, courts often rule on the merits of a case along with a determination on the issue of class certification. In fact, the study finds that certification of a class action is a type of intermediate procedural ruling. In its study of the District Court for the Northern District of Illinois, 80 percent of motions to dismiss were decided before the motion to certify. In its analysis of four federal district courts, 20 percent of motions for summary judgment were ruled on before a certification ruling and, in one district court, 67 percent of motions for summary judgment were ruled on before a determination on certification.

rate. Federal courts did not take kindly to the growth of class actions. Class actions sometimes present complex legal questions which utilize scare judicial resources (Purcell 2008). According to a study conducted by the Federal Judicial Center examining securities class action lawsuits, class actions consume three times as many judicial resources than a traditional lawsuit (Willging et al. 1996).

Some evidence provides that class action lawsuits were more beneficial to trial attorneys than members of the class. Particularly, attorneys reaped the majority of the benefits of class action litigation by incurring large attorney's fees with little compensation remaining for the members of the class. Empirical evidence shows that in consolidated cases, juries are more likely to confer higher awards when there is one plaintiff who joined the lawsuit that was severely injured (Bordens and Horowitz 1989). This provides evidence that juries are more likely to grant higher awards to all members of a class only if there is a small number of plaintiffs who suffered a serious injury. Some argue that class action lawsuits provide a windfall for attorneys who collect millions of dollars in attorney's fees while leaving members of the class with nominal awards.

Others perceive class action lawsuits as a threat to business interests. Richard Posner, a judge sitting on the Seventh Circuit Court of Appeals, calls class action lawsuits "blackmail settlements" due to a company's potential risk of a judicial determination finding it liable for all members of a class (Schwartz 2000, 490). Therefore, corporations would be less likely to proceed to trial to avoid the risk of an unfavorable settlement in a class action lawsuit. Even more, the threat of filing a lawsuit could be used as a coercive tool pressuring corporate defendants to settle. Therefore, certifying the class is an essential step for trial attorneys. More importantly, plaintiff's attorneys sought to litigate in state court, where they often found a more

favorable forum. In order to circumvent the requirements of diversity jurisdiction, attorneys added litigants who were residents of the same state as the defendant, negating the diversity of all litigants which is required for a court to obtain subject-matter jurisdiction over state-law claims (Purcell 2008). When Congress conferred citizenship to corporations, they began removing cases to federal courts for litigation that were sympathetic to their claims. Corporations use the mechanism of removal to gain a strategic advantage in litigation. When corporations removed cases to federal courts, plaintiffs would drop their claims anticipating an adverse decision in federal court (Curry 2007). Congress sought to rectify the perceived problems that arose with these lawsuits.

In 2004, Congress passed the Class Action Fairness Act, which modified the original jurisdiction of the federal courts conferring multi-state class action litigation to the jurisdiction of the federal courts regardless of the diversity of the parties subject to the litigation. Before the Act, federal courts had power to adjudicate class action lawsuits under the normal rules governing diversity jurisdiction, which required the named class plaintiffs and defendants to be domiciled in different states. Furthermore, the Act confers diversity jurisdiction in class action lawsuits where total amount in controversy is $5 million or more. Additionally, federal courts must exercise jurisdiction over class action lawsuits where one-third or less of the members of the class reside in the same state as the defendant, must decline jurisdiction when two-thirds or more of the members share the defendant's domicile, and has discretion to exercise jurisdiction when more than one-third but less than two-third of the members are domiciled in the defendant's state.

3.4 Empirical Scholarship Examining Congress, Courts and Class Action Lawsuits

Scholarship regarding the jurisdiction of the federal courts has been scarce. Much of the scholarship regarding the jurisdiction of the federal courts has focused on Congress. Congress controls the jurisdiction of the federal courts by a number of mechanisms. First, Congress can control the number of federal judgeships. Scholars have provided evidence that as the caseload of the federal courts increases, Congress increases the number of judgeships to accommodate for the increase number of cases (DeFigueiredo and Tiller 1996). Congress is also responsive to legal constraints of the jurisdiction of the federal courts, as evidenced by limiting the courts' diversity jurisdiction when caseload increases. Since diversity cases comprise of between 25 and 30 percent of the federal courts' docket, Congress is aware of the demands and constrains diversity cases place on the federal courts (Curry 2007). Historically, Congress has limited the diversity jurisdiction of the federal courts instead of expanding it. This is evident, in part, by the increases in the amount in controversy from $10,000 in 1952; $50,000 in 1988; to $75,000 in 1996 (Curry 2007). Increasing the amount in controversy limits the number of litigants who are able to meet the requisite amount and, therefore, restricts the number of defendants who are able to remove their case to federal court. Furthermore in 1978, a bill was introduced in the House to eliminate the diversity jurisdiction of the federal courts (Purcell 2008). Not only does Congress modify the diversity jurisdiction of federal courts, Congress has sought to eliminate the diversity jurisdiction due to the burden that it places on federal courts. These findings indicate that Congress is responsive to the administrative needs of the federal courts to assist the courts in accommodating the increase in caseload.

Not only does Congress respond to administrative considerations, empirical evidence shows that Congress uses the jurisdiction of the federal courts to achieve their political goals.

The evidence suggests that Congress uses jurisdiction as a tool to further its policy preferences. Scholars find that Congress increases the number of federal judgeships when Congress and the Presidency are politically aligned (DeFigueiredo and Tiller 1996). This provides evidence that Congress seeks to carry forth its policy goals by rendering it easier to appoint judges who are ideologically aligned with Congressional preferences. Congressional modification of the diversity jurisdiction of the federal courts is premised on Congress's belief that ideologically aligned judges will decide cases to conform to Congressional preferences. This evidence is also supported by Curry's finding (2007) in testing the likelihood of the House passing legislation modifying diversity jurisdiction. He finds that as the workload and ideological distance between federal district court and the House increase, the likelihood of Congress limiting diversity jurisdiction increases. His findings indicate that Congress is seeking to limit the jurisdiction of the federal courts when the courts' preferences are not ideologically congruent. By conferring power to ideologically aligned federal courts, Congress can further its political goals.

However, little scholarship examines the courts' use of jurisdiction to further their policy preferences. Legal scholars have provided qualitative evidence that the courts use rules regarding class action lawsuits in order to provide more access for potential plaintiffs. Frymer (2003) uses qualitative evidence of the federal courts' power to use jurisdiction of the federal courts to integrate labor unions. First, he notes that Congress created to Equal Employment Opportunity Commission to address discrimination in private companies, but failed to provide the EEOC with enforcement power. Because the EEOC lacked power, federal courts empowered private litigants by liberalizing class action requirements rendering it more favorable to bring a discrimination lawsuit against employers and unions. In fact, the EEOC only filed four percent of discrimination lawsuits against employers between 1972 and 1989 (Frymer 2003, 490; Donohue and Siegelman

1991, 1019). The EEOC did not have cease and desist powers, so individual litigants sued for a private right of action to enforce antidiscrimination laws against employers. During the time the EEOC lacked enforcement power, private attorneys filed class action lawsuits using federal statutes to enforce antidiscrimination laws.

Other scholars have conducted empirical work studying the jurisdiction of the federal courts in the context of class action lawsuits. Fitzpatrick (2010) finds that the political affiliation of the judge has no statistically significant effect on the probability of a district court judge approving a higher fee award in class action settlements. However, Fitzpatrick does not test ideology but rather simply the partisanship of the judge by determining whether the judge was appointed by a Democratic or Republican president. Measuring partisanship instead of ideology is problematic because partisanship provides very little variability in the independent variable. Furthermore, Coffee and Paulovic (2007) use legal analysis examining the likelihood of class certification by circuits to conclude that the Second, Third, and Ninth Circuits render liberal certification decisions and the Fourth, Fifth, and Seventh Circuits render conservative certification decisions. They link the variation, in part, to different standards of review in decisions for certification. For instance, the Second Circuit reviews decisions granting certification under an abuse of discretion standard but reviews decisions denying certification de novo. Also, Coffee and Paulovic argue that the Ninth Circuit is more liberal regarding the requirement that potential class members share a common question of law and fact. They also argue that precedent of the Fifth, Seventh, and Eleventh Circuits is most restrictive regarding class certifications seeking monetary damages and injunctive relief, while the Second Circuit has interpreted precedent in a more liberal fashion permitting such certifications. Coffee and Paulovic find that over 40 percent of class actions were filed in the Second and Ninth Circuits

which indicates that attorneys are forum shopping, providing further anecdotal evidence that these circuits are friendly forums for those seeking class certification. The variation between liberal and conservative interpretations of Rule 23 could account for the variation in the number of class actions that are filed within the Courts of Appeals.[4]

3.5 Theory: Jurisdiction and Class Action Lawsuits

My study addresses the gap in the literature regarding federal circuit courts' use of jurisdictional issues to control access. Because jurisdictional threshold issues can prevent certain litigants from accessing the courts, I argue that circuit courts use threshold issues to further their own policy preferences. They accomplish their goals by controlling certain parties' ability to gain access to the courts. By controlling who can gain access, courts cannot only choose which cases it will hear on the merits, but discourage certain litigants from filing cases if litigants find that courts are unlikely to hear their case. Litigants want to avoid time-consuming and costly litigation if courts are unlikely to confer jurisdiction over their claims and render a decision on the merits. Therefore, judges can further their own policy preferences by controlling who can gain access. They are able to do so because Congress has delegated its authority to the federal courts to promulgate rules that implicate jurisdiction. However, unlike rules that are solely procedural but are promulgated by the federal courts, Congress controls the jurisdiction of the federal courts. Because Congress has not conferred sole power over jurisdictional issues, such as class certifications, federal courts are not as free to decide these cases according to their ideological preferences. However, because of legislative action seeking to limit the jurisdiction of the federal courts, I argue that federal circuit courts act strategically seeking to maximize their

[4] Other scholars have empirically examined class actions without considering the effects of ideology (See Eisenberg and Miller 2005 examining various methods of calculating attorney's fee award; and Gande and Lewis 2009 examining the probability of shareholders anticipating a class action lawsuit and its effect on the requisite industry).

policy preferences but within the confines of Congressional ideology. Circuit courts desire to do so to retain their power to set their own judicial agendas. Therefore, I examine the extent that federal circuit courts control their appellate jurisdiction by the grant or denial of class certification in the area of civil rights litigation. However, I must also test the alternative theory that circuit courts decide cases on the threshold ground of jurisdiction in order to conserve scarce judicial resources to address heavy caseloads (Willging et al. 1996).

3.6 Hypotheses

First, the federal courts seek to control their caseload. Federal courts must resolve disputes with increasingly large caseloads (Willging et al. 1996). One method of alleviating large caseloads is to deny certification of a class. As class action lawsuits demand up to three times as many judicial resources than a non-class action lawsuit, panels could deny certification in order to preserve scarce judicial resources. Therefore, my first hypothesis is as follows:

H1: As the caseload of the circuit increases, the panel is more likely to deny a motion seeking class certification.

Furthermore, panels could also control their appellate jurisdiction by attempting to deny access to certain litigants on a class-wide basis. Class action lawsuits afford relief to a large number of plaintiffs who do not have the resources, time, and/or interest in pursuing claims. As illustrated in *Wal-Mart v. Dukes*, courts can employ their ideology deny access to litigants whose position is ideologically incongruent to their own. As a result, courts can deny thousand of litigants relief. Particularly, conservatives can deny a potential class seeking relief for an alleged violation of civil rights by denying a motion to certify. Therefore, I hypothesize the following:

H2: Conservative panels are more likely than liberal panels to rule against a litigant seeking class certification.

There is variation among circuit courts regarding standards of review for motions seeking class certification. Based on Coffee and Paulovic's (2007) analysis, conservative circuits have a more stringent standard of review for class certifications than liberal circuits. Therefore, the likelihood that a circuit will grant or deny a motion seeking certification depends on the ideology of the circuit. Because these standards vary based on whether the circuit is liberal or conservative, panels may be constrained by that circuit's certification precedent. That is, panels are not free to vote their sincere preferences for fear of en banc review (Clark 2009). Accordingly, the following is my third hypothesis:

H3: Conservative circuits are more likely to deny certification to plaintiffs than liberal circuits.

Additionally, Congress shapes the jurisdiction of the federal courts by controlling the cases courts hear through subject-matter jurisdiction and the litigants who may appear in court through diversity jurisdiction. Unlike procedural rules, the jurisdiction of the federal courts is solely controlled by Congress. Because the House and Senate Judiciary Committees control legislation seeking to modify the jurisdiction of the federal courts, I expect that

H4: As the ideology of the House and Senate Judiciary Committees become more conservative, the class is less likely to win.

3.7 Data and Methods

Data for this project was collected by reviewing cases published in Lexis/Nexis Academic. I coded cases from 1980 to 2000 for the First through Eleventh Federal Courts of Appeals and the D.C. Court of Appeals. I searched all cases that included the terms "appeal," "grant," "deny," and "vacate" within the sentence of "class certification." The dataset includes all cases where a party appealed the decision of the district court that granted or denied a motion

to certify a class in an employment discrimination lawsuit. Among these cases include alleged discrimination on the basis of race, gender, age and disability. The dataset includes all published and unpublished cases.

My dependent variable is whether the plaintiffs seeking to certify the class won the appeal. I coded "1" if the class won and "0" if the class lost. My total N is 75 because I limit cases to appeals challenging certification in the area of employment discrimination. My independent variables include the caseload of the federal courts. I measure caseload as the number of cases that are assigned per active panel for each circuit. I also include the median ideology of the circuit court panel. As in the previous chapter, I use the Giles, Hettinger, and Pepper nominate scores (Giles et al. 2001) to measure the ideology of circuit court judges and the scores developed by Christina Boyd to measure district court judges for those who sat on circuit court panels by designation (Boyd 2010). I control for the ideology of the Supreme Court by using the median judicial common space score for the Court. I again control for the ideology of the Supreme Court because it has power to reverse decisions of circuit courts. As stated in Chapter 2, although some scholarship has found that circuit court panels are not responsive to Supreme Court (Klein and Hume 2003), other scholarship has shown that circuit courts follow Supreme Court mandates (Songer et al. 1994). I also controlled for the influence of Congress and the president by using the median Poole and Rosenthal Common Space scores for the House and Senate Judiciary Committees, and the president.[5] I use a probit model as the dependent variable is dichotomous. Also, in this model I use robust standard errors clustered on circuit to account for the possibility that residuals may not be independent within each circuit. Thus, the following is my model:

[5] For all of these independent variables, I measured the ideological distance of the panel from the median ideology of the circuit, the Supreme Court, the Congressional variables, and the president.

Certification = β0 + β1 Panel Ideology + β2 Circuit Median + β3 Supreme Court + β4 House Judiciary Committee + β5 Senate Judiciary Committee + β6 President + β7 Caseload + ε

3.8 Results and Discussion

The summary statistics are presented in the table below.

Table 3.1: Summary Statistics

Variable	Mean	Standard Dev.	Minimum	Maximum
Class Winning	.28	.45	0	1
Panel Ideology	.023	.234	-.532	.459
Circuit Ideology	.055	.230	-.52	.581
Supreme Court	.044	.091	-.106	.179
House Jud. Cmt	-.106	.238	-.277	.381
Senate Jud. Cmt	-.061	.150	-.221	.180
President	.241	.573	-.532	.693
Caseload	776	364	328	2101

The summary statistics show that the potential class won the appeal at a rate of 28 percent. That is, when a litigant appealed a judgment denying or granting certification, the potential class won 28 percent of the time. The summary statistics provides some evidence that classes are disadvantaged when appealing a judgment challenging certification. However, plaintiffs seeking to certify a class should again be equally disadvantaged when litigating before liberal and conservative panels if judges are reviewing these appeals non-ideologically. The results of the probit model are presented in Table 3.2.

Table 3.2: Probit Model of the Class Winning

Variable	Coefficient	Standard Error
Panel Ideology	.020	(.535)
Circuit Median	-1.667*	(.557)
Supreme Court	3.399*	(2.015)
House Judiciary Cmt	-1.111	(2.253)
Senate Judiciary Cmt	-2.287	(2.937)
President	-.168	(.340)
Caseload	.001	(.001)
Constant	-1.748*	(.700)
N=78	$\chi^2 = 16.61$*	* = p > .05

The model indicates that I can reject the null hypothesis for Hypothesis 3, which provides evidence that the ideology of the circuit court has a statistically significant effect on the likelihood of the potential class winning the appeal. As the median ideology of the entire circuit becomes more conservative, the potential class seeking certification is less likely to win the appeal. To understand the magnitude, I estimate the predicted probability of the potential class winning the appeal. The results of that estimation are presented in Table 3.3.

Table 3.3: Predicted Probability of the Class Winning

Circuit Ideology	Probability	Confidence Intervals
Mean	**.26**	**(0.20, 0.32)**
Minimum	**.62**	**(0.36, 0.89)**
Maximum	.06	(-0.01, 0.14)

The estimation for the predicted probability of the class winning indicates that when the ideology of the circuit is held has its mean, the class has a 26 percent probability of winning. However, the probability significantly increases when the circuit is most liberal, where the class is 62 percent likely to prevail on appeal. When the circuit's ideology is most conservative, the probability of

the class winning is 6 percent. The results indicate that the estimation holding Circuit Ideology at its mean and minimum are statistically significant, while Circuit Ideology held at its maximum is not statistically significant. Estimating first differences, the graph as depicted in Figure 3.1 shows that the class is less likely to win as the ideology of the circuit changes from minimum to maximum.

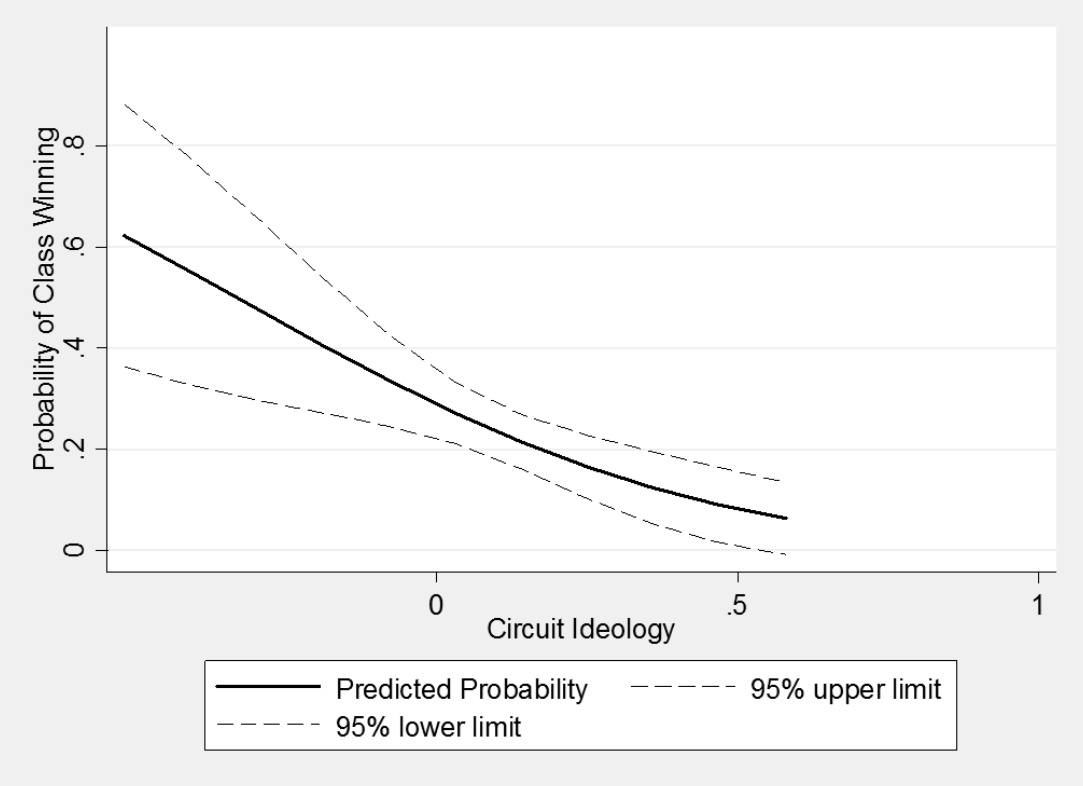

Figure 3.1: First Differences of Panel Ideology & the Likelihood of the Class Winning

The variation of the potential class winning an appeal challenging certification may be the result in differences in the standard of review for judgments on certifications within each circuit. Arguably, conservative circuits set precedent constraining panels' ability to decide certification issues pursuant to their ideology. Therefore, a more stringent standard of review may constrain a panel's ideological inclinations. This may explain the failure to reject the null

hypothesis for Hypothesis 2 as the coefficient for that hypothesis is not statistically significant. Further analysis is needed to ascertain whether variation among the standard of review for various circuits to explain why a potential class is less likely to win as the circuit becomes more conservative.

Overall, these findings lend support that liberals want to grant potential class litigants access to the courts. Arguably, liberals are devising legal rules rendering easier to grant certification and, therefore, provide access to a larger number of plaintiffs who otherwise would be precluded from bringing an action to court. When a potential class seeks certification in an action against a business or corporation, the certification itself can be used as leverage prompting a corporation to settle a case to avoid the risk of an adverse judgment which could cost substantially more than a settlement. Therefore, liberal circuits are granting access to a large number of plaintiffs. The ramifications are important, since litigants could be encouraged or discouraged from bringing class actions based on the ideology of the circuit. This is supported by evidence that in 2004, the Second and Ninth Circuits received over 40 percent of all motions nationwide seeking class certification as these circuits are known for liberal certification requirements (Coffee and Paulovic 2007). Attorneys may thus forum shop to increase their chances of certification in more "friendly" circuits.

The null hypotheses for the first, second, and fourth hypotheses cannot be rejected. The inability to reject the null hypotheses regarding the House and Senate Judiciary Committees is not entirely incongruent with previous scholarship. Many scholars have found that the federal courts of appeals are not responsive to changes in Congress's ideology (See Revesz 2001; Hume 2008). Although I find that the circuit courts are responsive to changes in the ideology of the House's and Senate's Judiciary Committees in my chapter examining procedural rules, I find no

similar results regarding class certifications. Circuit courts may believe that they have shielded themselves from potential Congressional retaliation by controlling certification decisions with stringent or lenient standards of review. Because these standards are the creation of the federal circuit courts via common-law, they may believe that Congress is unlikely to pose a threat. Furthermore, Circuit courts may be more responsive to the preferences of the Supreme Court because circuit courts control certification decisions according to that circuit's standard of review. The Supreme Court could render a decision establishing the standard of review for all circuit courts. Therefore, circuit courts may be particularly attuned to Supreme Court preferences. However, the sign for the coefficient of the ideology of the Supreme Court variable is in the opposite direction for this explanation. As the ideology of the Supreme Court becomes more liberal, the panel is less likely to grant certification. Consequently, more research is necessary to understand this effect.

3.9 Conclusion

My findings provide evidence that circuit courts use threshold issues to control which litigants gain access to the courts. Although the evidence does not provide support that panels are controlling access via class certification, the evidence provides support that access is controlled at the circuit level. Circuits vary in their certification decisions, with conservative circuits more likely to deny access by ruling against class certification.

The implications for the denial of class certification are vast. As demonstrated in *Wal-Mart v. Dukes*, a denial of a class certification has the potential to bar thousands of plaintiffs from bringing their claims to court. Although plaintiffs as individuals may sue a company, the likelihood of an individual plaintiff filing suit is low. The typical plaintiff does not have the incentive, time, and resources to sue a business or corporation (Galanter 1974). Because of these

disadvantages for individual litigants, the denial of class certification has the practical effects of precluding those litigants from litigating their claims in court.

Furthermore, the evidence does not show that Congress influences certification decisions. There is no effect for changes in Congress's ideology on class certification. Although there has been Congressional activity in this area, the findings are not inconsistent with previous scholarship finding that circuit courts are nonresponsive to changes in Congress's ideology (Revesz 2001; Hume 2009). In this context, the evidence indicates that circuit ideology has the greatest effect on access rather than the ideology of Congress or a circuit court panel.

In the next chapter, I examine whether federal circuit courts set their judicial agendas by transforming their mandatory appellate jurisdiction into one that is discretionary by deciding cases on justiciable grounds. Particularly, I examine whether federal circuit courts achieve this goal in controlling access by rendering decisions to grant or deny prudential standing to litigants seeking enforcement of the Fair Housing Act of 1968. I seek to examine whether federal circuit courts control which litigants obtain access to the courts in this regard.

CHAPTER 4: JUSTICIABLE IMPLICATIONS OF DECISIONS EXAMINING PRUDENTIAL STANDING

4.1 Introduction

In 1962, Penfield, New York, passed a housing ordinance which allocated 98 percent of the town's undeveloped land to single-family dwellings, setting minimum requirements for, among others things, lot size, floor space, and living space within each dwelling. Because of these requirements, low to moderate income individuals were unable to find housing because of the costs associated with building and/or purchasing such homes. Low-income plaintiffs sued, alleging a violation of the Fair Housing Act of 1968 and arguing that the zoning ordinance had the effect of excluding them, who were disproportionally racial and ethnic minorities, from being able to afford housing within the town. Because the effects of the zoning ordinance rendered it difficult for low to moderate income individuals to find affordable housing in Penfield, they had to resort to finding affordable housing in nearby Rochester. Another class of plaintiffs, property owners as Rochester taxpayers, also sued, arguing that the City of Rochester was forced to provide affordable housing to individuals who could not find housing in Penfield. As a result, Rochester's taxpayers carried the burden of providing housing for such individuals. The last plaintiff, a non-profit organization whose mission was to find affordable housing for its members, also filed suit against the Town of Penfield.

The U.S. Supreme Court in *Warth v. Seldin* (1975) rendered a 5-4 decision along ideological lines with the conservatives of the Court holding that the plaintiffs lacked standing. The Court held that the low income plaintiffs lacked standing because they failed to demonstrate that they suffered an injury from being excluded from affordable housing, and not just a generalized injury to all similarly situated low-income persons. Rochester taxpayers also lacked

prudential standing because Congress had not specifically conferred to those plaintiffs a private right of action pursuant to the Fair Housing Act, and because the relief they sought was not within the "zone of interest" of protection Congress intended pursuant to the Act. The Court also held that the non-profit organization lacked prudential standing because they failed to allege that Congress conferred to similarly situated organizations a private right of action to contest discrimination regarding this claim. In dicta, the Court further stated that even if there were such a statute conferring a private right of action, the non-profit organization would not satisfy standing requirements because only a small minority of its membership comprised of low-income individuals seeking residence in Penfield.

In dissent, the liberals of the Court argued poignantly that the majority used standing to determine which litigants could gain access to the courts. Justice Douglas writes:

> "Standing has become a barrier to access to the federal courts, just as 'the political question' was in earlier decades. The mounting caseload of federal courts is well known. But cases such as this one reflect festering sores in our society, and the American dream teaches that, if one reaches high enough and persists, there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need. They can, in time, be curbed by legislative or constitutional restraints if an emergency arises.
>
> We are today far from facing an emergency. For, in all frankness, no Justice of this Court need work more than four days a week to carry his burden" (422 U.S. at 518).

Justice Brennan further argues that the majority's decision premised on standing is pretext for not only avoiding rendering a decision on the merits, but also for obscuring the majority's disdain for the plaintiffs' claim. He writes:

> "While the Court gives lip service to the principle, oft repeated in recent years, that 'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal,' … in fact, the opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits.

> In effect, the Court tells the … plaintiffs they will not be permitted to prove what they have alleged … because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit" (422 U.S. at 520).

The dissents of Justices Douglas and Brennan illustrate that the liberals of the Court believed that the conservative majority used the threshold issue of prudential standing to bar litigants from asserting their claims because they disparaged low-income and minority plaintiffs seeking residence in a suburb. This case provides anecdotal evidence that the Supreme Court used standing to control access by dismissing the plaintiffs' claims on the grounds of prudential standing. This case leads to my final research question: Do courts use the doctrine of prudential standing to control access? As the Supreme Court controls its judicial agenda by certiorari review (see Epstein, Segal and Victor 2002), I argue that federal circuit courts transform their appellate jurisdiction by deciding cases on the threshold ground of prudential standing in order to set their judicial agendas.

Previous chapters of this dissertation examine how courts control access by rendering decisions on jurisdictional and procedural threshold issues. Chapters two and three examined how federal circuit courts decide procedural rules and jurisdictional certification issues to control which type of litigants gain access to their courts. This chapter focuses on how federal circuit courts use the threshold issue of prudential standing to control access to the courts. Prudential standing is defined as the federal courts' ability to deny standing to a litigant to sue pursuant to a Congressional statute. While federal courts use of standing is traditionally seen as unfettered power because justiciable issues are conferred pursuant to Article III of the U.S. Constitution, federal courts are constrained when they employ the doctrine of prudential standing because Congress can confer standing by statute. Through the common-law doctrine of prudential standing, courts can deny standing to litigants; however, Congress can confer standing to a class

of litigants when the court denies standing to such litigants. Pursuant to the doctrine of prudential standing, federal courts' discretion is curbed if Congress decides to confer standing to a class of plaintiffs. If Congress is silent, courts can decide whether to confer standing to a class of litigants. This principle is illustrated in *Warth v. Seldin*, where the conservatives of the court availed themselves of the opportunity to bar access to the courts to low-income and racial minorities in the absence of an expressed Congressional intent. Although this principle is illustrated in a case decided by the U.S. Supreme Court, federal circuit courts also decide issues pertaining to prudential standing.

In this chapter, I theorize that federal circuit courts decide issues of prudential standing according to their policy preferences to control litigants' access to the courts. I argue that federal courts are also aware, however, of potential Congressional retaliation and federal circuit court panels are constrained based on changes in the ideology of Congress. If courts stray too far from the preferences of Congress, courts invite retaliation which could curb their discretion in terms of conferring prudential standing. Thus, while circuit court judges seek to have their policy preferences enacted into law, they are also constrained by the preferences of Congress. In this chapter, I first discuss justiciability and its subset of Article III standing and prudential standing. Next, I provide a review of empirical scholarship examining justiciability and, in particular, standing. I then discuss my theory and hypotheses. Finally, I test my theory by examining the Fair Housing Act of 1968, which was enacted to provide a private right of action to victims of discrimination in the housing market and discuss the implications of my results.

4.2 Federal Courts and the Doctrine of Justiciability

Article III provides little guidance in the nature, power and role of the federal judiciary. Clause 1 of Section 2 of Article III provides:

> "The judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, … -- to *controversies* to which the United States shall be a party; -- to *controversies* between two or more states; -- between a state and citizens of another state; [and] --between citizens of different states...."

Note that Article III states that federal courts have the power to adjudicate all "cases" and "controversies." However, the Constitution does not define "cases" or "controversies." Ironically a clause limiting the power of federal courts leaves it to these same courts to interpret those provisions granting them this power of adjudication.

Courts have interpreted the power to adjudicate "cases" and "controversies" as the court's ability to provide relief to a plaintiff seeking redress from an injury (Gottlieb 1994). Federal courts have limited their power by devising a number of mechanisms defining which causes of action are justiciable (Pushaw 2003). Paramount is the court's inability to adjudicate a claim if the litigant cannot demonstrate that they have a live case. From this doctrine, courts decline jurisdiction over issuing advisory opinions, where a coordinate branch seeks a court's opinion on the constitutionality of an act. Furthermore, courts have developed the doctrine of ripeness, denying jurisdiction when a litigant fails to assert an actual "controversy" when the litigant has not yet suffered an injury or sues in anticipation of an injury that has not yet occurred or matured. Courts will similarly decline to adjudicate a claim under the doctrine of mootness if the relief the litigant seeks has already been obtained. Another issue that courts have rendered nonjusticiable is a political question. Pursuant to this doctrine, a court will decline to adjudicate a claim if the political branches of government are better suited to resolve the dispute.

4.3 Legal Analysis Examining Article III Standing and Prudential Standing

Standing is one of the most commonly adjudicated doctrines of justiciability. Justice O'Connor, in *Allen v. Wright* (1984), defines standing as follows:

> "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" (468 U.S. 737, 750-51) (internal citations and quotations omitted).

Beyond Article III standing, Congress has specified that certain litigants have standing to sue pursuant to an expressed grant conferred by statute, i.e., statutory standing. However, there is a class of cases where Congress fails to specify whether litigants have standing to sue to enforce a statutory provision, what is termed prudential standing. With prudential standing, courts must determine Congress's intent when a statute does not state whether a private right of action exists to enforce the statute.[6]

Under prudential standing, courts apply a "zone of interest test" to determine whether Congress intended to confer a private right of action to bring a lawsuit (see *Hazardous Waste Treatment v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989); see also *Warth v. Seldin*, 422 U.S. 490 (1975)). Courts make a determination of whether the statute created an injury within the plaintiff's "zone of interest" that Congress sought to protect. When a court denies a litigant

[6] Courts have also applied the doctrine of prudential standing to common-law cases. However, this chapter focuses on the statutory component to prudential standing.

standing based on prudential considerations, Congress can subsequently override the decision of the court and confer standing to the class of litigants (Fletcher 1988).

Prudential standing is best illustrated under the provisions of the Administrative Procedure Act (APA).[7] Under Section 5 of the APA, Congress can confer standing to citizens to enforce administrative agencies to carry forth Congressional intent, such as the Clean Water Act (Fletcher 1988). Absent Congressional expressed intent, courts must determine whether a private right of action exists to enforce a statute.

Section 5 U.S.C. 702 of the APA provides, in pertinent part:

> "A 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. … Nothing herein
>
> (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or
>
> (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

Practically, Congress has given federal courts power to interpret statutes to determine if a private right of action exists for enforcing provisions to further Congressional intent regarding regulations governing the actions of administrative agencies.

There is a difference between constitutional standing from prudential standing on the grounds that constitutional standing is conferred pursuant to Article III affording courts with wide discretion in determining standing. As scholars note (Gottlieb 1994; Ho and Ross 2010) Article III standing cannot be modified by the courts or Congress. However, prudential standing is a creation of the courts where judges have discretion to grant or deny standing to litigants. Congress can then confer standing when courts have denied standing to such litigants (Gottlieb

[7] For a brief discussion of the APA, see Chapter 2.

1994). If a court finds that a plaintiff has prudential standing, the plaintiff must satisfy the requirements of Article III standing (Fletcher 1988).

4.4 The Fair Housing Act

Congress passed the Fair Housing Act of 1968 to prevent discrimination against minorities in the residential housing market (Kushner 1991). The Act conferred a private right of action to sue for discrimination on the basis of race, color and national origin in leasing and purchasing of residences (Armstrong 1991). The Act now covers discrimination on the basis of other protected classes, such as gender and disability. The purpose of the Act is to curb discriminatory practices that perpetuated de facto segregation by prohibiting various discriminatory practices such as redlining, where financial institutions offer higher interest rates to buyers seeking to purchase in minority neighborhoods; discriminatory appraisals, where a prospective homeowner is discriminated against on the basis of their race or on the basis of the racial composition of a neighborhood which they are seeking to purchase a home; racial steering, where realtors "steer" prospective minority buyers to neighborhoods of similar racial composition; and exclusionary zoning, where municipalities deny zoning to contractors seeking to build multifamily dwellings (Prakash 2013, 1459). The Act also prohibits discrimination in transactions associated with the purchasing or leasing of a residence, which ranges from lending, insuring, and advertising. There are three methods of enforcing the Fair Housing Act. The Attorney General has authority to enforce the Act and file suit against violators. However, the primary means of enforcement are lawsuits by persons who allege some violation committed against them under the Act (Schwemm 1988). In 1988, Congress amended the Fair Housing Act to provide private litigants with a greater incentive to file suit. The amended Act removed a

$1,000 cap on punitive damages and removed the requirement of a plaintiff being financially indigent in order to win an award of an attorney's fee (Kushner 1989).

4.5 Courts and the Ideological Application of the Doctrine of Standing

Legal scholars have long argued that courts have used the doctrine of standing to control litigant access to the courts. These scholars, using primarily qualitative and anecdotal accounts, argue that Justices Frankfurter and Brandeis created the doctrine of standing to avoid judicial determination on New Deal legislation (Winter 1988; Sunstein 1988; Ho and Ross 2009). These justices, fearful of a conservative majority devised standing to allow states to experiment with liberal legislation (Winter 1988, 1456). Stearns (1995) argues that the Supreme Court used standing as a mechanism to control lower federal courts' ability to render decisions on the merits that invalidated New Deal legislation. Regulations promulgated pursuant to the APA conferred standing to various agencies and the government, but did not confer such standing to the beneficiaries of agency action (Sunstein 1988). This jurisprudence provided that plaintiffs had standing to sue if an agency breached a duty owed directly to the plaintiff. Courts' application of this doctrine limited lawsuits challenging various laws, which protected many New Deal regulations. Accordingly, progressive courts limited standing to shield administrative agencies from potential lawsuits challenging New Deal regulations. Courts granted standing after Congress began to confer standing by statute, indicating an expressed Congressional intent to monitor agency action. Liberal courts then recognized that Congressional intent was carried forward when litigants had the ability to sue when agencies failed to carry forward their Congressional mandate. Liberal courts reasoned that Congress desired to protect the interests of those whom the statute sought to protect (Ho and Ross 2010). Even though Congress amended

the APA in 1946 to confer standing to litigants who suffered an injury, the general provision left room for judicial discretion and ideological interpretation (Sunstein 1988).

Although there is a rich legal literature examining qualitatively judges' use of their ideology in issues addressing questions of standing, few empirical analyses exist. Among those is Segal and Spaeth (1993; 2002), who provide summary statistics regarding standing decisions of the Supreme Court. They characterize standing decisions in terms of the Court granting access to its doors. Particularly, they surveyed cases from 1953 to 2000 in which the Supreme Court questioned a litigant's standing to sue. They find that the Warren Court conferred standing in 68.9 percent of its cases, while the Burger and Rehnquist Courts held that plaintiffs had standing in 42.7 and 38.6, respectively (2002, 233). However, the Supreme Court addressed the issue of standing in only a small number of cases. Within the terms they examined, only 174 cases within that period addressed standing. Of those 174, the Court held that the litigant lacked standing in 90 cases. Only limited conclusions can be drawn from these preliminary statistics. Using a multivariate regression, Ho and Ross (2010) find evidence that as the ideological composition of the Supreme Court changes, the majority granted or denied standing to litigants who shared their ideological preferences.

Other scholars have conducted empirical work regarding standing decisions in lower federal courts. Staudt (2004) finds that policy preferences impact standing decisions in examining cases involving taxpayer standing to challenge governmental expenditures in federal courts at all levels of the judicial hierarchy. Regarding circuit courts, she finds that only the party of the president of circuit court judges is statistically significant in decisions to confer standing to taxpayers seeking to challenge a state law. Pierce (1999) finds that Republican judges are more likely than Democratic judges to deny standing to plaintiffs asserting environmental claims.

However, Pierce primarily employs a legal analysis and empirically does not control for independent variables. Fleisher (2007) used empirics to examine standing decisions for the D.C. Circuit Court panels finding no statistically significant difference in the likelihood of conservative and liberal panels dismissing a case on standing grounds. Rowland and Todd (1991) study the influence of ideology on standing decisions of federal district court judges. They find that the ideology of the judge impacts standing decisions. Judges who were appointed by President Reagan were slightly less likely to confer standing to litigants classified as "underdogs" than Carter-appointed judges. Moreover, Braman (2006) finds experimental evidence that legally-trained participants acting as federal district court judges considered the merits of a case when rendering a decision to confer standing to conform to their own ideological preferences. Rendering a judgment on a threshold issue as opposed to the merits of a case thus provides an opportunity to effect the outcome without reaching the merits. Scholars have studies Article III standing, but the scholarship examining prudential standing is quite sparse. Warshaw and Wannier (2011) find evidence that circuit courts are more likely to confer standing to the beneficiaries of the environmental regulation than the industries who are regulated. They find that Democratic-appointed circuit panels were more likely deny standing to businesses seeking standing in cases involving environmental regulation after the Supreme Court's decision in *Lujan v. Defenders of Wildlife* (1992). However, public law scholars have yet to provide substantial empirical analyses regarding federal courts' use of standing decisions and access control. As my contribution, I offer a theory and testable hypotheses to address this gap in the literature.

4.6 Theory and Hypotheses

In previous chapters, I argue federal circuit courts use threshold issues to grant or deny access to the courts for certain plaintiffs to control their judicial agendas. Just as circuit court

panels use procedural and jurisdictional rules to control access to the courts, I argue that circuit court panels use prudential standing to control who can gain access. Specifically, I theorize that their decisions reflect their ideological predispositions, and prudential standing provides a mechanism for judges to allow their favored litigants access to the courts while denying it to those they disfavor. I test this theory in the context of the Fair Housing Act of 1968. Prakash (2013) argues that the conservative courts use the threshold issue of prudential standing to bar minority plaintiffs seeking relief from discrimination pursuant to the Act. However, she does not empirically test this claim. I test whether circuit courts use prudential standing requirements to control which parties can gain access to the courts to bring a private right of action pursuant to the Fair Housing Act. As explicated in previous chapters, I expect that federal circuit courts are responsive to Congressional preferences. Congress can pass legislation conferring standing to litigants when federal courts deny them prudential standing. I therefore argue that circuit courts are constrained by Congressional ideology because those courts do not desire to render decisions outside of Congressional preferences. They are fearful of such retaliation because it limits federal circuit courts' ability to set their own judicial agendas.

Scholars have concluded that conservatives are more likely to deny access to plaintiffs who are either minorities or asserting rights on the behalf of minorities (Prakash 2013; Segal and Spaeth 2002; Epstein and Knight 1997). The dissenters in *Warth* argued that the conservative majority use the threshold issue of prudential standing as a pretext for denying litigants access to the courts to litigate their claim on the merits. However, the majority's position and the dissenters provide only anecdotal evidence of the majority's motive. Although the hypothesis I test does not seek to ascertain the motive of the justices, I seek to explain the outcome of their behavior. Therefore, my second hypothesis is as follows:

H1: Conservative panels are more likely than liberal panels to deny plaintiffs prudential standing when seeking to enforce the Fair Housing Act.

As hypothesized in previous chapters, federal courts may use threshold issues as a mechanism to control their caseloads (Willging et al. 1996). Also, scholars have argued that federal courts develop and increasingly use the doctrine of standing to control the caseload of federal courts. As the APA created new potential causes of action, federal courts attempt to control access to manage the increase in caseload (Fletcher 1988). Federal courts may be more likely to dispose of cases based on a threshold issue in order to reduce their caseload. Therefore, my second hypothesis is as follows:

H2: As the caseload of the circuit increases, the panel is more likely to deny prudential standing.

Also, because Congress confers to groups of people prudential standing, I expect that circuit court panels will respond to changes in Congressional ideology. However, any legislation that seeks to change the standing status of litigants will be assigned to the House and Senate Judiciary Committees. Because the majority party sitting on those committees controls whether legislation is voted out of committee, I measure the ideology of the majority party sitting on the committee. Therefore, I expect that circuit panels are responsive to changes in these respective committees.

H3: As the ideology of the majority party of the House and Senate Judiciary Committees become more conservative, the litigant seeking to enforce the Fair Housing Act is less likely to win.

Furthermore, as the chairs of the House and Senate Judiciary Committees act as gatekeepers to any legislation assigned to the committee, the chair has the power to prevent

legislation from reaching the chamber floor. Accordingly, I expect that circuit panels are responsive to changes in the ideology of the chairs of these respective committees.

H4: As the ideology of the Chair of the House and Senate Judiciary Committees become more conservative, the litigant seeking to enforce the Fair Housing Act is less likely to win.

4.7 Data and Methods

Data for this project was collected by reviewing cases published in Lexis/Nexis Academic. Because the Fair Housing Act was passed in 1968, I coded cases from 1970 until 2000. I coded cases decided by panels sitting on the First through Eleventh Federal Courts of Appeals and the D.C. Court of Appeals. I searched for all cases that included the terms "standing" and "Fair Housing Act." I coded a total of 96 cases. The dataset includes all published and unpublished cases. I coded all cases where a party appealed the decision of the federal district court that granted or denied the litigant prudential standing pursuant to the Fair Housing Act.

My dependent variable is whether the litigant seeking standing to enforce the Fair Housing Act won the appeal. I coded "1" if the pro-Fair Housing Act litigant won and "0" if that litigant lost. My independent variables include the caseload of the federal courts. I measure caseloads by the number of cases that were terminated per year by panel for each circuit. My independent variables also include the median ideology of the circuit court panel. As in previous chapters, I used the Giles, Hettinger, and Pepper nominate scores (Giles et al. 2001) to measure the ideology of circuit court judges and the scores developed by Christina Boyd to measure district court judges for those who sat on circuit court panels by designation (Boyd 2010). I controlled for the Supreme Court by using the median judicial common space score for the Court.

I also controlled for the influence of Congress and the President by using the median Poole and Rosenthal Common Space scores for the House and Senate Judiciary Committees, their Chairs, and the President. For all of these independent variables, I measured the ideological distance of the panel from the median ideology of the circuit, the Supreme Court, the Congressional variables, and the President. I use a probit analysis as the dependent variable is dichotomous. Also, I use robust standard errors clustered on circuit to account for the possibility that residuals may not be independent within each circuit. Thus, my model is as follows:

Standing = β0 + β1 Panel Ideology + β2 Circuit Median + β3 Supreme Court + β4 House Judiciary Committee + β5 Senate Judiciary Committee + β6 House Chair + β7 Senate Chair + β8 President + β9 Caseload + ε

4.8 Results and Discussion

The summary statistics are presented in Table 4.1 below.

Table 4.1: Summary Statistics

Variable	Mean	Standard Dev.	Minimum	Maximum
Pro-FHA Party	.56	.50	0	1
Panel Ideology	-.013	.296	-.543	.581
Circuit Median	.061	.253	-.377	.581
Supreme Court	.088	.073	-.106	.210
House Party Cmt	-.150	.348	-.505	.313
Senate Party Cmt	-.029	.370	-.439	.431
House Cmt Chair	-.224	.348	-.505	.313
Senate Cmt Chair	.083	.345	-.47	.407
President	.182	.544	-.532	.693
Caseload	745	272	234	2101

The summary statistics show that the pro-Fair Housing Act litigant wins at a relatively high rate for an appeal; the pro-Fair Housing Act won the appeal at a rate of 56 percent. The summary statistics provide some evidence that pro-Fair Housing Act litigants are not at a

disadvantage when seeking standing to enforce the provisions of the Act. The summary statistics also show that the median ideology of circuit court panels is slightly negative, with the median ideologies of the circuit courts and the Supreme Court being slightly positive. Additionally, the median ideologies of the Chair of the House Judiciary Committee and the majority party of the House and Senate Judiciary Committees are slightly negative, indicating that conservatives controlled these committees. The results of the model are presented in Table 4.2.

Table 4.2: Probit Model of the Pro-FHA Litigant Winning

Variable	Coefficient	Standard Error
Panel Ideology	-.704	(.535)
Circuit Median	.750	(1.089)
Supreme Court	-2.027	(3.815)
House Judiciary Cmt	19.979*	(8.904)
Senate Judiciary Cmt	-11.285*	(5.082)
House Chair	-15.717*	(5.689)
Senate Chair	-2.326	(2.778)
President	10.531*	(3.625)
Caseload	.001	(.001)
Constant	2.472	(1.645)
N=94	$\chi^2 = 34.07$	* = p > .05

I find support for the hypothesis regarding the ideology of the Chair of the House Judiciary Committee. As the ideological distance of the Chair becomes more conservative in relation to the circuit court panel, the pro-Fair Housing Act litigant is less likely to win. I also find support for the hypothesis regarding the ideological effects of the majority party of the Senate Judiciary Committee. It seems that panels heed to changes in the ideology of the majority party of the Senate Judiciary Committee. Panels may be particularly responsive to changes in the Senate Judiciary Committee since they hold confirmation hearings for presidential nominees to the Supreme Court. However, the coefficient for the majority party of the House Judiciary Committee is significant, but positively signed. This indicates that as the majority party of the

House Judiciary Committee becomes more liberal, the panel is less likely to confer standing to the pro-FHA litigant. This finding is the opposite of my expectations as I expect that panels would be more *not less* likely to confer standing as it became more liberal. Panels could not be concerned with changes within that Committee's ideology. Alternatively, these results must be taken with precaution as these variables are highly collinear. The presence of multicollinearity can lead to a Type II error, which introduces the possibility of accepting a hypothesis that is false (Gujaradi and Porter 2009).

Furthermore, the results indicate that I cannot reject the null hypotheses for Hypotheses 1 and 2. Although I do not find support for the hypothesis of the effects of the panel's ideology, the coefficient for this hypothesis is signed in the expected direction. Although signed in the expected direction, it appears that the ideology of the circuit panel has no effect on the decision to deny or grant prudential standing.

4.9 Conclusion

I find little support for my theory that federal circuit courts use the threshold issue of prudential standing to control their appellate jurisdiction to set their judicial agendas. However, I find support that panels are responsive to Congressional preferences. Circuit panels may not use prudential standing to set its judicial agenda because prudential standing may sufficiently constrain panels' preferences. The threat of Congress conferring standing to a group of litigants may cause panel to refrain from deciding cases in accordance with their ideological preferences. This may lend support for Fix and Randazzo's (2010) theory that courts render decisions on threshold issues to avoid reaching the merits of a case because they desire to defer to the political branches of government. Future research should explore why federal circuit courts do not use prudential standing in this regard. Also, future research should also explore the circumstances

that Congress will enact a statute conferring prudential standing when federal circuit courts have previously denied such standing.

CHAPTER 5: CONCLUSION

In this dissertation, I explicate a theory arguing that federal circuit courts transform their discretionary appellate jurisdiction into one that is mandatory to set their judicial agendas. Particularly, I argue that federal circuit courts achieve this goal by deciding cases on threshold grounds to control which litigants gain access to the courts. Circuit courts control access by avoiding the merits of a case when they render decisions on threshold grounds. When a court decides a case on threshold grounds, the court never adjudicates the merits of a litigant's claim. Consequently, the litigant will never obtain redress from the alleged grievance. Furthermore, a higher court will never review the merits of the claim because the circuit court never renders a decision on its merits.

Circuit courts can set their agendas by systematically dismissing cases that are incongruent with their policy preferences. That is, courts use the status of the party as a heuristic to determine whether their preferences are aligned with the appellant's position. My findings tend to show that conservative circuit courts are more likely than liberal circuits to dismiss a case on threshold grounds when the litigant is an individual or plaintiffs seeking certification of a class. If the ideology of the court were not a factor, conservative courts would be just as likely as liberal courts to dismiss their cases on threshold grounds. However, my findings support the former notion. Because my findings show that conservative circuit courts tend to punish individual litigants, this has the effect of barring similarly situated litigants from "having their day in court." Consequently, all litigants do not have equal access to the courts.

I also set forth a theory arguing that federal circuit courts act strategically when deciding threshold issues. As Epstein, Segal and Victor (2002) argue that justices of the Supreme Court seek to invite less scrutiny by acting strategically at the agenda-setting stage than the merits

stage, I likewise argue that federal circuit courts seek to invite less scrutiny at *their* agenda-setting stage than at the merits stage. Because of this, I argue that federal circuit courts are keenly aware of Congressional preferences and seek to decide cases within the confines of those preferences.

I examine three types of threshold issues for this dissertation: procedural, jurisdictional, and justiciable. In Chapter 2, I discuss how federal circuit courts control access by deciding cases involving procedural rules. Federal courts have this power because they not only create the Federal Rules of Practice and Procedure, but also interpret those Rules in conformance with their ideological preferences. I explicate my theory by examining Rule 11 of the Federal Rules of Civil Procedure, which provides grounds for sanctioning parties and attorneys for filing frivolous lawsuits. I find that conservative panels are more likely than liberal panels to rule against individual litigants appealing the grant or denial of a Rule 11 sanction. The implications of this finding are important because adverse decisions against individual litigants can have a substantially chilling effect on their decision to file lawsuits in conservative circuits. I also find support that circuit panels are responsive to Congressional preferences, particularly the preferences of the Chair of the House Judiciary Committee. Evidence finding that circuit panels are responsive to Congressional preferences lends support to my theory that the open rulemaking process of the Rules Enabling Act is a sufficient mechanism to constrain the preferences of circuit court panels. Because interest groups can "sound the alarm" when circuit panels stray too far from Congressional preferences, circuit panels decide cases within the preferences of the Chair of the House Judiciary Committee in order to avoid retaliation from Congress.

In Chapter 3, I discuss how federal circuit courts use jurisdictional issues to set their judicial agendas by controlling access to the courts. A federal court must have jurisdiction over a

party to adjudicate their claim. I test my theory by examining decisions on motions seeking class certification in class action litigation. Unlike my finding regarding procedural rules, I find that the ideology of the panel does not affect the likelihood that a panel will grant a motion seeking class certification. However, I do find that the ideology of the circuit has a significant effect on certification decisions. This may be a result of more stringent standard of review governing certifications in conservative circuits. That is, conservative circuits have set forth a standard of review for class certification to render it more difficult for panels to decide certification decisions in conformance with their ideology. Also, this finding provides support that conservative circuit courts seek to discourage class action lawsuits, as the evidence from Coffee and Paulovic (2007) suggests. However, Congress controls the jurisdiction of the federal courts and, therefore, controls which litigants can bring lawsuits in federal court. This includes decisions governing certification of class action lawsuits. However, my findings do not support the theory that circuit panels are constrained by Congressional preferences. The lack of an open process like the Rules Enabling Act may explain why circuit courts are not responsive to Congressional preferences.

In Chapter 4, I examine whether circuit courts control their agendas by determining that litigants lack prudential standing to bring their claims into court. Federal courts have power to deny prudential standing when Congress is silent regarding whether litigants have a private right of action to enforce a provision of a Congressional statute. I argue that federal courts use this power to control which litigants gain access to the courts. I test my theory by examining decisions to grant or deny prudential standing to litigants seeking enforcement of the Fair Housing Act of 1968. However, my findings do not support the notion that federal circuit courts use the doctrine of prudential standing to control which litigants gain access to the courts. I also expect that Congressional preferences influence circuit court decisions because Congress has the

power to confer standing when a federal court denies prudential standing to a class of litigants. My findings provide some support for this expectation. I find that circuit panels are more likely to deny prudential standing as the majority party of the Senate Judiciary Committee and the Chair of the House Judiciary Committee become more conservative. However, my findings regarding the majority party of the House Judiciary Committee do not conform to my expectations. These findings may show that the ideology of circuit panels is constrained by Congressional preferences. However, these results must be taken with precaution as the Congressional variables are highly collinear.

In conclusion, I argue that federal circuit courts transform their mandatory appellate jurisdiction to one that is discretionary to set their judicial agendas. I find support for my theory that federal circuit courts seek to set their agendas by controlling which litigants gain access to the courts. I find evidence that federal circuit courts use jurisdictional issues to control access in decisions to certify a class. The strongest support for this notion is discussed in my chapter examining procedural rules. Unlike jurisdictional and justiciable issues, federal circuit courts have power to promulgate procedural rules and render decisions interpreting those rules according to their policy preferences. Congress has structured this rulemaking process to allow ideologically aligned interest groups to "sound the alarm" when federal court preferences stray too far from Congressional preferences. Similar effects are not evident the chapter examining jurisdiction and those effects are questionable in the chapter examining justiciability. This may lend evidence that an open process is a necessary to constrain the ideological preferences of the federal circuit panels.

The implications of these findings are important. Because circuit courts practically serve as the court of last resort for the vast majority of appellants, they have little recourse when a

circuit court denies them access. Particularly, if conservative panels are more likely to rule against individuals, then individuals could be deterred from filing lawsuits. Moreover, this provides circuit panels with great power to control their judicial agendas. If circuit courts are successful in using threshold issues to control which cases it chooses to hear, it can systematically choose to hear cases at the merits stage and render decisions that maximize their policy goals. If circuit courts can achieve this goal, they are able to set their judicial agendas in a similar manner as the U.S. Supreme Court set its agenda by certiorari review.

I plan to continue my research examining how federal circuit courts set their agendas in this regard. In my dissertation, I study how circuit courts decide cases involving procedural rules according to their policy preferences. In future work, I will examine how federal courts create procedural rules according to their preferences and how these rules affect litigant access. Also, I will explore the role of interest groups in the rulemaking process. As Scherer et al. (2008) find that interest groups play an important role in the confirmation process of federal judges, I seek to further understand the influence of interest groups in procedural rulemaking. Additionally, I will further study the role legal doctrine has in constraining jurisdictional issues. As my findings show that conservative circuit courts use jurisdictional issues of decisions to certify a class, I will explore how circuit courts create legal doctrine to constrain panels' decisions in class certifications. Regarding prudential standing, I will investigate the conditions Congress retaliates and confers standing when a federal court denies prudential standing to certain litigants.

My long-term research agenda expands beyond the study of federal circuit courts. As I argue that federal circuit courts set their agendas by using threshold issue to control their appellate jurisdiction, I will explore whether this phenomenon occurs within federal district courts. If this occurs within federal district courts, litigants are totally barred from obtaining

redress from any federal court. Also, I seek to explore state courts' ability to set their agendas by deciding cases on threshold grounds. As research has shown that state court selection systems vary judicial outcomes (see Huber and Gordon 2004; Brace and Boyea 2008), I will explore whether selection systems affect state courts' ability to control their judicial agendas. In conclusion, public law scholars can better understand the power of the courts to set their judicial agendas by controlling access when rendering decisions on threshold grounds.

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