Leveling the Playing Field? Litigant Success Rates in Health-Care Policy Cases in the U.S. Courts of Appeals

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Though previous research on party capability demonstrates that the "haves" win more often in litigation than the "have-nots," this conclusion contradicts the conventional wisdom among the general populace that views the judiciary as the institution most likely to protect individual rights. This raises the question whether an area of the law exists where the courts tend to favor the have-nots over the haves. Using data from the Courts of Appeals Database, our results demonstrate that health-care policy cases present an opportunity for the have-nots to offset advantages typically possessed by the haves, thereby increasing their chances to prevail in litigation. Whether one examines average success rates for appellants, the "net advantage" for litigants, or a more sophisticated statistical model, the data indicate that individuals (i.e., the have-nots) typically enjoy larger success rates than either state and local government or the federal government.

As Songer and Sheehan (1992) note, "who gets what?" is a question that is central to the study of politics. Beginning with the seminal article by Galanter (1974), the overwhelming answer to this question has been that the "haves" win more often in litigation than the "have-nots." Yet this conclusion contradicts the conventional wisdom among the general populace that views the judiciary as the institution most likely to protect individual rights. This raises the question whether an area of the law exists where the courts tend to favor the "have-nots" over the "haves." We suggest that issues over health-care policy may present cases where judges must evaluate "life-or-death" situations, which, consequently, influence them to be more disposed to the protection of the have-nots. Therefore, our article examines litigant success rates in health-care policy cases before the U.S. Courts of Appeals. We contend that this area of the law may offer a level playing field to weaker litigants (i.e., the have-nots) thereby increasing their chances of success. Using data from the Courts of Appeals Database, we examine litigant success rates across a variety of empirical specifications. Our results indicate that health-care policy cases present an opportunity for the have-nots to offset advantages typically possessed by the haves, thereby increasing their chances to prevail in litigation before the courts of appeals.

Party Capability Theory

Galanter's initial research in 1974 has prompted a series of additional analyses examining the success rates of litigants across a variety of courts in the United States and

around the world.[1] The overwhelming consensus is that the "haves come out ahead" in the majority of litigation. As an explanation for this phenomenon, scholars developed theories pertaining to the strength and capabilities of the litigants:

> The greater resources of the stronger parties presumably confer advantages beyond hiring better lawyers on appeal. Larger organizations may be more experienced and thus better able to conform their behavior to the letter of the law or to build a better trial court record. . . . Experience and wealth also imply the capacity to be more selective in deciding which cases to appeal or defend when the lower court loser appeals (Wheeler et al., 1987:441).

Furthermore, the stronger parties tend to litigate more often, conferring upon them additional advantages as "repeat players" (Galanter, 1974), such as the ability to develop a comprehensive litigation strategy aimed at affecting the rules of adjudication. In general, these aspects afford substantial advantages to the haves that significantly increase their probability of success in court and enhance their ability to choose winnable cases to litigate. And the most successful repeat player has consistently been the U.S. government (Songer and Sheehan, 1992; Songer, Sheehan, and Haire, 1999). In 1925-88, U.S. governments were the victorious litigants in over 68 percent of the examined cases, while individual litigants lost over 60 percent of their cases (Songer, Sheehan, and Haire, 1999).

Yet, there are instances in which the haves—including the federal government—do not enjoy these tremendous advantages. For example, Sheehan, Mishler, and Songer (1992) discovered little support that repeat-player status or litigant resources improved the probability of success before the U.S. Supreme Court. Additionally, Songer, Kuersten, and Kaheny (2000) discovered that the presence of strong support by amici curiae favoring the weaker litigants can offset the traditional advantage enjoyed by the haves in state supreme court cases.

We contend there may be another aspect of litigation that decreases the advantages typically enjoyed by stronger parties and repeat players—an aspect that involves specific areas of the law. In so doing, we reiterate the question alluded to earlier: Why does conventional wisdom consistently believe that the courts protect the "weaker parties" when empirical research consistently demonstrates otherwise? We argue that it is possible for both conclusions to be accurate; that it is possible for the haves—especially the U.S. government—to enjoy broad patterns of success but that more specific areas of the law exist in which this advantage is reduced. One particular area of the law where the courts have leveled the playing field involves litigation over health care and related policy.

[1] Examples of research conducted outside the U.S. include analyses of the English Court of Appeals (Atkins, 1991), the Canadian Supreme Court (McCormick, 1993), and the Philippine Supreme Court (Haynie, 1994).