Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988

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This investigation examines the success of various types of litigants appearing before the U.S. Courts of Appeals from 1925 to 1988. The analysis parallels the earlier studies by Songer and Sheehan (1992) and Wheeler et al. (1987) that applied the core concepts introduced by Galanter's groundbreaking analysis of why the "haves" come out ahead to study litigant success on the U.S. Courts of Appeals and state courts of last resort. The findings suggest that repeat player litigants with substantial organizational strength ("haves") are much more likely to win in the federal courts of appeals than one-shot litigants with fewer resources. The "haves" win more frequently in published decisions, even after controls are introduced for the ideological makeup of the panel. The advantage in appellate litigation enjoyed by repeat player "haves" is remarkably consistent over time. In particular, the U.S. government has compiled an impressive record in these courts by dominating opposing litigants over the 64-year period of analysis.

Galanter's watershed analysis (1974) made a compelling case for the proposition that the "haves" tend to come out ahead in litigation. Since the publication of this analysis, Galanter's methods and theoretical insights have spawned numerous studies that have examined the advantages of some litigants in a wide variety of courts. Several studies of trial courts have confirmed Galanter's basic findings (Owen 1971; Wanner 1975). Generally, these findings indicate that classes of litigants with the greatest resources and the lowest relative stakes in litigation have the highest rates of success in trial courts; governments have been more successful in litigation than have businesses or other organizations, and organizations have been more successful than in-

The data analyzed in this work are taken from the United States Courts of Appeals Data Base, Donald R. Songer, principal investigator, supported by the National Science Foundation under grant no. SES-89-12678. The database and its documentation are available to scholars at the Web site of the Program for Law and Judicial Politics, Michigan State University: <http:/www.ssc.msu.edu/~pls/pljp>. Although the authors appreciate this support, which made the research reported in this paper possible, all findings and conclusions are those of the authors and do not necessarily reflect the views of the National Science Foundation. Address correspondence to Donald R. Songer, Department of Government and International Studies, University of South Carolina, Columbia, SC 29208 (e-mail: <dsonger@sc.edu>).

Law & Society Review, Volume 33, Number 4 (1999)

dividual litigants. Galanter (1974) suggests that these "haves" will win more frequently because they are likely to have favorable law on their side, superior material resources, and better lawyers and because a number of advantages accrue to them as a result of their "repeat player" status. Superior resources allow the "haves" to hire the best available legal representation and to incur legal expenses, such as those associated with extensive discovery and expert witnesses, that may increase the chances of success at trial. In addition, as repeat players, they will reap the benefits of greater litigation experience, including the ability to develop and implement a comprehensive litigation strategy that may involve forum shopping and making informed judgments regarding their prospects of winning at trial or on appeal.

The question of who wins and loses in U.S. courts may be the most important question we seek to answer as judicial scholars. In fact, "Who gets what?" has traditionally been viewed as one of the central questions in the study of politics more generally. In the United States, the courts are widely viewed as key institutions for the legitimate settlement of a wide spectrum of conflicts between individuals and groups that have important implications for the distribution of material and symbolic goods. Therefore, understanding who wins in the courts is an essential component of a full appreciation of "the authoritative allocation of values" in society (Easton 1953). Moreover, because the courts of appeals are the final arbiters for the vast majority of federal litigation, it is important to determine how different types of litigants have been received by these courts. In this article, we assess whether particular types of litigants win, or lose, more frequently in the U.S. Courts of Appeals than other types and whether their success varies over time. Drawing from Galanter's work, our comparison includes examining the success rates of repeat players, the "haves," and one shotters, who are usually "have nots," in the U.S. Courts of Appeals from 1925 to 1988.

Existing Research on the "Haves" in Appellate Courts

At the appellate level, support has been found for Galanter's proposition that the "haves" come out ahead in a wide variety of venues. In a study of 16 state supreme courts from 1870 to 1970, Wheeler et al. (1987) applied the general framework of Galanter's analysis to examine the relative success on appeal of five general classes of litigants. Overall, their findings were consistent with the theoretical expectations derived from Galanter, but the relative advantage of repeat player "haves" was modest. In matchups between stronger and weaker parties, the stronger, repeat player party was consistently more successful, with an advantage averaging 5%. Most notable was the consistent success of governments compared with litigants without organizational resources (ibid.).

The explanation for the higher success rates enjoyed by presumably stronger parties is consistent with that offered by Galanter. According to Wheeler et al. (ibid., p. 441):

> 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, matters on which we have no evidence. 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.

Because Wheeler et al. did not collect any data on judges' attitudes or values, they were unable to systematically determine whether the success of stronger parties was due to attitudinal factors. They speculated, however, that the greater success of large units of government versus small units of government and the greater success of big business against small business made such an interpretation unlikely. Thus, greater litigation resources was the most likely explanation of the empirical results.

More dramatic confirmation of Galanter's insights came in an analysis of the decisions of the U.S. Courts of Appeals. Songer and Sheehan's (1992) examination of both published and unpublished decisions of the courts of appeals discovered that the overall success rate of governments was roughly four times as high as the success rate of individuals and one and a half times the success rate of businesses. Trial court decisions, however, are usually affirmed by the U.S. Courts of Appeals (Howard 1981; Davis & Songer 1988). Therefore, Songer and Sheehan (1992) employed a measure of "net advantage" developed by Wheeler et al. (1987) that takes into account whether parties are able to overcome the tendency to affirm. This index of net advantage is computed for each type of litigant by first taking their success rate when they appear as the appellant and from that figure subtracting their opponents' success rate in those cases in which the litigant of interest participates as respondent. This index of advantage is independent of the relative frequency that different classes of litigants appear as appellants versus respondents. Songer and Sheehan (1992) found that businesses enjoyed an advantage of nearly 20 percentage points over individuals but were disadvantaged compared with the federal government by over 40 percentage points. In a multivariate analysis with controls for the type of issue and judicial ideology, litigant status continued to be strongly related to case outcome. Although the findings were impressive, this study was limited to decisions in a single year (1986) and drawn from only 3 of the 12 circuits.

Several analyses applying Galanter's theoretical perspectives to the decisions of courts in other nations have generated comparable findings. For example, McCormick found that in the Ca-

nadian Supreme Court, the federal government enjoyed a net advantage that was approximately five percentage points higher than that of big businesses, 15 points higher than the advantage of other businesses, and approximately 30 points higher than the rate for individuals (1993:532). Similarly, in the English Court of Appeals, Atkins discovered that governments enjoyed a 25% advantage over corporate litigants and corporations enjoyed a 14% advantage over individuals (1991:895). Preliminary studies of the high courts in both South Africa and India have discovered a similar pattern, with the "haves" enjoying higher rates of success than the "have nots" (Haynie et al. 1994). Thus, the general thesis that repeat player "haves" tend to fare well and that one-shot litigants lose frequently appears to have considerable cross-national validity, at least among countries in the English common law tradition.

The major exceptions to the general pattern of success in appellate courts have been observed in the supreme courts of the United States and the Philippines. Sheehan et al. (1992) examined the success of 10 categories of parties in the U.S. Supreme Court over a 36-year period and concluded that there was little evidence that repeat player status or litigant resources had a major impact on success in that forum. Although the federal government was the most successful litigant and poor individuals had the lowest overall rates of success, other patterns of success were not consistent with predictions derived from Galanter's theory. For example, poor individuals enjoyed a net advantage over state governments, and minorities were more successful than either local governments or businesses when paired against each other. Instead, the success of different classes of litigants was closely related to the changing ideological composition of the Court (e.g., the poor fared substantially better in liberal courts, and business was most successful in conservative courts). A similar failure to find a consistent pattern of success for the most advantaged litigants was observed in an analysis of the decisions of the Philippine Supreme Court. In fact, Haynie (1994) discovered that individuals tended to have higher rates of success than either governments or business litigants. Haynie concluded that in developing societies, there may be pressure for courts to support redistributive policies as a means of enhancing their legitimacy as a political institution. Such a concern for legitimacy may tend to outweigh the advantage that the haves would "normally" receive from superior experience and resources.

Collectively, existing research suggests that Galanter's insights on trial courts are also helpful in understanding case processing and outcomes in appellate courts, particularly state courts of last resort and lower federal appeals courts in the United States. As the summary of existing research in Table 1 indicates, in these courts, governmental litigants, with litigation

Table 1. Applying Galanter's Framework to Decisions of Appellate Courts (Summary of Prior Research)

Type of Litigant	Net Advantage				
	State Supreme Courts (1)	U.S. Courts of Appeals (2)	U.S. Supreme Court (3)	Canadian Supreme Court (4)	Philippine Supreme Court (5)
Federal government	n.a.	+45.1	+35.9	+20.4	−10.8[a]
State/city government	+11.8	+29.9			
State government			+11.2	+3.7[b]	
Local government	−1.6[c]		-6.3	−2.5	
"Big business"	+6.4	+5.9	−19.3	+15.0	n.a.
Business	+3.1	+1.6	−11.9	−5.9	−9.11
Individuals	−1.5	−18.2	−17.4	−9.6	+13.7

SOURCES: Col. (1): Wheeler et al. 1987; col. (2): Songer & Sheehan 1992 (analysis of 1986 decisions of three circuits); col. (3): Sheehan et al. 1992 (analysis of U.S. Supreme Court decisions, 1953–1988); col. (4): McCormick 1993; col. (5): Haynie 1994 (analysis of decisions of the Philippine Supreme Court, 1961–1986).

[a] Includes all levels of government.

[b] Provincial government net advantage.

[c] "Small" local governments.

resources and repeat player experience, appear to enjoy more success than any other type of litigant. On the other hand, individual litigants, generally one shotters, are not likely to succeed in lower appellate courts. In this article, we attempt to develop further our understanding of when and why the haves come out ahead by analyzing, over time, published decisions from all circuits of the U.S. Courts of Appeals. We apply a framework similar to that employed by Galanter (1974), Songer and Sheehan (1992), and Wheeler et al. (1987) to determine whether earlier findings are time bound. To overcome the limitations of the only previous analysis of the courts of appeals (that examined data from only three circuits and a single year), we focus on decisions from all circuits in the U.S. Courts of Appeals for a 64-year period, 1925 to 1988, and examine the extent to which categories of litigants have prevailed before the appeals courts in different periods. Because the position of the circuit courts within the legal system is closer to that of state supreme courts than it is to either the U.S. Supreme Court or to the trial courts examined by Galanter, the design employed for this analysis parallels the approaches taken by Wheeler et al. (ibid.) in their research on state courts of last resort and by Songer and Sheehan (1992) in their earlier study of the federal circuit courts.

Data and Measures

To examine the success of "haves" and "have nots" in cases decided by the U.S. Courts of Appeals, we selected data from the recently released appeals court database. The database includes data on the nature of the appellant and respondent, the issue,

the party of the judges on each panel, and the outcome of all cases from a random sample of published decisions from each circuit for each year from 1925 through 1988.

To facilitate the analysis of change over time, the 64 years of data included in the U.S. Courts of Appeals Data Base were divided into five periods. The periods capture significant changes in the legal and political history of the twentieth century that might plausibly affect the relative likelihood of success by certain categories of litigants. In the first period, 1925–1936, the legal system was dominated by conservative, probusiness judges at all levels of the judicial system. Our second period, 1937–1945, begins with the "switch in time that saved nine" that marked the beginning of the Roosevelt Court and its aggressive pro–New Deal policies. Throughout this period, the courts came to be dominated by Roosevelt judges who were selected in large part for their devotion to New Deal economic policies that had a decidedly pro-underdog orientation (Goldman 1997). The third period, 1946–1960, was characterized by economic prosperity and the selection of lower court judges (by Truman and Eisenhower) without much regard for their policy preferences (ibid.). The fourth period, 1961–1969, was most notable for the leadership of the judiciary by the Warren Court (perhaps the most liberal Supreme Court in our history), a pair of Democratic presidents in the White House, dramatic agitation in Congress and on the streets for expansion of civil rights, and strident advocacy for the welfare of poor people that culminated in President Johnson's "War on Poverty." During our final period, 1970–1988, the Supreme Court became steadily more conservative as the appointees of Nixon, Ford, and Reagan ascended to the high bench. These general trends suggest that in two periods (1937–1945 and 1961–1969), the courts should have been staffed by a considerable number of judges who were sympathetic to the interests of one-shot "have not" litigants (especially the poor), whereas in our first and last periods (1925–1936 and 1970–1988), the courts appear to have been dominated by political conservatives who presumably had probusiness proclivities. Our middle period, 1946–1960, would appear to represent a time of moderation. The analysis here examines whether the different political orientations that characterized these five periods were marked by different levels of success in courts for litigants with different status.

As prior attempts to operationalize and apply Galanter's concepts have pointed out (Atkins 1991; McCormick 1993; Songer & Sheehan 1992; Wheeler et al. 1987), specific information about the wealth of particular parties in a given case or the relative litigation experience of those parties is often not available in court opinions. Because the data for this study, like the data for these earlier studies, were derived from court opinions, there was rarely enough information to unambiguously classify one of the

parties as having greater litigation experience, wealth, or other relevant resources than their adversary. Consequently, we adopted the strategy employed by McCormick (1993), Songer and Sheehan (1992), and Wheeler et al. (1987) of assigning litigants to general classes and then making assumptions about which class was usually the stronger party.

Each appellant and each respondent were classified as belonging to one of five major classes: individual litigants, businesses,[1] state and local governments, the U.S. government, or other. "Other" included unions; nonprofit (private) organizations; nonprofit (private) schools; social, charitable, or fraternal organizations; political parties; and litigants who could not be unambiguously categorized. Into this "other" category fell 7.8% of the appellants and 6.3% of the respondents. They were excluded from analysis because they could not be categorized in terms of litigation resources. If the party listed in the case citation was a named individual, but his or her involvement in the suit was due directly to his or her role as an official of a government agency or as an officer, partner, or owner of a business, the code was based on the organizational affiliation and not as an individual. For example, if the chief executive officer of a multinational corporation was appealing a criminal conviction for personal income tax evasion, the appellant was coded as an individual. If the chief of police was the subject of a 1983 suit for damages because of an alleged torture of a prisoner held in that chief's jail, however, the defendant would be classified in the local government category. All government agencies, even those who are "independent" of the chief executive, and government corporations were categorized in the appropriate government class (for example, the National Labor Relations Board and the Tennessee Valley Authority were classified in the federal government class). Like McCormick (1993), Wheeler et al. (1987), and others who have attempted to operationalize and test Galanter's theory, we assume that individuals usually have less experience and fewer resources than either businesses or units of governments.[2] When business and governmental parties oppose one another, we assume that governments will usually be stronger because even when the financial resources of government are no greater than those of the business, the government agency is

[1] We did not distinguish "big business" litigants because the conceptualization and operationalization of "big business" varies over this 64-year period.

[2] Our impression was supported by closer examination of a 30-case sample decided by the U.S. Courts of Appeals in 1988 in which one of the litigants was categorized as an individual. We searched Westlaw for the number of previous appearances by the named litigant in the 5 years prior to the decision date. We found that none of the litigants who were classified as individuals had previously appeared before these courts.

more likely to be a repeat player (or a more frequent repeat player in the particular issue area involved in the suit)[3].

We defined winners and losers by looking at "who won the appeal in its most immediate sense, without attempting to view the appeal in some larger context" (ibid., p. 415). Thus, for example, if the decision of the district court or the administrative agency was "reversed," "reversed and remanded," "vacated," or "vacated and remanded," the appellant was coded as winning, regardless of whether the opinion announced a doctrine that was broad or narrow and regardless of whether that doctrine might be supposed in general to benefit future haves or have nots. Also, like McCormick (1993) and others, we excluded from analysis all cases with ambiguous results (e.g., those in which the court affirmed in part and reversed in part).

Our focus is on whether or not any relative advantage accrues to those classes of parties with superior litigation experience and resources. In the federal court system, the trial court loser enjoys a constitutional right of appeal. Although rational calculations of the chances of winning may exert a substantial impact on some decisions about whether or not to appeal, it will be rational for many litigants to appeal even if their chances of obtaining a reversal are substantially less than 50%. Appeals are brought by trial court losers after decisionmakers (judge and jury) at trial made initial interpretations of the facts and the law. Therefore, even if appellate justice is blind and litigation resources are irrelevant, one would expect that respondents would prevail against the majority of appeals. In the data used in this study, the courts of appeals affirmed 72% of the decisions appealed to them. Therefore, to assess whether the hypothesized relative advantage of repeat players with superior wealth and status exists, it is not enough to know whether or not the "haves" won more frequently in an absolute sense. Instead, we must also explore whether they "were better able than other parties to buck the basic tendency of appellate courts to affirm" (Wheeler et al. 1987:407). Therefore, we used the index of net advantage described earlier because it provides a better measure of litigant success in courts over different time periods than a simple measure of the proportion of decisions won by a given class of litigants would.

[3] Because governmental agencies may be presumed to be repeat players in the judicial process, we explored further our expectations that business litigants will be less likely to have litigation experience than governments but more likely to have expertise when compared with individual litigants. We sampled 50 cases decided in 1988 involving business litigants and searched through Westlaw to determine the number of previous appearances by the business litigant in the courts of appeals in the 5 years prior to the decision. We found that 24 of the businesses had previously appeared as a litigant in these courts. Although this test is not conclusive, it does support our conceptualization (and operationalization) of litigant types.

Appellant Success and Net Advantage

The beginning point of analysis was to examine the appellant success rate for each of the four basic categories of litigants. The overall data for the 64-year period are presented in Table 2.[4] The data roughly parallel the results reported by Songer and Sheehan (1992) for the single year they examined. There were wide disparities in the relative success of different classes of appellants in the courts of appeals, and those differences were quite consistent with the expectations derived from Galanter. Despite the general propensity of the circuit courts to affirm, the federal government was successful on 51.3% of its appeals and had an overall rate of success (from its participation as an appellant and as a respondent) of 70%. At the other end of the spectrum, individuals won only 26.1% of their appeals and had an overall rate of success of only 35.1%. Moreover, the rank order of the success rates was exactly the order that would be predicted from Galanter's theory. Individuals had the lowest rate of success, followed, in order, by business, state and local government, and the federal government. Overall, the United States was twice as successful as individuals and one and a half times as successful as businesses.

Table 2. Combined Success Rates and Net Advantage in Litigation, by Nature of Party in the Courts of Appeals, 1925–1988

Litigant	Success Rate as Appellant		When Respondent, Opponents' Success Rate		Net Advantage	Combined Success Rate	*N*
Individual	26.1%	–	38.7	=	−12.6	35.1%	9,311
Business	30.8	–	33.6	=	−2.8	48.2	9,313
State or local government	45.0	–	29.4	=	+15.6	64.5	2,205
U.S. government	51.3	–	25.7	=	+25.6	70.0	7,319

* Significance testing with proportions yielded the following z scores when comparing net advantage figures for these categories of litigants:
Individual-business $z = 8.23$, $P < .001$.
Business-state/local government $z = 10.27$, $P < .001$.
State/local government–federal government $z = 6.06$, $P < .001$.

As noted earlier, the net advantage index may be a better indicator of litigation success than the raw rate of success because it is unaffected by the relative frequency that a given class of litigant appears as an appellant rather than as a respondent. Thus, if there is a propensity to affirm in the courts of appeals, this propensity will not affect the index of net advantage. This

[4] In addition to decisions involving "other" parties that did not fall within our categorization of litigants, we also excluded those decisions that could not be unambiguously categorized as a win or a loss for appellants. To take into account differences in sample sizes over time, the data are weighted to reflect on the relationship between the number of sampled decisions and the population of published decisions (see documentation that accompanies the United States Courts of Appeals Data Base SES-89-12678 for information on weighting).

net advantage for each class of litigant, displayed in Table 2, reinforces the picture suggested by the raw measures of success. Individuals suffered a sharply negative net advantage, businesses were slightly below zero, and both levels of government enjoyed strong positive numbers for their net advantage. The federal government, which won 51.3% of the cases it appealed, held adversaries to only a 25.7% success rate in the cases they appealed (i.e., the federal government won 74.3% of the cases in which it appeared as respondent), giving the United States a net advantage of 25.6%. State and local governments had a net advantage of 15.6%, whereas businesses had a slightly negative net advantage of –2.8%. At the bottom were individuals whose net advantage was –12.6%, a finding that reflects that those who filed appeals against individuals won substantially more often than individuals did when they appealed.[5] The data in Table 2 suggest that, overall, the fate of individuals and businesses for the entire 64-year period was similar to that noted in Songer and Sheehan's earlier analysis of 1986 appeals court decisions (see Table 1). In contrast, governments fared slightly better when analyzing only 1986 decisions rather than decisions from the entire 64 years. Still, the size of the advantage enjoyed by governments over both individuals and businesses displayed in Table 2 is substantially greater than the advantage enjoyed by governments in the analysis of state courts and moderately greater than the advantage enjoyed by governments in the Canadian Supreme Court (see Table 1 for comparisons).

Turning to the analysis of change over time, it is evident from the data in Table 3 that the haves win consistently throughout the 64-year period examined. Looking first at the overall success rates of each category of litigant presented in the top half of Table 3, we can see that individuals had the lowest rates of success in all five periods and businesses had lower rates of success than either category of government in every period. Moreover, the success of each category of litigant remains remarkably consistent over time. In every time period, the success of individuals falls within the 31% to 39% range, whereas the success of business litigants varies between 45% and slightly under 49%. Although the gap between individual and business success varies over time, the highest degree of success achieved by individuals remains 6 percentage points below the lowest level of success achieved by business litigants.

[5] Although we did not present the data in Table 2, the net advantage figures, when calculated separately for criminal and civil disputes between individuals and governments, support these findings. The net advantage enjoyed by state and local governmental litigants over individuals in civil cases was 11.1%; in criminal cases, the advantage was 34.3%. The net advantage enjoyed by the U.S. government over individuals in civil cases was 26.7%; in criminal cases, it was 43.2%.

Table 3. Combined Success Rates and Net Advantage in Litigation, by Nature of Party in the Courts of Appeals and by Period

A. Combined Success Rates of Litigants by Time Period (No. of Decisions)

Litigant	1925–1936	1937–1945	1946–1960	1961–1969	1970–1988
Individual	39.2%	39.6%	33.7%	31.0%	33.9%
	(1,020)	(637)	(1,548)	(1,941)	(4,407)
Business	48.4	45.9	48.6	47.9	48.6
	(1,601)	(1,104)	(1,747)	(1,708)	(3,156)
State or local government	59.2	67.4	73.6	68.9	61.9
	(142)	(135)	(227)	(386)	(1,316)
U.S. government	68.8	64.6	67.2	73.6	70.7
	(701)	(625)	(1,267)	(1,578)	(3,205)

B. Net Advantage of Litigants by Time Period (No. of Decisions)

Litigant	1925–1936	1937–1945	1946–1960	1961–1969	1970–1988
Individual	−11.7	−5.1	−12.9	−7.1	−17.0
	(1,020)	(637)	(1,548)	(1,941)	(4,407)
Business	+0.4	−6.1	−0.6	−4.0	−3.6
	(1,601)	(1,104)	(1,747)	(1,708)	(3,156)
State or local government	+12.9	+19.6	+23.5	+14.9	+14.2
	(142)	(135)	(227)	(386)	(1,316)
U.S. government	+21.8	+15.4	+15.6	+30.6	+33.6
	(701)	(625)	(1,267)	(1,578)	(3,205)

The thesis that the stronger, repeat player litigants should prevail also receives strong support from the data on changes in the net advantage of different classes of litigants displayed in Table 3. The net advantage scores, like the overall success rates, show that the "haves" were generally more successful than one shotters presumed to have fewer resources. In all five periods, individuals, presumably most of whom are one shotters whose stakes are large relative to their resources, had sharply negative net advantage rates. Business litigants, a category of litigants that presumably contains nontrivial numbers of both repeat players and one-shot players, had net advantage rates near zero. In contrast, the repeat player government litigants had strongly positive net advantage rates. Predictions derived from Galanter's work appear to be least satisfactory as an explanation of outcomes in the 1937–1945 period. During this period, which includes the height of the New Deal and the ascendancy of the Roosevelt Court, individuals appeared to fare about as well as businesses (slightly lower on overall success rates but with a slightly higher net advantage score). Whereas businesses and individuals fared substantially worse than either level of government, state and local governments were more successful than the federal government on both measures of success.

Both the rates of overall success and the index of net advantage reported in Tables 2 and 3 include cases in which a litigant faced another party in the same category. To further explore the advantage that the stronger party appears to have in cases before

the federal circuit courts, we therefore followed the lead of Wheeler et al. (1987) and selected only those cases in which parties in different categories confronted each other. These comparisons are presented in Table 4.

Table 4. Net Advantage of Repeat Player "Haves" for Different Combinations of Opposing Parties, 1925–1988

Repeat Player "Have" Litigant	Relative "Have Not"	Net Advantage
Business	Individual	6.3%
State and local government	Individual	19.5
U.S. government	Individual	34.5
State and local government	Business	21.2
U.S. government	Business	21.9
U.S. government	State and local government	16.9

When specific matchups are examined, the findings strongly support Galanter's theory. Individuals have low rates of success against all other categories of respondents, whereas the success rate of the United States as appellant remains high against all other parties. In every matchup, the repeat player party presumed to be stronger enjoyed a substantial net advantage.[6] The matchups involving individuals are particularly revealing. As the presumed strength and litigation experience of the opponent of the individual litigants increase, the size of the net advantage going to the stronger party rises steeply. The 6.3% net advantage that businesses[7] enjoy over individuals rises to 19.5% when individuals faced state governments and increases to a 34.5% advantage for the United States when it faces individuals.

Table 5 presents data on these same specific matchups for each of the five periods used in the prior analyses above. Unfortunately, state and local governments were not involved in a sufficient number of cases with opposing litigants in other categories to make comparisons possible in all periods.[8] An examination of the data reveals that there was only one matchup in which the

[6] Admittedly, the broad categorization of litigants can undermine this presumption. In particular, we were concerned that our conceptualization would not apply if matchups between state or local governments and businesses were dominated by appeals in which large corporations with substantial resources were opposing relatively poor local governmental litigants. Further examination of the data, however, suggests that this conceptualization does not undermine our interpretation because only 7% of the matchups in this category pitted big businesses against local governments.

[7] Most disputes between businesses and individuals focused on economic issues (82%). Approximately half of these appeals (businesses versus individuals) were torts. Appeals with businesses opposing the U.S. government involved a greater number of labor issues (34%). Still, over half of contests pitting the federal government against businesses involved an economic question. Although they are relatively fewer in number, matchups between businesses and state or local governments raised more diverse issues, with one-third involving an economic regulatory dispute and approximately 18% focusing on a civil rights or liberties question.

[8] Net advantage scores were only computed for a matchup in a particular period if there were at least 10 cases in which each litigant appeared as an appellant against the other in the pair.

Table 5. Net Advantage of Repeat Player "Haves" for Different Combinations of Opposing Parties, by Period

Repeat Player "Have" Litigant	Relative Underdog	Net Advantage by Period				
		1925–1936	1937–1945	1946–1960	1961–1969	1970–1988
Business	Individual	8.4%	33.6%	15.6%	–6.4%	8.0%
State and local government	Individual	[a]	[a]	[a]	16.7	16.6
U.S. government	Individual	29.5	33.3	31.5	36.3	43.9
State and local government	Business	31.6	27.5	[a]	[a]	22.7
U.S. government	Business	27.6	19.3	9.3	16.1	32.3
U.S. government	State and local government	[a]	[a]	[a]	[a]	22.8

[a] Matchups with fewer than 10 participations by each party in the indicated pair as both an appellant and a respondent.

stronger party did not enjoy a positive net advantage over its opponent. In the 1961–1969 period, individuals enjoyed a 6.4% net advantage over business litigants they faced as appellants and respondents. In all other matchups across time periods, however, the litigant with presumed greater litigation experience and resources enjoyed a strong net advantage (at least 8% in all other cases). For all matchups, the stronger party enjoyed an average net advantage of 22.7%. Most striking is the 33.6% net advantage enjoyed by businesses in their matchups with individuals in the 1937–1945 period. Because it was noted that, overall, individuals had a lower negative net advantage than businesses for this period, the data in Table 5 suggest that the apparently weaker showing by businesses in the earlier table was due to the relative strength of the opponents faced by individuals and businesses. Specifically, the data suggest that, on average, businesses were more likely than individuals to face repeat player "have" litigants during this period.

Appellant Strength in a Multivariate Analysis

Although the analysis of bivariate relationships presented above produced results that are consistent with the thesis that litigant status and strength are significantly related to rates of appellant success, the thesis can be only provisionally supported until the effects of potential intervening variables are examined. For example, the apparent success of the presumptively stronger parties may be due in large part to the number of criminal appeals in the sample. Criminal appeals typically match an individual (especially a poor individual) against some level of government. Because many criminal appeals appear to have very little legal merit, the government usually wins. Alternatively, because judicial ideology, as measured by party affiliation or identity of the appointing president, has been found to be related to out-

comes in the federal courts (Carp & Rowland 1983; Goldman 1975; Tate 1981), the relative success of the "haves" may be due to the relative number of Democrats and Republicans that were on a court at a particular time.

Wheeler et al. (1987) attempt to account for the effects of a number of variables that might modify the relationship between litigant status and appellant success by introducing control variables (areas of law, nature of legal relationship between parties, and the nature of counsel) one at a time in a series of cross tabulations. In contrast, Songer and Sheehan (1992) argue that a more accurate picture of the effects of a variety of potentially significant variables can be obtained from a multivariate logistic regression model. We adopt the latter position and examine the likelihood of appellant success in a model that assesses the impact of litigant status while controlling for other variables suggested to be related to case outcomes.

The dependent variable in the model is the success of the appellant, coded "1" if the appellant won and "0" if the respondent won.[9] Because least squares regression is inappropriate when the dependent variable is dichotomous (as it is in this analysis), the parameters were estimated by logistic regression, a maximum likelihood estimation technique (Aldrich & Nelson 1984). This method produces estimates for the parameters of a model's independent variables in terms of the contribution each makes to the probability that the dependent variable falls into one of the designated categories (e.g., appellant win or loss). For each independent variable, a maximum-likelihood estimate *(mle)* is calculated along with its standard error *(SE)*. The maximum likelihood estimates represent the change in the logistic function that results from a one unit change in the independent variable.

To test whether litigant status affects case outcomes in a multivariate model, we created an ordinal measure that categorizes cases on the basis of appellant strength (1 = individual, 2 = business, 3 = state government, 4 = federal government). Because higher values on this variable identify appellants who are presumed to have greater litigation experience and resources than appellants who fall into the lower categories, it is expected that this variable will be positively related to the dependent variable. The same ordinal measure is used to measure litigant status for respondents. Higher values on this measure would be expected to reduce the likelihood of appellant success.

To distinguish criminal appeals, a dummy variable was created that was coded "1" if the case involved criminal law or procedure. Because nearly all these claims are raised by convicted defendants who will appeal even those cases that are without merit,

[9] As noted earlier, the sampling procedures used in the United States Courts of Appeals Data Base require weighting the observations in the logit model.

we anticipate that the effect of this variable will be to reduce the likelihood of appellant success. In addition, we created a variable to control for the ideological predisposition of the panel. Previous studies note that judges appointed by Democratic presidents were more likely than judges appointed by Republicans to support liberal decisions (Goldman 1975; Gottschall 1986). Therefore, each panel was identified as having either a Democratic or Republican majority, whereas the decision of the court or administrative agency below was coded as being either liberal or conservative.[10] Previous findings lead to the expectation that panels with Democratic majorities are more likely to support the appellant when the decision below was conservative and that panels with Republican majorities are more likely to support the appellant when the decision below was liberal. Therefore, in both situations, the political party effect variable was coded "1." In the opposite situations (i.e., Democratic panel and liberal decision below or Republican panel and conservative decision below), the party effect variable was coded "0." We anticipate that this variable will be positively related to appellant success.

In Table 6,[11] the estimated coefficients assessing the influence of litigant type on case outcomes support our expectations derived from Galanter's theoretical insights. The variable mea-

Table 6. Logistic Regression Estimates for the Likelihood of Appellate Success in Published Decisions, 1925–1988

Independent Variable	*mle*	*SE*	Odds Ratio
Intercept	–0.74	0.11	
Appellant	0.33**	0.03	1.39
Respondent	–0.10**	0.03	0.90
Criminal	–0.28**	0.06	0.75
Political party effect	0.47**	0.05	1.61

Mean dependent variable = 0.31
Model chi square = 502.95, $df = 4$, $P < .001$
N = 8,334; % predicted = 63.4%; gamma = .296
* Significant at .05. ** Significant at .01.

[10] We followed the definitions of liberal and conservative described by Goldman (1975). According to this definition, the liberal position is described as for the claims of the defendants or prisoners in criminal and prisoner petition cases, for the claims of minorities in racial discrimination cases, for the claims of plaintiffs in other civil liberties cases, for the government in regulation of business and tax cases, for individual workers or unions in disputes with management, for the injured person in tort cases, and for the economic underdog in private economic disputes.

[11] As noted elsewhere, only litigants and decisions that could be unambiguously categorized are included in the analysis. In this model, the control variable measuring the effect of the ideological makeup of the panel required the exclusion of observations that could not be unambiguously categorized as liberal or conservative. For example, cases that deal with attorney discipline or boundary disputes between states would be excluded. In addition, we excluded those panels with judges whose political party affiliation could not be determined (generally, judges who were not appointed to the U.S. Courts of Appeals but sit by designation). After deleting these cases, the number of observations analyzed in Table 6 fell to 8,334.

suring the status of the appellant is positively related to the likelihood of appellant success, and the relationship is significant at the .01 level. Although the magnitude is less, the measure of experience and resources of the respondent was also related to appellant success to a statistically significant degree. The results also indicate that the ideological makeup of the panel will affect case outcomes. Similar to the findings of numerous prior analyses of federal courts, panels with majorities appointed by Democratic presidents are more likely to support appeals from conservative decisions below, whereas panels with a majority of judges appointed by Republican presidents are more likely to support appeals from liberal decisions. More important for this study is that the effects of litigant experience and resources noted in Tables 2 through 5 remain strong even after controls for partisan preferences are included in the model.

The strong and statistically significant effects of litigant status in this multivariate model of decisionmaking over 64 years suggest that the nature of the litigant has had an enduring effect on the probability of appellant success that is independent of the policy preferences of the judges and the predisposition to affirm criminal convictions. Moreover, the odds ratios suggest that the impact of resources and experience may vary depending on whether the litigant was an appellant or respondent. Although both make a contribution to the explanatory power of the model, the litigant status measure for appellants appears to be a better predictor of case outcomes.

When the models are run separately for each of the five periods, the results, presented in Table 7, are generally consistent with the overall model presented in Table 6. In each period, the

Table 7. Logistic Regression Estimates for the Likelihood of Appellate Success in Published Decisions, by Time Period

Independent Variable	*mle (SE)* 1925–1936	1937–1945	1946–1960	1961–1969	1970–1988
Intercept	−0.98	−0.85	−0.72	−1.46	−0.39
	(0.34)	(0.47)	(0.26)	(0.25)	(0.16)
Appellant	0.40**	0.20*	0.25**	0.48**	0.33**
	(0.09)	(0.11)	(0.07)	(0.07)	(0.04)
Respondent	−0.14#	−0.14	−0.18**	0.04	−0.14**
	(0.09)	(0.11)	(0.07)	(0.06)	(0.04)
Criminal	−0.12	0.30	−0.03	−0.31*	−0.42**
	(0.22)	(0.25)	(0.16)	(0.13)	(0.07)
Political party	−0.04	0.62**	0.41**	0.63**	0.50**
	(0.16)	(0.22)	(0.13)	(0.11)	(0.07)
Mean dependent variable	.335	.272	.273	.263	.343
Model chi square	43.43	16.32	58.43	134.30	307.01
df	4	4	4	4	4
$P <$	.001	.01	.001	.001	.001
$N =$	731	489	1,304	1,841	3,969
% predicted	64.5	62.4	63.7	66.3	65.2
Gamma	0.318	0.261	0.289	0.350	0.322

$.10 > P > .05$. * Significant at .05. ** Significant at .01.

https://doi.org/10.2307/3115151 Published online by Cambridge University Press

coefficient for the effect of the appellant's experience and resources is positive, and in all but one of the periods, the coefficient is statistically significant at the .01 level. The measure of litigant strength for respondents reduced the likelihood of appellant success in four of the five periods and is statistically significant at the .05 level for two of the five periods (1946–1960 and 1970–1988).

Conclusion

At its most basic level, the findings of this study reaffirm Galanter's thesis that the "haves come out ahead." The parties that may be presumed to be repeat players with superior resources consistently fared better than their weaker opponents and the disparity in success rates was greatest when the disparity in strength was greatest. Although there was a strong propensity of the federal courts of appeals to affirm, the greater success of stronger parties could not be attributed to the number of times they appeared as respondent rather than as appellant.

The most notable addition of this analysis to the fairly extensive literature that has been built on Galanter's insights is the discovery that this tendency of repeat player "haves" to win more frequently than their less advantaged opponents has been remarkably stable over much of the twentieth century. Since 1925, individuals lost more than 60% of their cases, businesses had success rates slightly under 50%, and governments won a commanding majority (over 68%) of the cases in which they participated.

Our finding, that the haves come out ahead in appellate litigation in the federal circuit courts of appeals for a 64-year period, parallels the results reported by Wheeler et al. (1987), who noted only modest change over time in state courts of last resort. The persistence of the effects of litigant experience and resources over long periods on lower federal and state appellate courts is impressive particularly when one consider the extensive changes that have occurred in these courts during the same time. Both the federal circuit courts of appeals and state supreme courts have undergone massive changes in their agendas during the periods examined. For example, in the U.S. Courts of Appeals, there have been substantial increases in the proportion of civil liberties and criminal appeals since 1925. Given the common perception that many criminal appeals are frivolous, one might have expected that changes in the proportion of criminal appeals on the docket would affect the relative success rates of advantaged and disadvantaged litigants. The continuity in the effects noted above, however, suggests that the success of the "haves" in court is not primarily a function of the nature of the agenda.

On the courts of appeals (and, presumably, on state supreme courts), there have been significant changes in the partisan and ideological composition of the judiciary over time. The definition of the time periods used in this analysis was determined in large part by a desire to examine whether these changes were related to changes in the influence of repeat player status and litigant resources on outcomes. Our results suggested that there may have been a relatively modest increase in the propensity of the "have nots" to win in the period in which these partisan balances were most favorable to liberal interests (i.e., 1937–1945 period), but even major partisan shifts on the courts do not appear to fundamentally change the patterns predicted from Galanter's theoretical framework. The years since 1925 have also brought several institutional changes that might have been expected to benefit the litigation prospects for the "have nots." Most notable are the advent of a constitutional right of free legal counsel for the poor in some criminal appeals and the dramatic expansion of legal services available to the poor in civil contests. The efforts to provide access to the judicial process for those less fortunate, however, did not appear to significantly diminish the odds of success for governments, and to a lesser degree businesses, in these appellate courts over time.

Although it is thus apparent that the "haves" come out ahead in the U.S. Courts of Appeals to an impressive degree and that they have been coming out ahead throughout most of the twentieth century, we can only suggest, somewhat tentatively, why. Wheeler et al. (1987) considered, but tentatively rejected, the hypothesis that the "haves" came out ahead because of a normative tilt in the law that favored them. It may be that there has always been some normative tilt in the law toward the interests of business and governments, but major changes have affected the tilt since 1925. For example, from the mid 1950s until the early 1970s, the Supreme Court increasingly favored claims made by individuals asserting violations of their rights. Prior to that time, the Court was not sympathetic to individuals raising civil liberties and rights issues. Congress passed numerous statutes in the 1960s establishing Great Society programs and guaranteeing civil rights in employment, housing, and transportation. These changes may have contributed to the success of individuals in appeals involving business litigants during the 1960s. Overall, however, these changes did not appear to significantly affect the relationship between litigant strength and case outcomes in the courts of appeals. The second possibility investigated by Wheeler et al. was that the success of stronger parties might be due to judicial attitudes that favored them. The findings of our multivariate model, however, reinforce the earlier conclusions of Songer and Sheehan (1992) that, on the federal circuit courts, the effect of litigant status is independent of partisan-based influences.

The most probable explanation for the long-term success of the "haves" in the U.S. Courts of Appeals appears to be related to those factors suggested by Galanter (1974); our analysis found that parties presumed to be repeat players with greater resources came out ahead when pitted against presumptively weaker parties even after controlling for other influences affecting case outcomes. Unfortunately, the data are not sufficient to enable us to determine which of the specific characteristics of the stronger parties are the key ingredients of success. As Songer and Sheehan noted:

> Each of the categories of litigants we have employed will on average have greater financial resources to invest in litigation, but each is also more likely to reap the benefits of repeat player status and experience. Therefore, comparison of such categories of litigants does not shed much light on whether superior financial resources (with the presumably better lawyers, etc., that result) or the superior case selecting ability and litigation strategy which may accrue to repeat players is more important. The limitations of data derived from court opinions are the root of this problem. Such opinions do not consistently provide much information on the financial resources of the litigants or on whether they are receiving assistance from an interest group or some other outside source of support, nor do they provide much information on the litigation experience of the litigants. (1992:255)

Thus, the limitations of opinion-derived data make it difficult to determine conclusively the basis of the success of the "haves." One piece of data uncovered in the analysis, however, is relevant to the assessment of whether the successes enjoyed by the "haves" are due more to their wealth and status than to the advantages derived from their repeat player status. Whereas the wealth of litigants would reflect on their ability to hire better lawyers and finance more extensive research, repeat player status of litigants would influence their ability to estimate the odds of success on appeal and skill in selecting probable winners. It also might reflect their willingness to absorb trial court losses to avoid the risk of adverse precedent being created on appeal. Such litigants would be more interested in "playing for rules" rather than immediate material gain. If the success of the "haves" was due to wealth alone, one would expect that the effect of litigant status would be the same for appellants and respondents. Our multivariate analysis of appellant success, however, suggested that the status of appellants had a greater impact than the status of respondents. Such a finding may indicate that litigation experience is more important than material resources. The advantages that can be secured by wealth and prestige should benefit both appellants and respondents, but only the potential appellants (i.e., the party that lost in the court below) can take full advantage of a

sophisticated litigation strategy that Galanter suggests is characteristic of repeat players.

Although one can presume that governmental litigants, particularly federal agencies, are repeat players, our initial exploratory analysis of previous appearances by litigants before the circuit courts also supports these impressions. Individuals were one shotters; businesses had more litigation expertise but were not repeat players in the same sense as governmental parties. Although we recognize the interrelationship between financial resources and litigation strategy, particularly for private litigants, our findings suggest that the potential causal connection between litigant strength and case outcomes favors an interpretation that emphasizes litigant experience before the courts.

Our findings regarding the overwhelming success of the federal government also support that interpretation. Since 1946, we estimate that the U.S. government has been involved in over half the published decisions by the U.S. Courts of Appeals.[12] Between 1925 and 1945, the federal government also was a repeat player in these courts, participating in over 40% of cases accompanied by published decision. The success rate of the federal government is likely due not to participation alone, however. Since World War II, the administrative state has grown tremendously, leading to litigation involving judicial review of decisions by administrative agencies. These decisions may pit federal agencies against state and local governments, businesses, and individuals. In this type of appellate litigation, principles of case law require that judges generally accord a high level of deference to the expertise of federal agency officials. Finally, the federal government's high success rate, as noted earlier, may also reflect on a substantial number of nonmeritorious claims made by convicted defendants. Our interpretation of these findings, however, must remain somewhat speculative until further research examines this question more directly.

When compared with analyses of other courts (Wheeler et al. 1987; Sheehan et al. 1992), our findings are notable for the magnitude of the advantage enjoyed by the "haves" in the U.S. Courts of Appeals. In state courts of last resort, the "haves" enjoyed a modest advantage in appellate litigation (Wheeler et al. 1987). In the Supreme Court, the "haves" did not enjoy a consistent advantage after controlling for the effects of judicial ideology (Sheehan et al. 1992). These different findings likely reflect on disparities in the types of cases and workload of the U.S. Courts of Appeals. Unlike courts of last resort, the circuit courts must entertain all appeals over which they have jurisdiction. As a result, their docket is not dominated by those "hard" cases where judicial attitudes are more likely to determine case outcomes; in-

[12] Estimates are derived from the United States Courts of Appeals Data Base.

stead, their cases include a higher proportion of routine appeals where workload constraints potentially lead judges to rely on the parties to define the issues and arguments to be addressed. As a result, one would expect those litigants, who have greater resources, including experience, to be more likely to put forth arguments that will be more persuasive. Although specifying these underlying causal mechanisms will require future research, the results of this study clearly indicate that Galanter's insights on the relationship between party capability and litigation in the trial courts may be extended to explain patterns of litigants success in the U.S. Courts of Appeals. Moreover, these patterns have been enduring, as the "haves" were more likely to prevail over a half century of appellate litigation in the federal courts.

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