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

Sara Manning and Kirk A. Randazzo

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).

HEALTH CARE IN THE UNITED STATES AND THE ROLE OF THE FEDERAL JUDGE

Over the past several years, and most recently in the advent of the 2008 presidential election, the national debate over health-care policy has become more intense. According to a report by the Centers for Disease Control and the Merck Institute of Aging and Health (2004), the number of Americans reliant upon government-provided health care has been increasing since 1997, even though only a portion of those uninsured individuals are eligible for the federally run Medicare or the state-run Medicaid programs. Since President Johnson signed these programs into law in 1965, the judiciary has become more involved in handling a continuous increase of litigation.

A large portion of this increased litigation came as a result of the 1970 Supreme Court decision in *Goldberg v. Kelly*, 397 U.S. 254. Speaking for a 7-2 majority, Justice Brennan stated that the due-process clause of the Fourteenth Amendment required governments to provide a fair judicial hearing before they could terminate individual benefits. Though *Goldberg* spoke directly to welfare benefits under the Aid to Families with Dependent Children program, its language has since been incorporated into other governmental assistance programs, including health care. As a result, the courts have become more involved in monitoring health-care cases to ensure that benefits are not terminated arbitrarily. Furthermore, rising health-care costs have left many Americans dependent on Medicare and Medicaid for health insurance, with estimates expected to increase substantially as the Baby Boomer generation joins the population eligible for benefits (McClellan, 2000; Glied, 2003). Consequently, these expansions have placed extreme financial pressures on the governmental programs, which has in turn limited benefits to individuals, thereby causing additional litigation before federal courts.

The substantial increase in litigation over federal benefits necessarily raises questions about the roles of federal judges. If they approach this area of the law similar to other areas (such as criminal law or civil liberties) then we should expect to see outcomes similar to those reported by Songer and Sheehan (1992). However, if federal judges view their role in health-care litigation differently, then we should observe changes in the pattern of outcomes.

If federal judges view their roles differently, why should health-care policy invoke a perception of judges as the protectors of the have-nots? We argue that, fundamentally, these cases present issues with *actual* life-or-death consequences. Therefore, they are more akin to criminal cases than other civil cases in which the litigated outcome involves monetary compensation directly or through loss of prestige. Yet there is an important distinction between health-care policy cases and criminal appeals—the latter are not filtered through an administrative law judge (ALJ) and agency review. Consequently, the frequency of "frivolous appeals" is substantially reduced within health-care policy cases. This allows appellate judges to examine only those cases that present significant issues for adjudication.[2]

A related reason why health-care policy cases invoke different perceptions among judges pertains to their ability to review ALJ determinations. Under the substantial-evidence doctrine,[3] courts of appeals panels possess the authority to review factual determinations. Federal appellate judges have subsequently relied on this doctrine to make sure that the interests of the have-nots are protected. The case *McCruter v. Bowen* (1986) provides an example of the role adopted by federal judges in protecting individuals. Speaking on behalf of a unanimous panel, Judge Dumbauld[4] stated:

> Hence it becomes vital, in cases where the ALJ cites and relies upon [administrative regulations], to scrutinize with care his procedure and to examine the evidence to be sure that we are not confronted with another instance of misuse of the "severity" determination as a means of denying benefits to an applicant who is in fact unable to engage in substantial gainful activity.

The example from *McCruter* illustrates this protective role adopted by federal judges—they are conscious of the responsibility to ensure that individuals are not mistreated and denied benefits arbitrarily or capriciously. Through the substantial-evidence doctrine, judges are able to examine all aspects of the individual case to determine if proper procedures were followed and to award individual benefits when misuse and abuse are discovered.

Consequently, the potentially vulnerable position of the have-nots in health-care policy often necessitates an authoritative entity to provide an adequate level of protection within the system. We therefore argue that federal courts level the playing field in the adjudication of health-care cases. If this hypothesis is accurate, we should observe patterns of outcomes in which individual litigants achieve higher rates of success than discovered in previous research.

RESEARCH METHODOLOGY AND EMPIRICAL RESULTS

Data for this analysis came from the Appeals Court Database, compiled by Donald R. Songer.[5] To identify health-care policy cases we rely on the litigant codes included in the dataset. Specifically, we include cases if at least one litigant is a health-related agency (either federal or state).[6] Additionally, because the courts of appeals did not

[2] One additional issue area where federal judges might encounter similar cases is immigration appeals. Here, the Board of Immigration Appeals initially reviews claims and filters "frivolous" cases. Consequently, any cases that are reviewed by the courts of appeals potentially possess significant issues.

[3] The substantial-evidence doctrine focuses on "such relevant evidence as a reasonable mind might accept adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389 (1971).

[4] Senior district judge for the Western District of Pennsylvania, sitting by designation, 791 F. 2d 1544 at 1548 (1986).

[5] This data set is available from the University of South Carolina's Judicial Research Initiative (www.cas.sc.edu/poli/juri).

[6] Specifically, we include cases involving the U. S. Department of Health, Education, and Welfare (litigant code = 31006), the U.S. Department of Health and Human Services (litigant code = 31007), or any state-level or local agency with jurisdiction over human services, welfare, or health care (litigant code = 43004 or 53004).

Table 1
Appellant Success Rates by Litigant Type

	RESPONDENT			
Appellant	Individual (N)	State & Local Government (N)	Federal Government (N)	Average Success Rate
Individual		50.0% (25)	51.2% (85)	50.6%
State & Local Government	25.0% (7)		50.0% (5)	37.5%
Federal Government	24.1% (7)	30.8% (4)		27.5%

handle many health-care-related cases before *Goldberg v. Kelly* (1970), our analysis excludes cases before that decision. Consequently, the analysis contains 355 case observations from 1971 to 1996.

To more adequately compare our results to those obtained by Songer and Sheehan (1992), we initially examine appellant success rates by litigant type (see Table 1). Recall that in the original analysis by Songer and Sheehan (1992), individuals had an overall average success rate of 12.5 percent; a success rate of 10.2 percent against state and local governments; and a success rate of 12.5 percent against the federal government.[7] Noticeable differences emerge when one examines appellant success rates in health-care policy litigation (see Table 1). Individuals have a distinct advantage over other litigants; they possess an overall average success rate of 50.6 percent, with specific success rates of 50 percent against state and local governments and 51.2 percent against the federal government. In contrast, state and local governments have an overall average success rate of 37.5 percent, and the federal government has an overall average success rate of 27.5 percent. Thus, the initial results in Table 1 provide some support to our hypothesis that the courts of appeals may "level the playing field" when adjudicating health-care policy cases.

Yet, examining the success rates of appellants may not provide an accurate depiction of behavior, because the courts of appeals have a tendency to affirm the majority of cases they review. To account for this phenomenon, Songer and Sheehan (1992) developed an index of "net advantage," whereby the litigant's success as the appellant is tempered by the opponent's success when the litigant serves as respondent. In the original analysis, Songer and Sheehan discovered that the net advantage was -18.2 percent for individuals, 29.9 percent for state and local governments, and 45.1 percent

[7] The original analysis also examines success rates against private businesses. These are excluded from this analysis because private businesses are rarely involved in health-care policy litigation.

Table 2
Litigant Net Advantage

Litigant Type	Average Appellant Success	–	Opponent Success when Respondent	=	Net Advantage
Individual	50.6%	–	24.6%	=	26%
State & Local Government	37.5%	–	40.4%*	=	-2.9%
Federal Government	27.5%	–	50.6%	=	-23.1%

for the federal government. Following their methodology, we calculated the net advantage (see Table 2). We found a remarkably different pattern from the original results discovered by Songer and Sheehan. In health-care policy cases, individual litigants possess a net advantage of 26 percent, compared to -2.9 percent for state and local governments and -23.1 percent for the federal government. It is, therefore, readily apparent that this area of the law affords individual litigants (i.e., the have-nots) with a level playing field and, in so doing, substantially increases their chances of success.

Finally, to examine this phenomenon in a more systematic manner, we conducted an ordered probit analysis on litigant success rates. The dependent variable for this model is the success of the appellant; coded "0" if the appellant is unsuccessful, "1" if the appellant is partially successful, and "2" if the appellant is completely successful. The primary independent variable of interest, *Appellant Strength*, is an ordinal variable with individuals coded "0," state and local government coded "1," and the federal government coded "2."[8] According to our hypothesis (and supported initially by the previous empirical examinations), if the courts of appeals are "leveling the playing field" in health-care policy cases we should expect to observe individual litigants winning more often. Thus, the variable *Appellant Strength* should possess a significant and negative relationship to the dependent variable to confirm this hypothesis.

We also include two control variables in the ordered probit model. The first is a dummy variable measuring the presence of a *Civil Liberties Claim*. Our expectation is that judges may be sensitive to appellants (in particular, individuals) who raise questions regarding civil liberties. If so, then we expect a positive relationship between this variable and the dependent variable. Finally, we include the variable *Court Panel Ideology* to measure the collective ideological preferences of the appellant panel. To calculate this variable, we rely on the measure of appellate judge ideology developed by Giles, Hettinger, and Peppers (2001) and aggregate the individual scores to the panel (e.g., we calculate the mean score for the panel). Because these scores range

[8] We also ran separate analysis using a series of dummy variables for specific litigants, and the substantive conclusions remain consistent with the model presented here.

Table 3
Ordered Probit Analysis of Litigant Success

	Coefficient	Standard Error	p-value
Appellant Strength	-.167	.089	.060
Civil-Liberties Claim	-.121	.172	.481
Court-Panel Ideology	-.652	.315	.039
N	313		
Log-Likelihood	-285/755		
LR χ^2	8.76		
Probability > χ^2	.033		
Pseudo R^2	.015		
Cut_1	-.224		
Cut_2	-.003		

Dependent Variable: Litigant Success ("0" if Appellant unsuccessful, "1" if Appellant partially successful, and "2" if Appellant completely successful).

from liberal to conservative, we expect a negative relationship to exist; this would indicate that more liberal appellate panels are more likely to rule in favor of the appellant than conservative panels.

Examining these results reveals that the variable *Appellant Strength* is negative and achieves a low level of statistical significance (the p-value is .06). Additionally, the variable *Court-Panel Ideology* is statistically significant and negative (p-value of .039). However, the variable *Civil-Liberties Claim* is not related to the likelihood of appellant success (see Table 3). To better understand these empirical results, we calculate changes in the predicted probabilities for the two statistically significant variables (see Table 4).[9] Examining the changes in probabilities reveals that as litigants increase in "strength" from individuals to the federal government they are approximately 13 percent less likely to succeed as appellants (or, conversely, are 13 percent more likely to be completely unsuccessful as appellants). Additionally, as the collective ideology of the court panel becomes more conservative, the judges are approximately 27 percent less likely to rule completely in favor of the appellant.

CONCLUSIONS

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

[9] Changes in predicted probabilities are calculated by manipulating the variable of interest from its minimum to its maximum value while holding the remaining variables constant at their mean values.

Table 4
Changes in Predicted Probabilities

	Probability Y = 0 (std error)	Probability Y = 1 (std error)	Probability Y = 2 (std error)
Appellant Strength (from Individual to Federal Government)	.132 (.069)	-.004 (.004)	-.128 (.067)
Court-Panel Ideology (from Liberal to Conservative)	.274 (.126)	.003 (.004)	-.272 (.124)

Dependent Variable: Litigant Success ("0" if Appellant unsuccessful, "1" if Appellant partially successful, and "2" if Appellant completely successful).
Note: Changes in predicted probabilities are calculated by manipulating the variable of interest from its minimum to its maximum value while holding the remaining variables constant at their mean values.

exists where the courts tend to favor the have-nots over the haves. 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.

Our results lead to the conclusion 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. Whether one examines average success rates for appellants or the "net advantage" for litigants, 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. Additionally, when one employs a more sophisticated statistical model to examine this phenomenon systematically, the results provide moderate support for this conclusion.

In sum, our empirical findings demonstrate at least one area of law that confirms the conventional wisdom that the courts protect the "weaker parties." In health-care policy cases, the U.S. Courts of Appeals "level the playing field" and provide the have-nots with an opportunity for higher rates of success. Consequently, while the previous empirical research on party capability is correct that the "haves"—especially the U.S. government—enjoy broad patterns of success, in more specific areas of the law (such as health care) this advantage is reduced considerably.

Future research is needed to determine if additional areas of the law produce patterns similar to those encountered in health-care policy—one possible area involves immigration/deportation appeals. These cases are similar in that a federal agency (the Board of Immigration Appeals) initially reviews individual cases, which are then reviewed by the courts of appeals. The outcomes of these decisions involve "life-or-death" situations in that negative outcomes essentially translate into deportation. Additionally, with the changes experienced in immigration law following September 11, 2001, new issues or aspects may force federal judges to "level the playing field" along different dimensions. **jsj**

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