

## Reexamining Litigant Success in State Supreme Courts

---

Donald J. Farole Jr.

**S**ince Marc Galanter (1974) formulated the hypothesis that parties with greater resources, usually “repeat players,” fare better in courts and are better able to influence legal change than “one shotters,” numerous scholars have provided empirical insights into the extent to which stronger parties enjoy advantages in litigation. Studies of U.S. trial courts provide evidence that “haves” do tend to come out ahead (Galanter 1974; Owen 1971; Wanner 1975). Governments generally have been more successful in litigation than businesses and other organizations, which in turn have been more successful than individual litigants. Greater resources allow the “haves” to hire the best lawyers and incur the expenses for extensive discovery, expert witnesses, appeals to higher courts, and other activities. As repeat players, they can structure their interactions with the courts by carefully selecting cases to pursue, engaging in forum shopping, settling cases when the prospects appear low for success at trial or on appeal, implementing comprehensive litigation strategies, and developing favorable legal precedents.

Studies of litigant success in appellate courts, however, provide less conclusive support for Galanter’s hypothesis. Although stronger parties are substantially more successful in U.S. Courts of Appeals (Songer & Sheehan 1992), party type is not a strong predictor of success on the merits in U.S. Supreme Court litigation (Sheehan et al. 1992). At the state level, Wheeler and his colleagues (1987) examined 16 state supreme courts from 1870

---

A preliminary version of this article was presented at the annual meeting of the Midwest Political Science Association in Chicago, April 1998. The research was funded in part by grants from the University of North Carolina at Greensboro. I thank Nina Gunther, Seth McLaughlin, Michael Tobin, and Michael Vos for their research assistance. I also thank Charles Epp, Steven Puro, Jennifer Segal, and Gregory McAvoy for their comments and suggestions. Address correspondence to Donald J. Farole Jr., 21-19 35th St., Astoria, NY 11105 (e-mail: <dfarole@harrisinteractive.com>).

to 1970, finding that the “haves” generally came out ahead but that differential success rates between stronger and weaker parties, although statistically significant, were not great. On many measures, the net disadvantage of weaker parties was less than 5% to 6%, causing the authors to conclude that the advantage of the haves is “rather small” (1987:403).

This research note relies on more recent data to reassess the relationship between the relative strength of litigants and their success in state supreme courts. I examine litigant success in five states during the years 1975, 1980, 1985, and 1990. I also attempt to push forward our understanding of the importance of resources by accounting for a variety of alternative explanations for litigant success, including judicial bias, that Wheeler et al. (*ibid.*) do not consider. I present a framework similar to that of Wheeler et al. and Songer and Sheehan (1992) to explore whether powerful litigants get their way in state judiciaries.

### Sample Selection and Case Coding

The analysis relies on a sample of published opinions from the supreme courts in Alabama, Kansas, New Jersey, South Dakota, and West Virginia in the years of 1975, 1980, 1985, and 1990. Because the case selection procedures and variable coding are not identical to that used by Wheeler et al. (1987), the differences must be made clear.<sup>1</sup> For each court in each year, I began by identifying all opinions of one page or longer published in West’s regional reporters. When a court issued less than (or close to) 100 opinions in a given year, all were included in the analysis. When a much greater number of opinions were issued, 100 were chosen at random.

The search yielded a total of 1,981 cases, with 400 opinions each from the high courts of Alabama and Kansas, 383 from New Jersey, 394 from West Virginia, and 404 from South Dakota. Four law student assistants coded each case for a variety of variables, including the nature of the appellant and respondent, agenda area, and the outcome of the case. Reliability tests using a random 10% sample of cases showed a high degree of reliability among coders (see Appendix A).

Limited resources and the lack of relevant information in published court opinions makes it difficult to obtain information about the resources of specific parties. As a result, I adopted the strategy used by Wheeler et al. (*ibid.*) of assigning litigants to general categories and then making assumptions about the relative strength of these classes of litigants. Each litigant was identified as either a state government, local government (including

<sup>1</sup> The data were originally collected for another study, which required sampling relatively many cases from relatively few states. See Wheeler et al. (1987:404–5) for more on their data collection.

large cities and counties), business, group (union; nonprofit, social, or charitable organization; political party),<sup>2</sup> or individual. Notably, the coding of the governmental litigants differs from Wheeler et al., who distinguish between “small town” and “city and state governments.” Cases involving litigants who could not be clearly classified were excluded from the analysis. When named parties were individuals but they were acting in their official capacity as government or business officials, the parties were coded according to their affiliation.

Like Wheeler et al., determination of the winner and loser was based on how the parties fared in the immediate case at hand without attention to the larger political or social context or the doctrine enunciated by the state supreme court. As a general rule, if the lower court or agency decision was “reversed,” “reversed and remanded,” “vacated,” or “vacated and remanded,” the appellant was coded as having won. Cases with ambiguous results were excluded from the analysis.<sup>3</sup>

Note that, regarding choice of states, clearly, no five states constitute a completely representative sample. The five chosen do provide rough regional representation and are reasonably well distributed on factors known to affect state court decision-making: judicial selection method, degree of docket discretion, and the presence of intermediate appellate courts.<sup>4</sup> Nevertheless, I recognize the relatively limited scope of the study and make no formal attempt to generalize my findings to all states.

## The Success of Appellants in State Supreme Courts

Table 1 begins the analysis by presenting appellant success rates for six categories of litigants in the state supreme courts. Overall rates generally confirm that stronger parties are more successful on appeal than weaker parties. Individual appellants are less successful than businesses (the overall rate for individuals is 41.1%), which are less successful than local governments,

<sup>2</sup> My initial analysis examines groups to compare them with other classes of litigants. Because many organizations in the group classification cannot be safely categorized in terms of their relative resources, however, I exclude them from the second (multivariate) phase of the analysis.

<sup>3</sup> Unlike Wheeler et al., I did not exclude all cases affirmed in part or reversed in part. In some cases, courts address myriad legal claims, resolving most (although not all) in favor of one party. Such resolution occurred in 4.1% of the cases in this analysis and—following the coding rules used in the Supreme Court Dataset (Spaeth 1994)—the favored party was coded as the winner. This method allows for examination of cases in which a court clearly favored one party even though the victory was not total and complete. There was 97.5% agreement among coders on this variable, suggesting it validly assesses the winning party.

<sup>4</sup> Alabama and West Virginia choose high court judges by partisan election, New Jersey by gubernatorial appointment, and Kansas and South Dakota by merit selection. West Virginia and South Dakota have no system of intermediate appellate courts. The degree of docket discretion also varies greatly across courts. One high court, West Virginia's, has a completely discretionary docket.

which in turn, are less successful than state government. Note, however, that business appellants are not markedly more successful than individuals. In fact, in civil cases, individuals and businesses have essentially equivalent rates of appellant success (45.1% and 45.2%, respectively). Groups were only slightly less successful on appeal than businesses, although the relative paucity of cases involving groups cautions against inferring too much from the data.

**Table 1.** Appellant Success Rates versus Different Respondents

Appellant	Respondent						
	Criminal Defendant (N)	Individual Civil (N)	Group (N)	Business (N)	Local Govt. (N)	State Govt. (N)	Total (N)
Individual criminal	—	—	—	—	40.0% (15)	32.9% (410)	33.2% <sup>a</sup> (425)
Individual civil	—	47.1% (325)	100% (2)	44.9% (263)	37.7% (122)	47.6% (84)	45.1% <sup>a</sup> (796)
Group	—	60.0 (5)	0.0 (2)	50.0 (2)	28.6 (14)	71.4 (7)	43.3 (30)
Business	—	47.3 (146)	33.3 (3)	48.1 (108)	39.6 (53)	37.8 (37)	45.2 (347)
Local government	57.1% (7)	52.1 (48)	50.0 (12)	51.5 (33)	53.8 (26)	33.3 (3)	51.9 (129)
State government	54.8 (84)	80.7 (109)	66.7 (3)	62.2 (37)	85.7 (7)	62.5 (8)	68.7 (249)

NOTE: — = no cases.

<sup>a</sup>The overall rate of appellant success for individual litigants is 41.1%.

Wheeler et al. (*ibid.*, Table 1) also report higher appellant success rates, against a variety of opponents, for presumed stronger parties. Individual appellants won 38.5% of the time in their analysis; the success rate for city and state governments was 48.2%. Note, however, that this report reveals a difference of 9.2% between the most successful and least successful litigants, which stands in sharp contrast to the 27.6% difference in success rates for state governments and individuals reported in Table 1 of my analysis.

Table 2 reveals overall rates of success—both as appellant and respondent—for parties in state supreme courts. The last column of Table 2 shows that governments, particularly state governments, enjoy greater success rates than all other litigants. Although businesses are more successful than individuals, once again the difference between businesses and individuals in civil cases is not dramatic (49.1% for business compared with 46.0% for individuals). These data are substantially similar to those of Wheeler et al. (*ibid.*, Table 2), although they show that individuals litigants won 48.1% of the time, whereas the success rate for individuals in my sample is 43.1%.

**Table 2.** Overall Success Rates and Net Advantages of Different Parties in State Supreme Courts

Type of Party	Success Rate as Appellant (N)	–	When Respondent, Opponents' Success Rate (N)	=	Net Advantage (N)	Overall Success Rate as Appellant and Respondent (N)
Individual	41.1% (1,221)	–	53.6% (724)	=	–12.5	43.1% (1,945)
Criminal	33.2 (425)	–	54.9 (91)	=	–21.7	35.3 (516)
Civil	45.1 (796)	–	53.4 (633)	=	–8.3	46.0 (1,429)
Group	43.3 (30)	–	50.0 (22)	=	–6.7	46.2 (52)
Business	45.2 (347)	–	47.6 (443)	=	–2.4	49.1 (792)
Local government	51.9 (129)	–	40.9 (237)	=	11.0	56.6 (366)
State government	68.7 (249)	–	36.4 (549)	=	32.3	65.2 (798)

These data provide some insight as to why government, and to a much lesser extent other presumed stronger parties, are more successful than other parties in state supreme courts. Success appears to be due in part to greater selectivity in choosing which cases to appeal; governments were appellants far less frequently than other litigants were and had higher success rates on appeal. In addition, governments had greater success in turning away the appeals of others, suggesting that they possess greater litigation resources and expertise.

Note, too, that although state government (the strongest category of litigants) had greater success than individuals (the weakest category) both as appellant and respondent, the differential success rate was much more pronounced when the parties acted as appellants. State government won 63.6% of the time as respondent, a rate 17.2% greater than the success of individual respondents. When these litigants were appellants, however, the difference in success rates grows to 27.6%. Because there is no reason to believe that any class of litigants has greater material resources as appellant than as respondent, something else must account for the finding. The ability of stronger parties to pick and choose cases to appeal may play an important role in explaining their relatively greater success in state high courts. Because they can absorb moderate losses in lower courts, stronger litigants are less likely than weaker ones to appeal cases of questionable legal merit or that they believe stand little chance of success. Some evidence suggests that stronger litigants are better situated than weaker ones to avail themselves of advantages associated with strategic action, advantages somewhat independent of litigant re-

sources.<sup>5</sup> Such evidence is most likely to manifest itself in the behavior of appellants, who generally have greater opportunities for strategic action than respondents. The findings provide evidence, albeit suggestive, of the importance of repeat players' ability to make such strategic decisions (Galanter 1974).

Table 2 also shows the net advantage for each category of litigant. The net advantage measure may be a better indicator of litigation success than the raw rate of success because it is unaffected by the relative frequency with which various classes of litigants appear as an appellant rather than a respondent. If there is a propensity to affirm (or reverse) in a state supreme court, this propensity does not affect the net advantage index. The net advantage confirms that presumed stronger parties, most notably governments, have greater success compared with individual litigants. For example, state governments won 68.7% of the cases they appealed; their opponents' success rate was only 36.4%, giving state government a net advantage of 32.3%, far greater than any other category of litigant. Only governmental litigants have a positive net advantage, whereas the score for individuals is -12.5%.

What is striking about these data compared to those reported by Wheeler et al. (1987:Table 2) is the magnitude of the net advantage enjoyed by government. They reported an 11.8% net advantage for "city and state government." In contrast, "state government" enjoys a net advantage of 32.3% in my sample. Although my findings are relatively comparable to those of Wheeler et al. for other categories of litigants, government is much more successful during a more recent era in the five states. Of course, much caution is needed when comparing the findings because the variable coding is not identical.

Table 2 includes cases in which a litigant faced another from the same category. To provide more complete analysis of the relative strength of different categories of litigants, I next chose only those cases in which different categories of litigants faced one another. Table 3 shows the net advantages of various pairing of litigants.<sup>6</sup>

In every matchup, the presumed stronger party enjoyed a net advantage. In the 263 cases in which individuals were appellants against businesses, individuals won 44.9% of the cases. When businesses appealed against individuals, businesses won 47.3% of the cases, yielding a net advantage of 3.2% for business litigants. Although this advantage is neither substantively nor statistically significant (chi-square = 0.06,  $df = 1$ ), the net advantage of the

<sup>5</sup> Of course, the relatively greater ability of repeat players to act in a generally strategic manner stems in part from their greater financial and litigation resources.

<sup>6</sup> Because there were too few cases with group litigants to draw meaningful comparisons, cases involving groups were dropped from this and subsequent portions of the analysis.

**Table 3.** Net Advantage for Different Combinations of Parties

Combination of Parties	Net Advantage
Individual vs. business	Business by 3.2%
Individual vs. local government	Local government by 14.4%
Individual vs. state government	State government by 33.1%
Criminal defendant vs. state government	State government by 21.9%
Business vs. local government	Local government by 11.9%
Business vs. state government	State government by 24.4%
Local government vs. state government	State government by 52.4%
Appellant success rate for stronger party = 59.5% ( $N = 462$ )	
Appellant success rate for weaker party = 38.9% ( $N = 963$ )	
Net advantage for stronger party = 20.6%	

NOTE: For the two-by-two table summarizing the total success rate: chi-square = 52.88, with a two-tailed probability  $P < .001$ .

stronger party in every other matchup is greater and achieves statistical significance at least at the .05 level. Note that state government enjoys a hefty 24.4% net advantage over business ( $N = 74$ ). The overall net advantage for the presumed stronger party, 20.6%, is much greater than the 5.2% net advantage reported by Wheeler et al. (1987:Table 3).

### The Success of Big Business

To obtain a more refined analysis, I next subdivide the category of business litigants into big and small business. The goal is to identify those businesses that are assumed to represent large national corporations and presumably have greater litigation and financial resources than smaller “mom and pop” businesses. Following the lead of Wheeler et al. (*ibid.*, p. 413), I created a big business category that consists of railroads, banks, manufacturing companies, and insurance companies. Like Songer and Sheehan (1992), I also add airlines and oil companies to this category. Although this measure may not capture all the largest business organizations, or those most frequently active in litigation, it does include virtually all companies that had substantial resources. Consequently, it is safe to presume that in cases that pit these big businesses against the residual category of businesses or individual litigants, the former have greater resources available. The success rates for big businesses are displayed in Table 4.

Although relatively few cases involve big business, they clearly enjoyed substantial advantages over small, locally based businesses. The advantage over individual litigants, however, is somewhat more modest. Overall, the net advantage for big business is 11.1%, compared with the -2.4% net advantage for the total business category noted in Table 2.

As a final bivariate test of the effect of litigant strength on appellant success, litigants were classified on a five-point scale of relative strength with state government = 5, local government = 4, big business = 3, small business = 2, and individual = 1. Based on

**Table 4.** The Success of Big Business versus Other Parties (Percentage of Cases Won by Appellant)

Opponent	Big Business as Appellant (N)	Big Business as Respondent (N)	Net Advantage for Big Business
Individual	49.0% (51)	37.4% (91)	11.6%
Small business	61.1 (18)	31.6 (19)	29.5
Local government	— <sup>a</sup>	— <sup>a</sup>	— <sup>a</sup>
State government	— <sup>a</sup>	— <sup>a</sup>	— <sup>a</sup>
Total <sup>b</sup>	49.1 (108)	38.0 (142)	11.1

<sup>a</sup> Too few cases for meaningful comparisons.

<sup>b</sup> Includes success against other big businesses and state and local government.

this summary measure, I computed an index of relative strength for each case that equals the strength of the appellant minus the strength of the respondent. The index ranges from +4 (state government appellant versus individual respondent) to -4 (individual appellant versus state government respondent). If litigant resources affect outcomes, there should be a linear relationship between the index and rates of appellant strength.

This hypothesis is borne out in the data presented in Table 5. As the relative strength of the appellants versus respondents declines, there is a monotonic decline in appellant success rates. In cases where appellants were stronger than respondents, appellants were successful more than half the time. When appellants were weaker than their opponents, the success rate was less than 50%. At the extremes, state governments were successful in nearly 70% of their appeals against individual respondents, whereas individuals prevailed in only 35.4% of their appeals against state governments.

**Table 5.** Appellant Success Rates for the Relative Strength of Appellant and Respondent

Relative Strength Index (Appellant – Respondent)	% of Cases Won by Appellant	N
+4 to +3	66.1%	277
+2 to +1	50.2	209
0	48.3	429
-1 to -2	43.4	346
-3 to -4	36.2	657

NOTE: For the five-by-two table of frequencies used to generate the table: chi-square = 38.95,  $df = 4$ ,  $P < .001$ .

## Party Strength in the Multivariate Context

The bivariate analysis provides some support for the hypothesis that presumed powerful parties are more successful in state supreme courts. State and local government have significantly



higher rates of success as both appellant and respondent than all other parties. Although businesses are somewhat more successful than individual litigants, strong differences do not emerge in these data.

These findings are generally consistent with those found by Wheeler and his colleagues (1987). Like Wheeler et al., however, the findings do not conclusively speak to the question of whether party strength affects litigant success. A more complete test requires multivariate analysis. Wheeler et al. attempt to account for other potentially relevant factors—the area of law, legal relationship between parties, and nature of counsel—in a series of cross-tabulations. As Songer and Sheehan (1992:237) recognize, however, because Wheeler et al. “had neither direct data on judges’ attitudes nor even indirect indicators of those values, they were unable to determine systematically whether the success of stronger parties was due to judicial bias.” If litigant advantages remain after controlling for alternate explanations, including the partisan composition of the state high court, we can be much more confident that litigant strength is significantly related to appellant success in state supreme courts.

To provide more systematic analysis, I rely on a logistic regression model. The dependent variable in the model is appellant success, coded 1 if the appellant wins in the state supreme court and 0 if the respondent wins. (Appendix B details the coding of all variables used in the analysis.) Logistic regression is necessary given the dichotomous nature of the dependent variable. The independent variables in the model can be interpreted in terms of the contributions that each independent variable makes in increasing or decreasing the probability of appellant success in the state high court.<sup>7</sup>

To assess party strength, I rely on the five-point scales of appellant and respondent strength discussed above and mapped out in Appendix B. Because higher scores are associated with presumed stronger parties, the appellant strength variable should be positively related to the probability of appellant success, whereas the respondent strength variable should be negative. A second set of independent variables account for the legal issue in the case. The issue variables were coded 1 if the issue in question was the most important issue in the case and 0 otherwise.<sup>8</sup> The issues controlled for are public law (primarily government regulation, taxation, abuse of authority), criminal, civil liberties (noncriminal), and economic. Of the 1,571 cases included in this portion of the analysis, 24.6% were coded 0 on all four

---

<sup>7</sup> Specifically, the model produces maximum likelihood estimate (*mle*) and its standard error (*SE*) for each independent variable. The *mle* represents the instantaneous rate of change in the probability of the appellant winning given a unit change in the independent variable.

<sup>8</sup> Thus, no case was coded as more than one issue area.

issue variables. I also include dummy variables for the years 1980, 1985, and 1990 to determine whether the probability of appellant success varied significantly across the years.

Finally, to control for the policy preferences of the state supreme court, a party variable was created. The first step was to code each court as having either a Democratic or Republican majority. Next, for each case, the decision of the lower court or agency was coded as either liberal or conservative.<sup>9</sup> Although it is difficult to tap the policy goals of state supreme court judges, previous studies suggest that high courts with Democratic majorities will be more likely to support an appellant when the decision below was conservative and courts with Republican majorities will be more likely to support an appellant when the decision below was liberal. In these situations, the party variable was coded 1. In the opposite situations (liberal lower court decision and Democratic court, or conservative lower court decision and Republican court), the variable was coded 0. This variable distinguishes appeals in which the appellant asks the court to rule consistent with its presumed policy preferences from appeals in which the majority is asked to go against its preferred position. If the policy preferences of the court affect litigant success, this variable should be statistically significant in the positive direction.

This measure of the policy preferences of state supreme courts is admittedly imperfect. Because “no measure of the individual political attitudes of state supreme court justices exists” (Kilwein & Brisbin 1997:138), however, I have relied on measures based on the partisan composition of courts. Similar measures have been used in other studies of state high courts (*ibid.*) as well as in studies of the federal courts (Songer & Sheehan 1992).

Table 6 presents the results of the logistic regression model. Overall, the model performs moderately well. The signs of the variables are in the predicted direction, and the full model is significant at the .0001 level.<sup>10</sup> Most of the independent variables have a statistically significant relationship with appellant success. The presence of a criminal issue has a strong negative association with success (the vast majority of criminal cases involve individual

---

<sup>9</sup> I followed the definition of liberal and conservative used by other researchers (e.g., Songer & Sheehan 1991). Liberal is defined as support for (1) the claims of defendants or prisoners in criminal and prison petition cases, (2) minorities in racial discrimination cases, (3) plaintiffs in other civil liberties cases, (4) government in business and tax regulation cases, (5) individual workers or unions in disputes with management, (6) injured parties in tort cases, and (7) the economic underdog in private economic disputes. In some areas of law, such as family law (divorce, child custody, estate administration), decisions cannot be safely assumed to be liberal or conservative. There are 348 such cases in the sample, and these cases were dropped from the multivariate portion of the analysis.

<sup>10</sup> The overall reduction of error in the model is not of central importance, because no attempt is made to fully specify a model of voting on state supreme courts. Instead, the goal is to test the impact of litigant strength when controlling for factors believed to be significantly related to litigant success.

**Table 6.** Logit Estimates for Appellant Success in State Supreme Courts ( $N = 1,571$ )

Independent Variable	<i>mle</i>	<i>SE</i>	<i>mle/SE</i>
Intercept	-0.613	0.228	-1.99**
Appellant	0.248	0.046	4.89***
Respondent	-0.033	0.048	0.96
Party	0.584	0.107	4.72***
Public law	-0.476	0.194	-2.36*
Criminal	-0.518	0.156	-3.49***
Civil liberties	-0.138	0.176	-0.85
Economic	-0.394	0.156	-2.43*
1980	0.152	0.151	1.01
1985	-0.025	0.151	-0.17

Model chi-square = 112.596;  $df = 10$ , sign. = .0001,  
-LLR = 2,053.310.

NOTE: Dependent variable = appellant success, mean = 0.456. Proportion correctly predicted = 61.62%. Reduction in error = 7.22%.

\* Significant at .05 \*\* Significant at .01 \*\*\* Significant at .001

defendants appealing convictions or sentences). The other issue variables also are associated with decreased probabilities of success, although the coefficient for civil liberties is not statistically significant. The year variables indicate that appellants were not significantly more likely to win in some years than in others.<sup>11</sup> As expected, the party variable is positively related to the probability of appellant success. With all other variables held at their means, the predicted probability of success declines from 52.3% to 38.1% when a court must, to support the appellant, rule inconsistently with its presumed preferences. This variable is significant at the .001 level, providing strong support for the hypothesis that Democratic courts are more likely to support appeals from conservative decisions and Republican courts are more likely to support appeals from liberal decisions.

Even after accounting for a variety of factors identified as significant in past research, however, litigant type is still strongly associated with appellant success in state supreme courts. The coefficient for the appellant type variable is positive and significant at the .001 level, indicating that presumed stronger parties have a greater probability of prevailing on appeal. This effect is independent of the partisan composition of the state high court, of issue area, of respondent type, and of year.<sup>12</sup> The coefficient for

<sup>11</sup> This finding does not necessarily mean that the influence of appellant strength on case outcomes did not vary across the years examined. In a separate analysis not reported here, however, conditional variables assessing the relative impact of appellant and respondent strength in each year were added to the logistic regression model. None of the conditional variables achieved statistical significance, showing that the relative impact of party strength did not in fact vary over time. Because the interpretation of these variables can be unwieldy, I do not include them in the model presented in Table 6.

<sup>12</sup> It might be argued that stronger parties prevail in some states but not others. When the model is rerun with dummy variables for each state, however, it produces no substantive change in the impact of appellant strength ( $mle = .230$ ,  $SE = .049$ ,  $P < .0001$ ) or any independent variable, including Party ( $mle = .591$ ,  $SE = .111$ ,  $P < .0001$ ). Thus, the variables of interest in Table 6 affect appellant success independent of state effects.

the respondent type variable, although in the anticipated direction, is not statistically significant. This finding is similar to that of Songer and Sheehan (1992) in their study of U.S. Courts of Appeals.

Table 7 illustrates the magnitude of the impact of appellant type on appellant success. The table presents the predicted probability of appellant success with all other independent variables set at their means. The estimated probability of success increases almost uniformly with each increase in the index of appellant strength. With all other variables set at their means, state government appellants are nearly 23% more likely to win than individual appellants.

**Table 7.** Estimated Probabilities of Appellant Success, by Appellant Type

Appellant Type	Predicted Probability of Success <sup>a</sup>
Individual	.397
Small business	.453
Big business	.510
Local government	.567
State government	.623

<sup>a</sup> Predicted success with the values of all other independent variables in the logit model set at their mean.

## Conclusion

Although a large body of studies have shown advantages for stronger parties in litigation, there is some question as to what extent these advantages are enjoyed in state supreme courts. Wheeler et al. (1987:403) concluded that the disadvantage of weaker parties during the period of 1870 to 1970 was “rather small.” Based on an examination of litigant success in more recent years in five state high courts, my findings lend support—albeit qualified support—for the thesis that advantaged litigants are more successful in state high courts than other litigants. Presumed stronger parties were generally more successful both as appellant and respondent. And much more important, even after controlling for alternate explanations for appellant success, including the ideological preferences of partisan majorities on the state high courts, is that appellant strength is significantly related to success on appeal.

Some of my findings are similar to those of Wheeler and his colleagues. Among private sector litigants, businesses tended to be more successful than individuals in both samples, although the advantage is statistically significant but by no means extraordinary. The systematic differences between businesses and individuals predicted by Galanter (1974) simply do not appear. It should be noted, however, that big businesses were far more successful than small businesses, suggesting that the presumably

greater resources and expertise of larger organizational litigants do affect their fortunes in the courts.

Like Wheeler et al. (1987), the most stark differences emerge between governmental and nongovernmental litigants. State and local governments were significantly more successful than nongovernmental litigants. Greater success rates for repeat players, at least in these five states, is driven largely by the dominance of government. Important is that the relative advantages enjoyed by governmental litigants in this analysis are far greater than those found by Wheeler et al. Because the states and time period examined differ, it is difficult to determine conclusively why government is so much more successful in my analysis. A contributing factor surely is that Wheeler et al. examine the success rates of cities and state governments together. Because state governments are the most successful category of litigants in this sample and Wheeler et al. do not provide data for state governments alone, their analysis may understate the success of the most advantaged litigants.

More important, however, may be the increased professionalization of state governments in recent decades. State attorneys general have become more adept in litigation in the U.S. Supreme Court (Waltenburg & Swinford 1998; Cigler 1995) and, presumably, state courts as well. This trend may help to explain the greater success of state governments in this analysis than in Wheeler et al., who examine a century period ending in 1970. In recent decades, there has been growth in the number and activity of public interest groups (Farole 1998; Epstein 1994) and legal services agencies, as well as the use of class action litigation, in efforts to increase the relative power of disadvantaged litigants in the courts. Gains for disadvantaged litigants, however, may be offset to some degree by a growing proficiency among state governments and perhaps other repeat players. The growing importance of U.S. courts, at both the state and federal levels, has given government greater incentive to use the resources available to develop greater expertise in the judicial process.

To what extent do my results square with Galanter's (1974) hypothesis? Because "government" and "repeat player" are not interchangeable, to find that government wins much more often than other litigants does not necessarily provide full support for the claim that the "haves" will come out ahead. One possible interpretation for government agencies' success is that they are simply the most capable, by far, of all repeat players. They possess the greatest resources, expertise, insider knowledge of the judicial process, and other repeat player characteristics. This explanation is consistent, in broad contours, with historical-institutional studies that emphasize the relative autonomy of the state (for example, Skowronek 1982). Governments are not simply passive recipients of pressure but key legal actors in themselves.

Aside from their mastery of the judicial process, government is fundamentally no different from other litigants.

Yet perhaps government is not just another litigant. A large but scattered literature documents judicial deference to representatives of the government: the Supreme Court's respect for the Solicitor General (Caplan 1987), the observation that prosecutors are the key players in criminal courts (Heumann 1978; Flemming et al. 1992), the generally broad discretion granted to government agencies by administrative law. These literatures are consistent with the idea that government is in fact fundamentally different from other litigants, and their success in state supreme courts may reflect judicial deference. Of course, even this explanation for the dominance of government is not necessarily inconsistent with Galanter's argument: government agencies may be accorded respect because they are so commonly before the courts. In other words, governments are repeat players.

However my results are interpreted, they clearly show that government—not necessarily all repeat players—comes out ahead in the five state supreme courts. Whether this finding is true in all state high courts requires further analysis. Indeed, explicit attention to interstate variations in litigant success, although not the central concern of this study or Wheeler et al. (1987), can lend insight into the conditions under which the “haves” come out ahead. Galanter's (1974) essay is rich with hypotheses that, a quarter century later, still demand more rigorous empirical investigation.

## References

- Caplan, Lincoln (1987) *The Tenth Justice: The Solicitor General and the Rule of Law*. New York: Knopf.
- Cigler, Beverly A. (1995) “Not Just Another Special Interest: Intergovernmental Representation,” in A.J. Cigler & B.A. Loomis, eds., *Interest Group Politics*, 4th ed. Washington, DC: Congressional Quarterly Press.
- Epstein, Lee (1994) “Exploring the Participation of Organized Interests in State Court Litigation,” 47 *Political Research Q.* 335–51.
- Farole, Donald J., Jr. (1998) *Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries*. Westport, CT: Praeger Press.
- Flemming, Roy B., Peter F. Nardulli, & James Eisenstein (1992) *The Craft of Justice: Politics and Work in Criminal Court Communities*. Philadelphia: Univ. of Pennsylvania Press.
- Galanter, Marc (1974) “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Social Change,” 9 *Law & Society Rev.* 95–160.
- Heumann, Milton (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. Chicago: Univ. of Chicago Press.
- Kilwein, John C., & Richard A. Brisbin Jr. (1997) “Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by States Supreme Courts,” 41 *American J. of Political Science* 122–48.
- Owen, Harold J. (1971) “The Role of Trial Courts in the Local Political System: A Comparison of Two Georgia Counties.” Unpublished Ph.D. diss., Political Science Department, Univ. of Georgia.

- Sheehan, Reginald S., William Mishler, & Donald R. Songer (1992) "Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court," 86 *American Political Science Rev.* 464–71.
- Skowronek, Stephen (1982) *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*. New York: Cambridge Univ. Press.
- Songer, Donald R. & Reginald S. Sheehan (1992) "Who Wins on Appeal? Underdogs and Underdogs in the United States Courts of Appeals," 36 *American J. of Political Science* 235–58.
- Spaeth, Harold (1994) US Supreme Court Judicial Database, 1953–1992 Terms. Ann Arbor, MI: ICPSR Study #9422.
- Waltenburg, Eric N., & Bill Swinford (1998) *Litigating Federalism: The States Before the U.S. Supreme Court*. Westport, CT: Greenwood Press.
- Wanner, Craig (1975) "The Public Ordering of Private Relations: Part I: Initiating Civil Cases in Urban Trial Courts," 8 *Law & Society Rev.* 421–40.
- Wheeler, Stanton, Bliss Cartwright, Robert A. Kagan, & Lawrence M. Friedman (1987) "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970," 21 *Law & Society Rev.* 403–45.

## Appendix A Reliability of Coding

Variable	Agreement Rate (%)
State	100.0
Year	100.0
Winning party	97.5
Respondent	94.0
Appellant	92.5
Issue	90.0

*N* = 190

## Appendix B Coding of Variables Used in Logistic Regression Model

### Dependent variable

Appellant success      1 if appellant wins in state supreme court  
    0 if appellant loses in state supreme court

### Independent variables

Appellant and respondent	1 if individual 2 if small business 3 if big business 4 if local government 5 if state government
Party	1 if lower court/agency decision is conservative and state supreme court majority Democratic OR lower court/agency decision is liberal and state supreme court majority Republican 0 if lower court/agency decision is conservative and state supreme court majority Republican OR lower court/agency decision is liberal and state supreme court majority Democratic
Year variables	1 if case was decided in that year 0 otherwise
Issues variables (public law, criminal, civil liberties, and economic)	1 if the issue was the most important issue in the case 0 otherwise