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Explaining Litigant Success in the High Court of Australia

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The authors examine the influence of party capability theory while controlling for legal-structural and doctrinal changes in the High Court. Based on their analysis of cases from 1970 to 2003, several notable conclusions emerge. The most interesting determinant of litigant success in Australia involves a shift within the High Court from a mechanical form of jurisprudence to a doctrine of implied rights. Once the High Court announced *Mabo*, 'one-shot' litigants gained a significant advantage and were more likely to win. Additionally, the change to a doctrine of implied rights provided barristers with new opportunities to craft novel legal arguments. Consequently, their influence over decision outcomes increased. As barristers gained more experience and more successes, the likelihood of their clients winning increased substantially.

Keywords: High Court; implied rights; litigation; party capability

Judicial scholars have long been interested in determining the factors influencing decision-making in legal institutions. One area of research that has received substantial attention over the last 30 years addresses the fundamental question of who wins and loses in litigation. As often pointed out in this literature, the determination of who wins and loses is essential to our understanding of the 'allocation of values' (Easton 1953) in society and the role of courts in determining the distribution of rights among parties.

In attempting to understand and address the question of who wins and loses among direct parties,[1] researchers draw primarily on a seminal article written by Marc Galanter (1974). Galanter put forward the hypothesis that there are differential success rates between the 'haves' and the 'have-nots' among the parties in litigation. He asked the question, 'Why the Haves Come Out Ahead?'

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[1]The term 'parties' is commonly used in judicial politics literature to refer to the litigants in the case and is not related to political parties.

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This basic question would become the premise upon which a body of research developed over the next 30 years in the field of judicial behaviour. Consequently, the article is one of the most cited in the field of judicial politics, and the source for an edited volume dedicated to the impact of the Galanter proposition on the study of litigation (Kritzer and Silbey 2003). This area of research is better known today as 'party capability theory'.

In this article we explore party capability theory in the High Court of Australia, with a focus on identifying how structural and legal-cultural changes across time have an impact on litigation outcomes. We also for the first time examine the impact of barristers on litigant success rates in the High Court. The research furthers the judicial politics literature by developing a more nuanced theory of party capability that moves beyond the assumption that advantaged litigants win more often in all instances. Our theoretical assumption is that the influences advantaged litigants enjoy are dependent on the structure of the court and the legal philosophies pursued by judges.

Evolution of Party Capability Theory

Over the past 30 years researchers have tested the 'repeat player' hypothesis in various legal forums.[2] Wheeler et al. (1987) examined the success rates of parties in 16 United States' (US) state supreme courts from 1870 to 1970. They found some support for the argument that 'repeat players' win more often than 'one-shot' litigants. 'Repeat players' consistently won more often against their opponents, and governmental litigants had the highest rates of success against litigants with fewer resources and experience. Farole (1999) re-examined the Wheeler study for the period from 1975 to 1999 and found similarly that the 'haves' came out ahead in state supreme court litigation, especially the government, which had seen a significant increase in success since the earlier study.

In United States' federal appeals courts, Songer and Sheehan (1992) found strong evidence that 'repeat players' have an advantage in litigation. The success rates for government were four times higher than for individuals, and businesses won more often when appearing against individuals.

Support for the Galanter premise has also been found in legal institutions outside the United States. McCormick (1993) examined the success of different classes of litigants from 1949 to 1992 and discovered strong support for the 'repeat player' hypothesis in the Canadian Supreme Court. In the English Courts of Appeals, Atkins (1991) saw a 25 point advantage accrue to the government when opposing corporate litigants, and individuals were at a 14 per cent disadvantage against corporations. Dotan (1999) replicated these studies for Israel's High Court and also found that government and corporations were at an advantage against individuals.

[2]The repeat player hypothesis and the 'haves versus have nots' hypothesis are not exactly the same but in the literature they have been used interchangeably to represent parties who have greater resources and experience in litigation. Resources and experience lead to a greater probability of success in litigation. When we utilise the 'repeat player', the 'haves' or the Galanter premise in the article, we are referring to litigants who are at an advantage due to superior resources and experience.

Although there have been numerous studies demonstrating support for the Galanter hypothesis, there are studies that do not support the proposition that 'repeat players' will enjoy an advantage over 'one-shot' litigants. Sheehan, Mishler and Songer (1992) examined the United States Supreme Court across a 36-year period and found little evidence that 'repeat players' had an advantage. The pattern of success identified by Sheehan, Mishler and Songer was more consistent with changes in the ideology of the Court. Employing a multivariate model, they discovered empirical support for the premise that minorities were favoured by more liberal courts and businesses favoured by more conservative courts.

Haynie (1994) also found no pattern of 'repeat player' advantage in her analysis of the Philippines' Supreme Court. Individuals had higher rates of success than businesses or government. She argued that the Galanter hypothesis might not have as much validity in developing nations because the courts might be inclined to serve as an agent for redistributive policies. This role perception of the court might alleviate the impact of litigant resources and experience on outcomes. In her study of the South African Appellate Division (2003), Haynie again found weak support for advantaged parties in a developing nation.

Smyth (2000) replicated these studies in his analysis of the High Court of Australia for the period from 1948 to 1999. Utilising similar litigant categories and net advantage measures to those employed in earlier studies, he found little support for the Galanter hypothesis. While the federal government enjoyed a significant net advantage, the pattern of success for other litigants was not consistent with the hypothesis.

Some researchers suggest litigation success is better measured as a function of the experience of representative counsel for the litigants (McGuire 1998; Wahlbeck 1997). Lawyers who appear before a court more often will have an advantage in litigation for several reasons. Appearing before a court multiple times allows attorneys to develop their oratory and case preparation skills for that court. It also allows them to develop a working relationship with the court, with judges expecting that written arguments and oral presentations will be better and more credible. McGuire (1995; 1998) examined the success rates of attorneys in the United States Supreme Court and found that experience is significantly related to the success of the party. Yet, Flemming and Krutz (2002) found that in the leave to appeal stage of the Canadian Supreme Court, there seemed to be no advantages for more experienced attorneys. Haynie (2008) recently found that the number of appearances before the court was not significant, but what really mattered was how successful the attorney had been in previous cases. She concluded that the ability of a party to hire or be represented by attorneys who had been previously successful in court increased the chances of success significantly.

The Australian High Court and Party Capability Theory

The Australian High Court provides an excellent forum to examine the 'repeat player' hypothesis in conjunction with procedural, structural, and legal-cultural differences that might impact upon success rates in litigation. The founders of the Australian Constitution relied on the United States and England as the models for their system. This resulted in a system of government (including the

High Court) with similarities to both models, yet also possessing unique features. Additionally, given the relatively young age of the country compared to England and the United States, Australia and the High Court in particular have also experienced important changes in their procedures and decision-making philosophies. These changes provide an opportunity to examine how alterations in legal structures and shifts in legal doctrine can impact who wins and loses.

One of the obvious differences between Australia and the United States or Canada is the absence of a Bill of Rights. Smyth (2001) argued that the absence of a document protecting individual rights accounted in some part for his findings that 'repeat players' did not have an advantage in the High Court. However, while McCormick (1993) found support for a 'repeat player' hypothesis in Canada, Sheehan, Mishler and Songer (1992) did not find support in the US Supreme Court. Though the presence of a rights document may affect the agenda of a court, it should not affect the Galanter premise of party capability.

Another important difference for the High Court is the length of oral arguments. Unlike the US Supreme Court where oral argument is limited to 30 minutes for each side, the Australian High Court allows unlimited time for arguments. This reflects the British tradition of emphasising oral argument over written briefs (Leigh 2000). Written briefs can be filed in the Court but it is not compulsory (Bennett 2002). It has only been in recent history that the Court has begun to require outlines of barristers' arguments before the arguments begin (Brennan 2002). In 1997 the Court finally moved to the submission of cases briefed 'on the papers' prior to oral argument (Wood 2008). The justices, however, do not see written briefs replacing the importance of oral argument (Leigh 2000). Emphasising oral argument in its proceedings distinguishes the High Court of Australia from many other high courts in other nations, including the United States. It would follow that the oratorical skills of barristers are very important in the Australian judicial process. Given the findings in the United States (McGuire 1998; Wahlbeck 1997) and in South Africa (Haynie and Sill 2007) regarding the importance of attorney experience, we expect that it is even more significant in a court that places so much emphasis on oral argument.

The High Court of Australia has greater jurisdiction than many other common law courts around the world. It can hear cases from the State court system even if there is no federal or constitutional question of law involved. This can have an impact on the nature of cases brought into the Court. The success of parties might be affected by whether the case involves the State legal system or is a case involving a federal issue. There is some evidence in the literature that national governments have advantage solely because the Court is a part of the national system of government (Kritzer 2003). One could argue that advantage might be less significant for State governments, especially in cases not involving a federal issue, since the High Court may feel no allegiance to the State system.

Another difference between Australia and the US or Canada involves a procedural change adopted in 1984. Previously, the High Court did not possess complete discretionary jurisdiction. Many civil cases were heard as a 'right of appeal' (Patapan 2000). In 1984, the High Court gained complete control of its

docket – civil cases now needed to petition for 'special leave' to appeal, similar to Crown (criminal) cases. This shift in the legal structure of the High Court provides an opportunity to determine what effect the procurement of discretionary docket control has on litigant success. Though studies in the United States suggest that discretionary docket control has a profound influence, those studies were based on analyses of different institutions.

The final important difference between the Australian High Court and the United States or Canadian Supreme Courts involves a fundamental shift in legal philosophy and jurisprudence across time. Historically, the High Court has been perceived as apolitical and extremely legalistic. Chief Justice Owen Dixon expressed this view in his swearing-in ceremony when he stated, 'the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or another'.[3] However, changes in the last several decades have led to shifts in jurisprudence.

The High Court became the final court of appeal after the abolition of Privy Council appeals. In 1976 the Federal Court of Australia was established to help alleviate the caseload of the High Court. In combination with the end of 'right of appeal' cases, this led to the opportunity for the Court to choose the cases it wanted to hear. The Court was now free to hear cases of national importance and/or those involving constitutional issues (Patapan 2000). The shift in legal philosophy began to appear in the Mason Court (1989–95) with the Court proclaiming 'it no longer declared the law, that in some sense it had always made the law and continued to do so' (Patapan 2000, 5).

Recognition of this shift in the role of the Court was first suggested by Brian Galligan (1987) in his book, *Politics of the High Court*, and it led to extensive debate about the Court becoming more political, potentially to the extent of the United States Supreme Court. In the last few years the Court has become more conservative and some argue it has backed away from the Mason reformulation of jurisprudence. Nonetheless, it is still accepted that the High Court today gives more attention to individual rights cases than it did in its early history. From a case perspective, the demarcation of the change is often traced to *Mabo v Queensland*,[4] in which the High Court recognised the rights of Aboriginal and Torres Strait Islander people to native title. Although the decision was based on an economic argument, many viewed it as the recognition of individual rights for Aborigines and Torres Strait Islanders. The Court would also use the doctrine of 'implied rights' to find protections for free speech in the Constitution.[5] This shift in the jurisprudence of the High Court began to open doors to areas of litigation that had been closed for many years to civil claimants.

Hypotheses and Data

We test several hypotheses directed at tapping into the 'repeat player' hypothesis originally presented by Galanter and examined in various other

[3](1952) 85 CLR xii–xiv.
[4](1992) 175 CLR 1.
[5]*Nationwide News v Wills* (1992) 177 CLR 1.

legal institutions. The basic hypothesis that has been utilised by all the research in this area is that 'repeat players' will have higher success rates in the courts and more specifically that repeat players will win more often when opposing 'one-shot' litigants. We also contend that repeat players may carry a status advantage as a result of how they may be perceived in society and possibly by the High Court. Consequently, our first hypothesis (the 'Litigant Status Hypothesis') states that repeat player litigants will enjoy higher overall success rates than one-shot litigants. To measure these effects we categorise the parties in each case according to the following groupings: Individuals, Private Business or Non-profit Organisation, State or Local Government, and National Government.

Secondly, since we believe the quality of barrister representation is a substantial influence on the success of litigants, we examine various aspects of barrister quality. The initial barrister hypothesis (the 'Barrister Experience Hypothesis') states that litigants with barristers who have had more experience in the High Court will be more successful than those with less experience. We measure barrister experience simply by taking the number of times the lead barrister has previously appeared before the High Court.[6] Yet, as Haynie (2008) discovered, it is also plausible that attorney success in previous cases (rather than simple experience) is a more important indicator of party success. Therefore, our 'Barrister Success Hypothesis' states that litigants who employ more successful barristers will be more likely to win before the High Court. We operationalise barrister success by counting the number of times the lead barrister has won a case before the High Court – wins are counted by positive integers and losses are counted by negative integers. Thus, a barrister appearing for the first time would score '0' on this measure, an individual with three previous wins and one loss would score '2', and a barrister with three losses would score '−3'.

Thirdly, it is important to control for significant structural changes within a judicial institution. In the High Court the shift to complete discretionary docket control should influence the nature of many of the cases coming before the Court, since it could now choose all the cases it wanted to hear and was not mandated under the 'right to appeal' provisions. Eliminating cases that might have not been meritorious and ripe for appeal would likely lead to more cases in which the resource and experience differentials of litigants would be less. Consequently, our 'Discretionary Docket Control Hypothesis'[7] states that 'one-shot' litigants will be more successful after the move to complete discretionary jurisdiction by the High Court.

Finally, we test whether the shift from strict legalism and declaring the law to a jurisprudence of implied rights and making law did influence litigant success patterns in our time period.[8] Our 'Implied Rights Hypothesis' states that 'one-

[6]Since the data began in 1970, this measure treats all barristers as equal (that is, with no experience) in 1970 and then measures the number of cases litigated in subsequent years.

[7]This is measured by including a dummy variable for cases litigated after 1984, when the High Court obtained discretionary docket control.

[8]The time period of our data is 1970 to 2003. In recent years, scholars have argued that the High Court has retreated from the implied rights approach and that many individual litigants who have tried to be creative with their arguments under this approach have not been successful. Since our data do not extend to that recent time period, we are unable to shed further light on that

Table 1. Appellant Success Rates by Litigant Type (All Cases)

	Respondent				
Appellant	Individual (N)	Private Business or Non-profit Organisation (N)	State or Local Government (N)	National Government (N)	Success Rate (N)
Individual (N = 847)	10.3% (87)	9.1% (77)	8.6% (73)	22.6% (191)	50.5% (428)
Private Business or Non-profit Organisation (N = 532)	9.6% (51)	16.9% (90)	5.5% (29)	9.2% (49)	41.2% (219)
State or Local Government (N = 164)	24.4% (40)	14.0% (23)	3.7% (6)	5.5% (9)	47.6% (78)
National Government (N = 140)	24.3% (34)	24.3% (34)	3.6% (5)	0.1% (1)	52.9% (74)

Note: Cell entries calculated based on appellant victory (i.e. Australian High Court decision is to reverse or vacate the lower court decision).

shot' litigants will be more successful following the jurisprudential change to implied rights and making the law. This potential influence is examined by analysing patterns of High Court decision-making before and after the *Mabo* decision in 1992.

Data for this analysis come from the High Courts Judicial Database[9] consisting of information for nine countries including Australia. All the cases adjudicated by the High Court from 1970 through 2003 are included; the total number of cases is 1,893. The database is comprehensive and includes, among many other variables, detailed coding for parties in the case, issues, outcomes, judge votes and names of barristers arguing the case.

Empirical Results

Our initial empirical analysis follows previous research by looking at appellant success rates across various litigant categories. As one examines the descriptive data depicted in Table 1, several important observations emerge. First, we notice that the National Government possesses the highest overall success rate (52.9 per cent) as an appellant. This observation provides anecdotal confirmation of the basic Galanter premise – the 'haves' or 'repeat players' come out ahead. Yet, the second general observation does not support

retreat. What our data do test for, however, is whether utilising the implied rights approach benefitted certain litigants. Of course, a movement away from implied rights might have the opposite effect for those litigants in recent years.

[9]The High Courts Judicial Database is a public access database created by Stacia Haynie, Reginald S. Sheehan, Donald R. Songer and C. Neal Tate with the support of grants from the National Science Foundation. It can be downloaded at: <http://sitemason.vanderbilt.edu/page/exnakE>. Consulted August 2010.

Table 2. Litigant Net Advantage (All Cases)

Litigant Type	Success as Appellant	–	Opponent Success when Respondent	=	Net Advantage
Individual	50.5%	–	48.2%	=	2.3%
Private Business or Non-profit Org.	41.2%	–	45.7%	=	−4.5%
State or Local Government	47.6%	–	51.4%	=	−3.8%
National Government	52.9%	–	46.9%	=	6.0%

Galanter's conclusion – Individuals possess the next highest rate of success (50.5 per cent). Finally, we notice that State Governments have the third highest appellant success rate (47.6 per cent) and Private Businesses come in last (41.2 per cent).

While these results are interesting – partially supporting the Galanter hypothesis – it is possible that rates of success as appellants are different from success as respondents. Songer and Sheehan (1992) discovered this asymmetrical success rate in the US Courts of Appeals; because of the tendency for appellate judges to affirm lower court cases, they constructed an index of net advantage. This index examines the rate of success when a litigant appears as an appellant against and subtracts from that the rate of opponents' success when the litigant appears as a respondent.

Smyth (2000) demonstrated that examining a litigant's net advantage reveals important information concerning success rates in the High Court of Australia. Following in this tradition we construct an index of net advantage and report the results in Table 2. It is evident that the overall pattern of success observed in Table 1 continues. The National Government possesses the highest net advantage (6.0 per cent), Individuals are second (2.3 per cent), State and Local Government is third (−3.8 per cent), and Private Business is last (−4.5 per cent). Consequently, these results provide partial support for Galanter's hypothesis that 'repeat players' win more often than 'one-shot' litigants.

Viewed as a whole, the descriptive results reported above provide only partial support for the Galanter premise that the 'haves' come out ahead. Though the National Government is the most successful litigant, Individuals follow close behind. However, in order to adequately test the hypotheses stated earlier, one cannot rely on descriptive results; rather, a multivariate empirical model is needed.

Our final set of analyses involves several probit models to empirically test the determinants of litigant success; the results of these models are reported in Table 3. For each analysis, the dependent variable is whether the appellant wins a particular case (coded '1') or not (coded '0').[10] To evaluate the 'Litigant Status Hypothesis' we include several dummy variables measuring specific litigant categories for both appellants and respondents. These variables include *Individual as Appellant*, *Individual as Respondent*, *Business as Appellant*, *Business as Respondent*, *State/Local Government as Appellant*, *State/Local*

[10]For more detailed descriptions of the independent variables and their descriptive statistics, please refer to Appendix E of the online appendices of the University of South Carolina's Judicial Research Initiative (JuRI). URL: <http://www.cas.sc.edu/poli/juri>. Consulted August 2010.

Government as Respondent, *National Government as Appellant*, and *National Government as Respondent*. If the 'Litigant Status Hypothesis' is correct then we expect positive coefficients for the stronger parties when they appear as appellants and negative coefficients for the stronger parties when they appear as respondents.

Evaluating the hypotheses related to barrister quality requires a series of independent variables (some in combination with particular litigants). To test the 'Barrister Experience Hypothesis' we include the variables *Appellant Barrister Participation* and *Respondent Barrister Participation*.[11] Additionally, we include separate variables measuring barrister experience for Individuals (*Individual Appellant Barrister Participation* and *Individual Respondent Barrister Participation*) and the National Government (*National Government Appellant Barrister Participation* and *National Government Respondent Barrister Participation*). Finally, for these latter sets of experience variables we also include squared terms to capture particular non-linearities related to initial learning effects versus decreasing marginal advantages over time. If the 'Barrister Experience Hypothesis' is valid, then the appellant variables should possess positive coefficients while the respondent variables should possess negative coefficients, since the dependent variable measures the likelihood of an appellant win.

Additionally, to test the 'Barrister Success Hypothesis' we include several variables similar to the participation variables, but record the number of previous cases won by the lead barrister. Consequently, we include variables measuring general *Appellant Barrister Success* and *Respondent Barrister Success*, as well as variables measuring success for barristers representing Individuals and those representing the National Government (as well as squared terms for these latter sets to capture any non-linearities). If the 'Barrister Success Hypothesis' is valid then we expect positive coefficients for the appellant variables and negative coefficients for the respondent variables.

To test both the 'Discretionary Control Hypothesis' and the 'Implied Rights Hypothesis' we run separate models across the various time periods. The initial model examines all cases (1970–2002) in the dataset. Additionally, we run a separate model examining the years when the High Court did not possess control of its docket (1970–84); when the High Court gained discretionary control but had not signalled a doctrine of implied rights (1985–91); and a model to examine effects after the *Mabo* decision (1992–2002). If the institutional changes and shifts in legal jurisprudence substantially affect litigant success then we expect to observe substantial differences in the variables across these specific time periods.

The first column of Table 3 represents an analysis of all cases before the High Court of Australia from 1970 to 2003. Examining these data reveals that none of the litigant characteristic variables achieves statistical significance.[12] In terms of barrister influence, the results indicate that general experience does not matter, but prior success is significantly related to appellant wins. As the

[11]Each variable is simply the number of times the lead barrister previously appeared before the High Court.

[12]For alternative specifications that examine criminal appeals and governmental regulation cases separately, see Appendix A of the JuRI. URL: <http://www.cas.sc.edu/poli/juri>. Consulted August 2010.

Table 3. Litigant Success Rates in the High Court of Australia

	All Cases (1970–2002)	Pre-Docket Control (1970–84)	Post-Docket Control and Pre-*Mabo* (1985–91)	Post-Docket Control and Post-*Mabo* (1992–2002)
Litigant Characteristics				
Individual as Appellant	.018 (.133)	−.416** (.208)	.642* (.329)	.551** (.277)
Individual as Respondent	−.173 (.158)	−.376 (.273)	.828 (.461)	−.375 (.273)
Business as Appellant	.028 (.131)	−.162 (.174)	.273 (.292)	.690*** (.256)
Business as Respondent	−.125 (.117)	−.476** (.186)	.830** (.395)	−.006 (.200)
State/Local Government as Appellant	.133 (.159)	−.252 (.236)	.889** (.358)	.571* (.331)
State/Local Government as Respondent	.143 (.130)	.089 (.183)	.722 (.466)	.164 (.276)
National Government as Appellant	.085 (.221)	.440 (.494)	−1.050 (.777)	1.511*** (.375)
National Government as Respondent	−.138 (.144)	−.042 (.252)	.728 (.500)	−.311 (.292)
Barrister Characteristics				
App. Barrister Participation	.002 (.007)	−.012 (.016)	.068** (.020)	−.001 (.008)
App. Barrister Success	.199*** (.030)	.296*** (.052)	.310*** (.071)	.120** (.052)
Resp. Barrister Participation	.013 (.012)	.053 (.029)	.086** (.034)	−.017 (.013)
Resp. Barrister Success	−.242*** (.043)	−.323*** (.088)	−.418*** (.116)	−.274*** (.072)
Indiv. App. Barrister Participation	.066*** (.021)	.165** (.069)	−.116** (.056)	.090*** (.033)
Indiv. App. Barrister Success	.118** (.049)	.128 (.091)	.117 (.114)	.229*** (.087)
Indiv. Resp. Barrister Participation	.078 (.061)	.072 (.119)	−.037 (.091)	.223*** (.084)
Indiv. Resp. Barrister Success	−.328** (.127)	−1.104*** (.220)	−.172 (.176)	−.409*** (.184)
Nat'l Gov't App. Barrister Participation	.022 (.035)	−.116 (.179)	.296* (.161)	−.062 (.037)
Nat'l Gov't App. Barrister Success	.064 (.093)	.146 (.239)	.111 (.171)	.046 (.132)
Nat'l Gov't Resp. Barrister Participation	.029 (.031)	−.038 (.097)	.042 (.063)	.028 (.076)
Nat'l Gov't Resp. Barrister Success	−.207*** (.074)	−.122 (.141)	−.054 (.156)	−.288* (.151)
Indiv. App. Barrister Participation^2	−.001*** (.000)	−.004 (.003)	.001 (.001)	−.001*** (.000)

(*continued*)

Table 3. (*Continued*)

	All Cases (1970–2002)	Pre-Docket Control (1970–84)	Post-Docket Control and Pre-*Mabo* (1985–91)	Post-Docket Control and Post-*Mabo* (1992–2002)
Indiv. App. Barrister Success^2	−.017* (.010)	.003 (.003)	.003 (.002)	−.040*** (.013)
Indiv. Resp. Barrister Participation^2	−.001 (.001)	−.021 (.026)	.058*** (.016)	−.005** (.002)
Indiv. Resp. Barrister Success^2	.030*** (.007)	.064*** (.011)	−.060 (.075)	−.031 (.033)
Nat'l Gov't App. Barrister Participation^2	−.000 (.000)	.011 (.009)	−.007** (.003)	.000 (.000)
Nat'l Gov't App. Barrister Success^2	.011 (.019)	−.000 (.006)	.001 (.001)	.004 (.026)
Nat'l Gov't Resp. Barrister Participation^2	.000 (.000)	−.064 (.086)	.001 (.035)	.002 (.003)
Nat'l Gov't Resp. Barrister Success^2	.013*** (.004)	.019 (.015)	−.038 (.027)	.060 (.043)
Constant	−.095 (.143)	.181 (.194)	−1.595 (.538)	−.474 (.299)
N	1726	861	375	490
Log-Likelihood	−800.573	−337.597	−139.684	−212.965
LR/Wald Test	265.45	204.45	129.75	119.93
Probability $> \chi^2$	.000	.000	.000	.000
R^2	.331	.428	.458	.351
% Correctly Predicted	83.3%	86.2%	84.3%	81.8%
% Reduction of Error	65.9%	68.5%	64.9%	53.7%

*p < .10; **p < .05; ***p < .01 (two-tailed tests).
Dependent variable: Whether the appellant wins ('1') or not ('0'). Coefficients represent results of a probit model with robust standard errors listed in parentheses.

Appellant Barrister accumulates more wins, the likelihood of the appellant winning increases. Additionally, as the *Respondent Barrister* accumulates more wins in prior cases, the likelihood of the appellant winning decreases. Similarly, we see that the quality of barristers representing Individuals significantly influences the dependent variable – *Individual Appellant Barrister Participation*, *Individual Appellant Barrister Success*, and *Individual Respondent Barrister Success* are all statistically significant with coefficients in the expected direction. However, it is important to note that the success of barristers representing Individuals reaches a point of diminishing returns over time. This is represented by the squared terms – *Individual Appellant Barrister Participation*^{2}, *Individual Appellant Barrister Success*^{2}, and *Individual Respondent Barrister Success*^{2} – all of which are significant but in the opposite direction of the non-squared terms.

Turning to the second column, which examines the period before the High Court obtained discretionary docket control (from 1970–84), we observe that the variable *Individual as Appellant* is now significant and negative. This indicates that cases brought to the High Court by Individuals were significantly less likely to win. Conversely, the variable *Business as Respondent* is significant and negative, indicating that Businesses were more likely to win (that is, the likelihood of an appellant win decreases) when appeals were brought against them before the High Court. Beyond these litigant differences, the variables measuring barrister quality display patterns similar to those observed in the pooled sample (that is, in column one).

When we examine column three, however, we observe that the advent of discretionary docket control by the High Court marks a substantial shift in terms of litigant success. Initially, the empirical results indicate that the variable *Individual as Appellant* is statistically significant for the first time; and the positive coefficient reveals that Individuals are significantly more likely to win when they bring appeals before the High Court. Second, we observe that the variable *Business as Respondent* is significant but the coefficient is now positive (whereas in the previous era it was negative). This indicates that Businesses are less likely to win cases when an appeal is brought against them to the High Court. Third, the data indicate that similar to Individuals, State and Local Governments are significantly more likely to win when they bring appeals.

In addition to the changes in litigant characteristics, column three reveals that general barrister quality influences outcomes once the High Court obtains discretionary control of its docket. The variables *Appellant Barrister Participation* and *Appellant Barrister Success* are significant and positive and the variable *Respondent Barrister Success* is significant and negative, as expected.[13] Though these variables indicate that barrister quality is important, we do not see similar results for those barristers representing Individuals or the National Government.

The final column presents data on High Court outcomes after the *Mabo* decision in which the justices announce a doctrine of implied rights. If our 'Implied Rights Hypothesis' is correct then we should observe 'one-shot' litigants (that is, Individuals) winning more cases following the *Mabo* decision. The results in the final column support this hypothesis. First, the variable

[13]The variable *Respondent Barrister Participation* is also statistically significant, but the sign is in the opposite direction.

Individual as Appellant remains significant and positive (similar to column three) indicating that appeals brought by Individuals have a greater likelihood of winning at the High Court. Furthermore, the variables *Business as Appellant*, *State/Local Government as Appellant* and *National Government as Appellant* are also significant and positive; these litigants have a greater likelihood of winning when they bring appeals to the High Court. Therefore, it is apparent that starting with the High Court's discretionary control of its docket in the 1980s, the post-*Mabo* era continues a pattern whereby appellants receive favourable treatment from the justices.

Yet, the evidence from the post-*Mabo* era reveals that barristers representing Individuals wield a substantial influence on the likelihood of winning – more than barristers representing other litigants. The variables *Individual Appellant Barrister Participation*, *Individual Appellant Barrister Success*, and *Individual Respondent Barrister Success* are all statistically significant and in the expected direction.[14] The results indicate that following the High Court's decision in *Mabo*, barristers representing Individuals are able to develop legal arguments that resonate with the justices, building on the implied rights doctrine. Consequently, both their prior experience and previous success allow these barristers to significantly increase the likelihood of a favourable decision for 'one-shot' litigants (that is, Individuals).[15]

Substantive Implications of Empirical Results

While the empirical results presented in Table 3 provide solid support for several of our hypotheses, it is difficult to discern the substantive impact of litigant capability and barrister quality. To better understand how these aspects relate dynamically to outcomes on the High Court, we offer several graphical displays. Figure 1 represents how litigant capability (without controlling for barrister quality) affects the likelihood of an appellant win over time. Immediately, one can see that all three categories (Individual, Business, and the National Government) experience an overall decline in the likelihood of winning from 1970 to 1984 (when the High Court gains discretionary control of its docket). Then, in 1985 each category experiences positive trends that continue in the post-*Mabo* era. As a result, if one were to only examine the influence of these litigant categories, one would conclude that the institutional changes experienced by the High Court (most notably the changes to its discretionary jurisdiction) substantially affected all litigants.

Yet, once we control for the influence of barristers, the pattern of success changes dramatically. Figure 2 displays the cumulative success of barristers representing Individuals and barristers representing the National Government. We observe in the graph that the success of barristers representing Individuals decreases from 1970 to 1985 (with a dramatic decline after 1980); and when the High Court obtains discretionary control of its docket, the cumulative success of these barristers fluctuates wildly. However, following the *Mabo* decision their

[14]Additionally, the variable *Individual Respondent Barrister Participation* is statistically significant, but in the opposite direction.

[15]Because our empirical data only extend to 2003, we cannot comment on recent scholarship that indicates the High Court has limited the doctrine of implied rights.

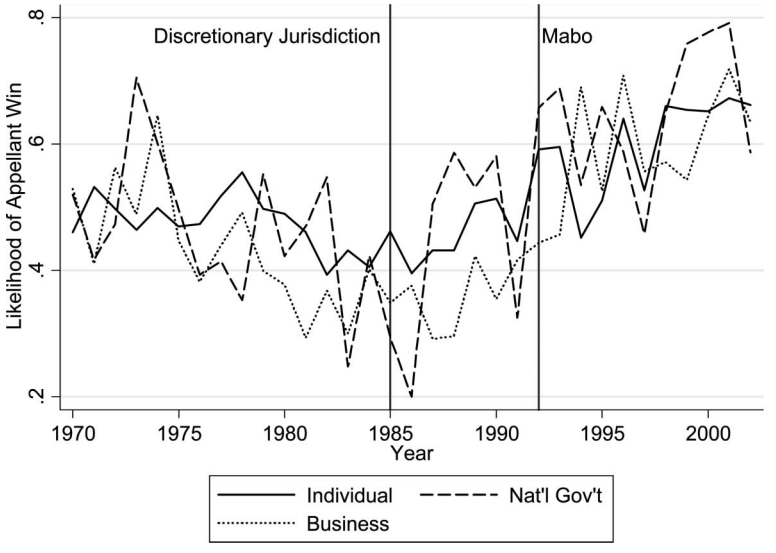

Figure 1. Likelihood of Appellant Win for Litigant Categories.

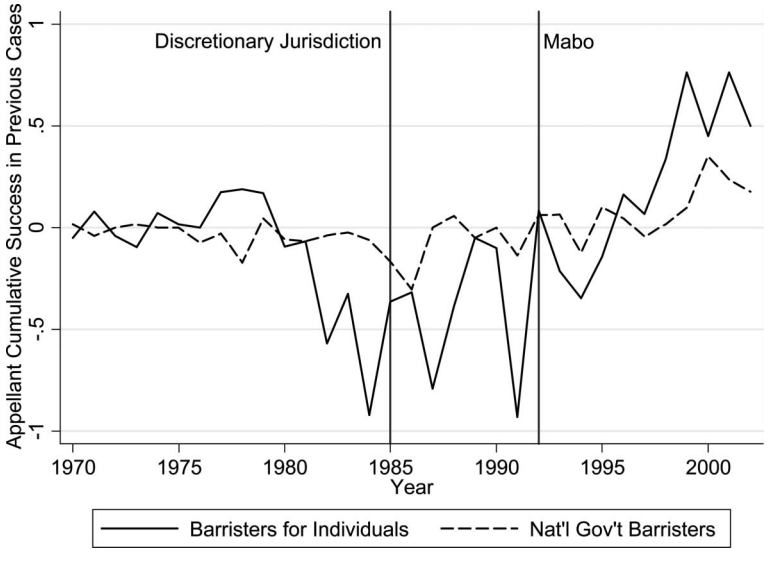

Figure 2. Cumulative Success of Appellant Barristers in Prior Cases.

cumulative success increases tremendously. In contrast, the cumulative success of barristers representing the National Government remains consistent across the entire 30-year time span. These patterns lead us to conclude that the High Court's announcement of a doctrine of implied rights in *Mabo* significantly affected the ability of barristers representing Individuals to craft new legal arguments in favour of their clients.

Finally, to see how closely related litigant success is to barrister quality, we graphed the likelihood of an appellant win for Individuals against their

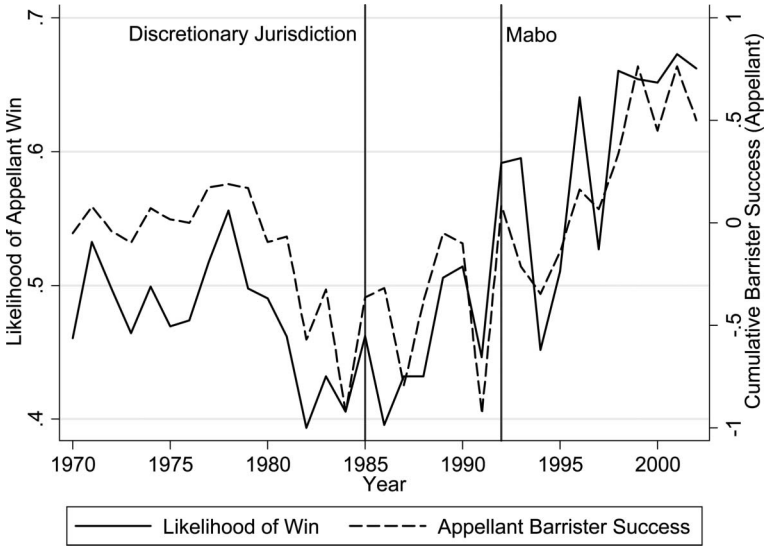

Figure 3. Likelihood of Appellant Win for Individuals and Barrister Success.

barristers' previous success (depicted in Figure 3). It is apparent from this figure that barrister success in previous cases has a tangible and direct effect on the likelihood of an Individual win. Additionally, it is apparent that the High Court's decision in *Mabo* substantially affected both trends in a positive manner.

The comparison across the various time periods raises the question of why there is change over time. We believe the primary rationale for this change involves the types of cases adjudicated by the High Court. Though the Court gained discretionary control of its docket in 1984, it is likely that the justices continued to receive legal arguments that were grounded in the mechanical jurisprudence tradition. As a result, it is unlikely that barrister experience would play as prominent a role in the success of Individuals. However, after the High Court's decision in *Mabo*, barristers were able to craft new legal arguments based on the doctrine of implied rights. As a result, the influence of barristers increased substantially and their previous experience and successes translated into higher likelihoods of winning for their clients. Consequently, it is the institutional change to a doctrine of implied rights after the *Mabo* decision that substantially determines the impact of litigant status and barrister quality.

Conclusions

The term 'party capability theory' suggests a much more complex and sophisticated array of hypotheses designed to explain outcomes for direct parties in litigation. The development of a theory of party capability requires scholars to examine more than party resources to determine why certain parties come out ahead in litigation. At a minimum, the theory needs to identify under what conditions resources of the 'haves' are a contributing factor and how other factors may affect the success of parties. We argue that party capability theory needs to expand beyond the Galanter hypothesis, and define more broadly

party capability as determined by litigant characteristics, legal structures and legal cultures.

Our paper moves in that direction by examining several factors related to litigant success in the High Court. Because of changes to the Court's legal structure and culture, Australia serves as an ideal test of the determinants of party capability theory. Based on our analysis of cases from 1970 to 2003, several notable conclusions emerge. Firstly, we find only partial support in Australia for the initial Galanter premise that 'repeat players' win more often than 'one-shot' litigants. While the National Government enjoys a distinct advantage over other litigant categories, Individuals also possess higher net advantages (contrary to Galanter's expectation).

Secondly, one of the reasons that we observe mixed empirical support for the 'Litigant Status Hypothesis' is that barrister quality significantly affects the likelihood of litigant success. As barristers gain experience before the High Court, and as they win more cases, their clients reap benefits. The empirical data provide strong support for the 'Barrister Success Hypothesis' and partial support for the 'Barrister Experience Hypothesis'.[16]

Yet, perhaps the most interesting determinant of litigant success in Australia involves a shift within the High Court from a mechanical form of jurisprudence to a doctrine of implied rights. This shift, symbolised in 1992 with the *Mabo* decision, profoundly influences the determinants of litigant success. Once the High Court announced *Mabo*, 'one-shot' litigants gained a significant advantage in relation to their barristers. The change to a doctrine of implied rights provided barristers with new opportunities to craft novel legal arguments. Consequently, their influence over decision outcomes increased – as barristers gained more experience and were more successful, the likelihood of their clients winning increased substantially. Our data only extend to 2003 so we cannot address the recent changes in legal philosophy that may have occurred within the High Court but it is clear that the movement to implied rights did benefit certain litigants.

It is apparent that the initial Galanter premise of 'repeat player' advantage needs to be reconsidered. No longer should scholars simply assume that party status leads to increased success. Rather, a more nuanced model is necessary – one that incorporates litigant characteristics, attorney experience, institutional structures, and legal culture. Understanding how these aspects influence litigant success provides scholars with a richer model of party capability theory.

References

Atkins, B. 1991. 'Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal'. *American Journal of Political Science* 35: 881–903.

Bennett, D. 2002. 'Argument Before the Court'. *In*: A. Blackshield, M. Coper and G. Williams, eds. *The Oxford Companion to the High Court of Australia*. South Melbourne: Oxford University Press.

[16]Future research should also examine whether the gender and education of barristers influence outcomes on the High Court. To the extent that the judiciary is dominated by males educated in private schools, it could be suggested that female barristers and individuals from public schools might have less influence.

Brennan, G. 2002. 'Decision-making Process'. *In*: A. Blackshield, M. Coper and G. Williams, eds. *The Oxford Companion to the High Court of Australia*. South Melbourne: Oxford University Press.
Dotan, Y. 1999. 'Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice'. *Law and Society Review* 33: 1059–80.
Easton, D. 1953. *The Political System: An Inquiry into the State of Political Science*. New York: Knopf.
Farole, D.J., Jr. 1999. 'Reexamining Litigant Success in State Supreme Courts'. *Law and Society Review* 33: 1043–58.
Flemming, R.B. and Krutz, G.S. 2002. 'Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses'. *Journal of Politics* 64: 232–48.
Galanter, M. 1974. 'Who Wins?' *Law and Society Review* 9: 357–64.
Galligan, B. 1987. *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*. St Lucia: University of Queensland Press.
Haynie, S. 1994. 'Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court'. *Journal of Politics* 56: 752–72.
Haynie, S. 2003. *Judging in Black and White: Decision-making in the South African Appellate Division, 1950–1990*. New York: Peter Lange.
Haynie, S. and Sill, K.L. 2007. 'Experienced Advocates and Litigation Outcomes: Repeat Players in the South African Supreme Court of Appeal'. *Political Research Quarterly* 60: 443–53.
Kritzer, H.M. 2003. 'The Government Gorilla: Why Does Government Come out Ahead in Appellate Outcomes'. *In*: H.M. Kritzer and S.S. Silbey, eds. *In Litigation: Do the 'Haves' Still Come Out Ahead?*. Stanford, CA: Stanford University Press.
Kritzer, H.M. and Silbey, S.S., eds. 2003. *In Litigation: Do the 'Haves' Still Come Out Ahead?* Stanford, CA: Stanford University Press.
Leigh, A. 2000. 'Behind the Bench: Associates in the High Court of Australia'. *Alternative Law Journal* 25: 295–99.
McCormick, P. 1993. 'Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992'. *Canadian Journal of Political Science* 26: 523–40.
McGuire, K.T. 1995. 'Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success'. *Journal of Politics* 57: 187–96.
McGuire, K.T. 1998. 'Explaining Executive Success in the U.S. Supreme Court'. *Political Research Quarterly* 51: 505–26.
Patapan, H. 2000. *Judging Democracy: The New Politics of the High Court of Australia*. Cambridge: Cambridge University Press.
Sheehan, R.S., Mishler, W. and Songer, D.R. 1992. 'Ideology, Status and the Differential Success of Direct Parties Before the Supreme Court'. *American Political Science Review* 86: 464–71.
Smyth, R. 2000. 'The "Haves" and the "Have Nots": An Empirical Study of the Rational Actor and Party Capability Hypotheses in the High Court 1948–99'. *Australian Journal of Political Science* 35: 255–74.
Songer, D.R. and Sheehan, R.S. 1992. 'Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals'. *American Journal of Political Science* 36: 235–58.
Wahlbeck, P. 1997. 'The Life of the Law: Judicial Politics and Legal Change'. *Journal of Politics* 59: 778–802.
Wheeler, S., Cartwright, B., Kagan, R.A. and Friedman, L.M. 1987. 'Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Court, 1870–1970'. *Law and Society Review* 21: 403–445.
Wood, R. 2008. *Why Do High Court Judges Join? Joining Behavior and Australia's Seriatim Tradition*. Unpublished PhD dissertation. Department of Political Science, Michigan State University.