Testing Representational Advantage in the Argentine Supreme Court

SERGIO MURO, Universidad Torcuato Di Tella
ALEJANDRO CHEHTMAN, Universidad Torcuato Di Tella
JORGE SILVA MÉNDEZ, World Bank
NELSON AMAYA DURÁN, World Bank

ABSTRACT

Even if party capability theory has been well documented, parsing out the reasons why "haves" come out ahead has been challenging. Our study takes advantage of the Argentine Supreme Court's power to dismiss appeals because they contain formal errors to ascertain the existence of representational advantage. We show that representational advantage plays a significant role, as individual appellants represent a larger proportion of appeals rejected on formal grounds than of those analyzed on their merits. In addition, certain areas of law where asymmetrical capability is prevalent and consistent, particularly labor law, are significantly overrepresented in appeals rejected on formal grounds.

I. INTRODUCTION

Courts are typically passive institutions that must be mobilized by litigants. They are also known to suffer from chronic case overload. Under these conditions, Galanter's (1974) influential party capability theory suggests that the status of litigants before courts has substantial influence on judicial outcomes. Corporations and the government act as repeat players, enabling them to take better advantage of the legal system.[1] In contrast, one-shot

We are indebted to the research assistants of the Argentine Supreme Court Project (http://www.utdt.edu/listado_contenidos.php?id_item_menu=23499) for their excellent work, as well as to participants in the 2016 inaugural conference of the Argentine Supreme Court Project and three anonymous referees for their insightful comments. The usual disclaimer applies. Contact the corresponding author, Sergio Muro, at smuro@utdt.edu.

1. McCormick (1993, 525) summarizes the advantages nicely by saying that repeat players "typically deploy superior material resources, which permit them to hire the best legal representation and to pay the

Journal of Law and Courts (Spring 2018) © 2018 by the Law and Courts Organized Section of the American Political Science Association. All rights reserved. 2164-6570/2018/0601-0001$10.00

litigants usually have high stakes in the outcome of their cases, have fewer resources at their disposal for expensive legal battles or to pursue their long-term interests, and receive little benefit from developing a precedent.

The theory's predictions have been corroborated in many studies.[2] Wheeler et al. (1987) found support for the theory in a study of 16 state supreme courts. Songer and Sheehan (1992) showed that party capability is strongly related to appellant success in federal courts of appeals in both published and unpublished opinions. Internationally, Atkins (1991) demonstrated that governments fare better than corporations and corporations fare better than individuals in the English courts of appeals. McCormick (1993) found similar results for the Supreme Court of Canada. More recently, Chen, Huang, and Lin (2014) have shown party capability effects in the Taiwanese Supreme Court at the jurisdictional stage, that is, to grant or deny certiorari review.

While party capability studies have shown the effects of litigant status in different settings, existing research has been less successful at disentangling the sources of litigant advantages. Following Galanter (1974), the litigation advantages of "haves" are believed to derive from their capacity to mold the law through time to accommodate their interests and to adapt their legal relationships to take full advantage of the law, from a better ability to select which cases to litigate and which cases to settle, and from a conscious or unconscious tendency of adjudicators to find in their favor, as well as from the ability to retain better counsel (i.e., representational advantage).

This study contributes to the literature on party capability—and, more generally, on access to justice—by investigating the effects of representational advantages in the discretionary jurisdiction of the Supreme Court of Argentina (CSJN). We define "representational advantage" as the capacity to secure better counsel, and we use the ability of legal counsel to fulfill certain formal legal requirements as a proxy to evaluate it.[3]

In 2007, CSJN took advantage of its broad regulatory powers to impose formal requirements on appeals through an administrative order called *Acordada 4* (or, simply, *Acordada*). Noncompliance with those requirements is sufficient ground for CSJN to dis-

---

costs of extensive legal research and preparation, while being better able to absorb the costs of delay. Their repeat-player status also implies the benefits of greater litigation experience, a capacity for selecting the best cases for appeal (and for settling out of court to avoid cases with little prospect of victory) and the ability to develop and implement a comprehensive litigation strategy. Working a longer time horizon, they can even to some extent 'win while losing'—for example, if a 'losing' decision embodies rules of evidence or procedure or interpretation that will favour their cause in the long run, or if it states very narrowly a principle that would have been more dangerous or expensive stated generously and expansively."

2. Glenn (2003) has shown that as of 2003 there have been at least 184 articles discussing party capability theory.

3. Previous studies have shown legal counsel characteristics—such as years of experience, the size of the legal team, the area of specialization, the schools that lawyers attended, and success rates in the Supreme Court—to be good proxies for lawyer quality. Unfortunately, we are not aware of the existence of such data in Argentina.

miss an appeal by issuing a decision that merely states that the appellant did not comply with one or more specific articles of *Acordada* (e.g., the maximum number of pages per appeal or the maximum number of lines per page). Justices have the option to make an exception and substantively revise appeals violating *Acordada* rules, but the use of such exceptions is believed to be very limited.[4] Because appeals are rejected purely on formal grounds, our research design allows us to study representational advantages in a context in which other sources of litigant advantages identified in the literature should not play a role.[5]

Our study is based on the analysis of an original database consisting of the 1,160 decisions to dismiss appeals on formal grounds issued by CSJN during 2012, as well as 1,118 decisions issued by the courts after substantive review.[6] These decisions were individually codified and processed. We also conducted 27 semistructured interviews to gain greater insight into the underlying reasons for the observed results. The study shows that representational advantage plays a significant role by unevenly affecting certain types of appeals. Specifically, individual appellants represent a larger proportion of appeals rejected on formal grounds than of appeals analyzed on their merits. In addition, certain areas of law in which asymmetrical capability is prevalent and consistent, particularly labor law, are significantly overrepresented in appeals rejected on formal grounds.

To the best of our knowledge, no other article has been able to parse out representational from other types of haves' advantages. Johnson, Wahlbeck, and Spriggs (2006) provided strong evidence of the importance of lawyer quality by studying lawyers' impact on success based on Justice Blackmun's grading of attorney performance during hearings. Nevertheless, they admit that "it is possible that attorneys get higher grades in cases in which they have the 'better' legal position; thus the relationship between [appeal success and lawyer performance during oral argument] reflect[s] the effect of the legal and factual

---

4. This, according to interviews we have conducted (interview A-3 and two anonymous interviewees). Further, CSJN's composition during the period of our study has been described as liberal by many authors (Kapiszewski 2006; González Bertomeu, Dalla Pellegrina, and Garoupa 2017, describing the same CSJN's composition as the one studied in this article). Therefore, and in line with results in other high courts (Haynie 1994; Dotan 1999), we would expect that any use of *Acordada*'s exception would have resulted in a reduction of the proportion of appeals presented by "have nots" being rejected on formal grounds, making actual haves' representational advantages even larger. For more on the use of *Acordada*'s exception, see Sec. V.

5. As one of the journal's reviewers pointed out, the ability to comply with formal requirements may not fully represent the quality of legal counsel. Nevertheless, for the purposes of appealing to CSJN, noncompliance with formal requirements practically negates any other qualities counsel may have, as compliance with the aforementioned rules is a prerequisite for substantial review.

6. The choice to use decisions issued in 2012 was informed by several factors. First, *Acordada* has been in effect since 2007, allowing enough time for lawyers to adapt to the new rules. Second, the database for this project was constructed from scratch starting in 2013, which led us to focus on the most recent information available. Third, while all the decisions are from 2012, appeals represent a longer period. Indeed, appeals in our sample were filed in 2012 and in previous years (mostly 2010 and 2011). Finally, the composition of CSJN was the same from 2006 to 2014, when two justices died. Hence, we have no reason to believe that 2012 was a special year for CSJN.

circumstances of the case" (108). By contrast, this type of difficulty does not arise in the present context, given that the objective requirements of *Acordada* are neutral between the parties.[7] Furthermore, our setting avoids the need to wrestle with the issue of who actually won a case. Judicial decisions typically entail many subtleties that may allow a losing party to claim small victories that carry over to other cases. This difficult evaluative scenario is prevented, as it is clear that parties who have had their appeals rejected on formal grounds have flatly lost.

Our main findings are also important because they incorporate docket management techniques into discussions of party success in developing countries. While several studies have confirmed the main tenets of the party capability theory in the United States (Wheeler et al. 1987; Songer and Sheehan 1992), other studies have found that some supreme courts in other countries tend to favor weaker parties—for either strategic or ideological reasons (Haynie 1994; Dotan 1999). Nevertheless, those studies do not focus on case dismissals.[8] Kastellec and Lax (2008) have shown that not accounting for case dismissals can distort findings about the effects of case characteristics on outcomes. Our results suggest that docket management techniques may also affect case outcome results, as well as the ability of even the most willing ideological courts to offset resource differences among litigants.

The article proceeds as follows. Section II introduces relevant background information on CSJN. In Section III, we present our main hypotheses based on the party capability theory. Section IV describes our data collection. In Section V, we present descriptive statistics and our main results. Section VI discusses the results and their implications. In Section VII, we briefly conclude.

II. LEGAL AND INSTITUTIONAL BACKGROUND

Before we start, we need to briefly explain the formal restrictions introduced by CSJN in 2007 through *Acordada* and the context in which these requirements were introduced, as well as describe the Court's organizational structure and jurisdiction. CSJN intervenes both through its original jurisdiction and as the tribunal of last resort.[9] Only the latter is relevant for our purposes here.[10] CSJN's appellate jurisdiction includes appeals of cases decided by courts of federal, national (i.e., local courts of the city of Buenos Aires; Art. 4 of

7. It could be argued that haves are better at selecting cases for appeal and, therefore, have increased chances of CSJN using *Acordada*'s exception in their cases. The rare use of the exception suggests otherwise. For more on case strength affecting results, see Sec. V.

8. For an exception focusing on the Taiwanese Supreme Court, see Chen et al. (2014).

9. When the Argentine parliament established the Supreme Court appellate jurisdiction, it followed closely the US Judiciary Act of 1789.

10. Its original jurisdiction is used for cases related to foreign ambassadors, ministers, or consuls or for cases between provinces or a province and a foreign state. Argentine Constitution, Art. 117 and Art. 1 of Act 48 (http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/116296/texact.htm).

Law No. 48), federal/national (i.e., criminal cases from federal or national origin that reach the Federal Criminal Cassation Court), or provincial jurisdiction.[11]

In order to reach CSJN, appellants must file complaints—commonly referred to as *recurso extraordinario* (REX)—in the relevant lower court of appeals (or provincial supreme court), which decides whether the appeal meets the substantive and procedural requirements after affording an opportunity for respondents to file replies. If the lower court considers that all requirements are satisfied, the appeal is sent to CSJN. If the lower court believes they are not, the appeal is denied; in that case, litigants may directly ask CSJN to hear their cases through a *recurso de queja* (RHE). In this case, CSJN will review whether the lower court legitimately denied the appeals.

Once appeals reach CSJN, they are distributed to the judicial department specialized in the area of the appeal. The specialized department will conduct a preliminary assessment on the basis of the formal requirements. The department will often keep the file for internal drafting before being circulated among the justices if the appeal arrives through RHE. When the appeal was granted by the previous court, the specialized department will usually distribute it among the justices, often starting with one with particular specialization in an area (before going to the others).[12] Justices will make a decision on the appeal after reviewing the appeal file. Hearings are extremely rare.[13]

The fact that CSJN has jurisdiction over a case does not guarantee that the court will arrive at a decision on the merits of the appeal. In 1990, Congress reformed the Code of Civil and Commercial Procedure, giving CSJN discretion to dispose of appeals based on a lack of substantive importance.[14] This type of decision is referred to as *Article 280*. Since then, CSJN has routinely made use of the discretionary power to reject appeals on the grounds that the matters raised by the appellant are either insignificant or inconsequential.

After the 2001 economic crisis, in the context of a legitimacy crisis that affected public offices more broadly, CSJN was facing the "worst crisis of credibility in its institutional history" (Ruibal 2009, 59). CSJN was significantly renovated by the first Kirchner administration.[15] Since then, CSJN has struggled to relegitimize itself; among its actions toward that goal, it has sought to improve the efficiency and transparency of its decision making.

---

11. In most of these cases, the Supreme Court possesses appellate jurisdiction, save for those cases concerning foreign ambassadors, ministers, and consuls and those cases in which a province is a party, where the Court has original and exclusive jurisdiction. See Art. 117 of the Argentine Constitution. An unofficial English version of the Constitution is available at http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf.

12. Tax law appeals are always analyzed by the relevant judicial department (Secretaría Judicial No. 7). Interview A-3.

13. On this, see Benedetti and Sáenz (2016).

14. Articles 280 and 285, *Código de Procedimiento Civil y Comercial de la Nación, Ley 23.774* (1990), available in Spanish at http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16547/texact.htm#5.

15. Decree 222/03. The Kirchner administration appointed Justices Lorenzetti, Argibay, Highton de Nolasco, and Zaffaroni.

In 2007, CSJN adopted *Acordada* as one of its key measures to streamline and facilitate appeals before it, as well as making decision making more transparent and efficient.[16] *Acordada* is a formal step before proceeding to analyze any extraordinary appeal. It stipulates a series of formal requirements each appeal must follow, among which we could highlight the following ones: a maximum length of 40 pages for the original appeal—REX (Art. 1)—and of 10 pages for the direct appeal, RHE (Art. 4);[17] a maximum of 26 lines per page and a minimum font size of 12 (Art. 1);[18] and a cover page with all of the relevant information on the file and the appeal (Arts. 2 and 5, respectively). Moreover, the submission itself should contain specific references about the court whose decision is appealed, the facts of the case, the type of harm the decision generates for the appellant, a clear refutation of "each and every independent argument" on which the disputed decision rests, and a "direct and clear relationship" between the federal norms invoked and the decision that has been reached (Arts. 3 and 6, respectively); the RHE submission should be accompanied by copies of several parts of the file (Art. 7); appeals should contain a detailed list of all of the legal norms cited that do not appear in the Argentine National Gazette (Boletín Oficial; Art. 8); appeals should follow the rules of citation of Supreme Court precedents preferred by CSJN (Art. 9); and the grounds of the appeal should not constitute a mere reference to previous parts of the file or a schematic or formal enunciation that does not allow CSJN to understand the precise grievance that is being alleged (Art. 10). Finally, Article 11, paragraph 1, stipulates that failure to fulfill each and every requirement would be sanctioned by rejection of the appeal, unless CSJN considers that that lack of fulfillment is not an insurmountable obstacle for the admissibility of the appeal.[19] Article 12, in turn, clarifies that these provisions will not apply to appeals presented *in forma pauperis*.[20]

In order for CSJN to reject an appeal on *Acordada* grounds, it must deliver an opinion—typically of the boilerplate type.[21] In practical terms, it means that, at the time of our study, at least four justices must vote to decide that the submission had not met the minimal standards set by *Acordada*.[22] Notably, this procedure is exactly the same one that the Argentine Supreme Court employs in order to issue opinions on the merits of cases.

---

16. On the effects of *Acordada*, see Muro et al. (2016).

17. As RHE appeal must be accompanied by the denied REX appeal, the page limit is smaller here.

18. An amendment has established that appeals should be presented on A4 paper (*Acordada 38/2011*).

19. The widespread view shared among our interviewees is that CSJN will use *Acordada*'s exception if the underlying injustice merits review or if CSJN "cares" about the underlying legal problem.

20. *Acordada* contains a model of the cover that both the initial appeal and the *queja* should follow.

21. Boilerplate opinions are also used to dismiss appeals on discretionary grounds and on lack of autonomous reasoning grounds.

22. In 2014, CSJN composition was reduced from seven to five justices. Hence, at least three justices have to vote now to reach a decision. It should also be noted that a majority vote is reached for dismissal even if a vote provides other grounds for appeal dismissal in a separate opinion.

III. HYPOTHESES

We examine party capability theory in the context of appeals to CSJN that were rejected on formal grounds or analyzed on their merits. Looking at these appeals is important because it allows us to direct our attention toward the specific reasons underlying why haves come out ahead.

The literature has identified four sources of haves' advantages (Wheeler et al. 1987), typically interacting with one another to reinforce their effect. First, through lobbying practices across time, haves may be able to mold the normative structure of the legal system in their favor. Further, because of their knowledge of the legal system, haves may better construct their legal relations so as to use the rules to their advantage. Second, as repeat players with deep pockets, haves develop strategic abilities that allow them to cherry pick which cases they want to litigate in order to generate favorable precedents (Albiston 1999). Due to litigation experience, haves are, on average, better able to assess success probability in any given case. Hence, cases with fact patterns that may not be best suited to generate wins can be settled privately without affecting the development of precedents. Third, judicial attitudes may cement the position of haves too. Through social relationships and social rank, judges tend to be closer to haves, and, as a result, they may tend to favor consciously or unconsciously the positions advanced by haves. Finally, haves tend to possess representational advantages. As repeat players, haves can use their experience with lawyers to better select the counsel to represent them. In the specific *Acordada* context, such a selection would involve evaluating the lawyer's familiarity with institutional rules—what Kritzer (1998) calls "process expertise." Also, because of their deeper pockets, haves can typically afford to select better-qualified counsel, build more effective litigation teams, and withstand extensive trial and appeal sequences.

By looking at the proportional differences between appeals that are rejected on formal grounds and appeals revised on the merits, we are able to parse out representational advantages from judges' ideological preferences (Sheehan, Mishler, and Songer 1992), judicial alignment with certain parties (Kritzer 2003), any normative tilt of the substantive legal system in favor of haves, and any differences in strategic abilities parties may have in selecting cases for appeal. None of these considerations should affect the decision of the Argentine Supreme Court to reject the case on formal grounds. As a result, we hypothesize that representational advantages, by themselves, matter. Hence, appellants with fewer (more) resources should have a higher (lower) proportion of appeals rejected on *Acordada* grounds than examined on the merits.

The proxies used in the literature for stronger or weaker party capability are imperfect (Wheeler et al. 1987). This is the case because researchers seldom have information about litigant resources. Nevertheless, in some areas of law, some litigants are more consistently the underdog. This is the case with individuals who litigate labor disputes against corporations or the government, or with individuals who go against the public prosecutor in criminal cases. In both cases, these individuals have fewer resources at their disposal than their counterparts and may be unable to retain CSJN-savvy lawyers. Therefore, we expect

to see a larger proportion of appeals rejected under *Acordada* arising from subject areas in which litigant asymmetry is systemic, such as labor law or criminal law.

IV. DATA COLLECTION AND PROCESSING

The focus of this study is on decisions arising out of REX and RHE appeals issued by CSJN in 2012, that is, the subset of cases in which litigants decided to appeal to CSJN. CSJN publishes online every opinion it issues, along with a case history and other background information. Starting in 2012, CSJN has categorized every opinion according to different criteria, and it introduced a search engine that allows searching for opinions meeting any of the predetermined criteria. One such criterion is the outcome of the opinion. We used the search engine to find every opinion that CSJN made during 2012 categorized as *Acordada*, or decided on the merits, excluding pension cases.[23] In addition, we randomly selected one-fourth (500) of all opinions issued in 2012 decided on Article 280 grounds, again excluding pension cases. After discarding repeated opinions and opinions that were mistakenly classified as *Acordada*, Article 280, or decisions on the merits, we ended up with a working database consisting of 621 decisions on the merits, 1,160 *Acordada* decisions, and 497 Article 280 opinions.[24] The data obtained provide a sound basis for assessing party capability theory. Further, the opinions we looked at are significant. The bulk of CSJN's workload is composed of its discretionary jurisdiction opinions. The practical importance of these opinions to every participant in the CSJN appeals process is evident.[25]

To further understand the work of CSJN regarding formal appeals rejections, we conducted a series of interviews with 27 key participants of the appeals process. The respondents were chosen for their experience with CSJN, as well as for their different roles in the appeals process. After developing an open-ended questionnaire, we interviewed practicing lawyers with regular experience filing CSJN appeals. We interviewed appeals court judges and appeals court officials who routinely handle CSJN appeals. In addition, we interviewed CSJN officials in charge of dealing with appeals and preparing internal documents.

---

23. While CSJN subclassifies appeals decided on the merits, for the purposes of this article they will be treated as one category. Pension cases are somewhat particular, and we therefore decided to exclude them from our analysis. Specifically, almost every pension case arises out of disputes between pensioners and the government owing to lack of adjustments made to the pension amount over the years. Typically, lower courts would order the government to adjust those amounts according to a specific criterion, and the government has adopted a policy that mandates its legal department to appeal each case up to the Supreme Court. Therefore, there are thousands of similar cases reaching the Supreme Court each year that do not merit much attention for present purposes.

24. The cases identified by the methods described above were coded by student research assistants. Before the student coding, we developed a template to structure the coding and a coding protocol. After review of the performance of the form, the protocol, and the students in an initial set of cases, the form and the protocol were revised. The students used that revised form and protocol to code the cases, under our supervision.

25. For instance, the prospect of appeals dismissals on formal error grounds affects the probability of private settlements.

Table 1. List of Interviewees

Name	Position
Abritta, Cristian	Secretario, Corte Suprema de Justicia de la Nación
Alvarez Tuñón, Eduardo	Fiscal general, Cámara Nacional del Trabajo
Blanco, Hernán	Secretario, Sala IV, Cámara Federal de Casación Penal
Canevari, Esteban	Secretario, Corte Suprema de Justicia de la Nación
Erbín, Juan	Subdirector Nacional de Asuntos Judiciales de Procuración del Tesoro de la Nación
Ferro, Lautaro D.	Partner, Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz (h)
Garay, Alberto F.	Partner, Carrió & Garay Abogados
García Vior, Andrea	Secretaria, Sala II, de la Cámara Nacional de Apelaciones del Trabajo
Giménez, María Inés	Partner, Bulit Goñi & Tarsitano
Hockl, María Cecilia	Secretaria letrada, Corte Suprema de Justicia de la Nación
Incera, Luis M.	Partner, Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz (h)
Kiper, Claudio	Juez, Sala H, Cámara Nacional de Apelaciones en lo Civil
Mairal, Hector A.	Partner, Marval, O'Farrell & Mairal
Marra, Macarena	Secretaria, Sala II de la Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal
Navarro, Marcelo	Secretario letrado, Corte Suprema de Justicia de la Nación
Tarsitano, Alberto	Partner, Bulit Goñi & Tarsitano
Veramendi, Enrique V.	Partner, Marval, O'Farrell & Mairal

Note.—This list does not include individuals who have requested to remain anonymous.

Finally, we interviewed officials from the relevant public offices in charge of litigation before CSJN, that is, the Procuración General de la Nación, the Defensoría General de la Nación, and the Procuración General del Tesoro de la Nación.[26] The answers obtained informed both our hypothesis design and the discussion section of this essay. A list of those interviewees who authorized us to reveal their names can be found in table 1. To ensure greater disclosure, no proposition is explicitly attributed to any of them.

V. RESULTS

We started by looking at the *Acordada* decisions in order to confirm that they are based on formal requirements. For each *Acordada* opinion in our database, we coded the article(s) explicitly cited by CSJN in each of its rejections. Most of the time (73% of cases), CSJN cites just one article, and, in our sample, up to five articles are cited, but only three times.

As shown in figure 1, the article most frequently cited by CSJN is Article 4 (54.66% of the time), followed by Article 7 (41.99%) and Article 1 (24.73%). Articles 1 and 4 refer to the maximum page length and to the page format for the REX and RHE, respectively. Together, violation of the maximum length and page format accounts for 72.89% of all the appeals rejected. Adding Article 7 rejections—that is, appeals lacking copies of rel-

26. The Procuración General de la Nación is the head of the public prosecution service, while the Defensoría General de la Nación is the head of the public defense service (see Art. 120 of the Argentine Constitution). The Procuración General del Tesoro de la Nación is the main office providing legal advice and legal services to the administration.

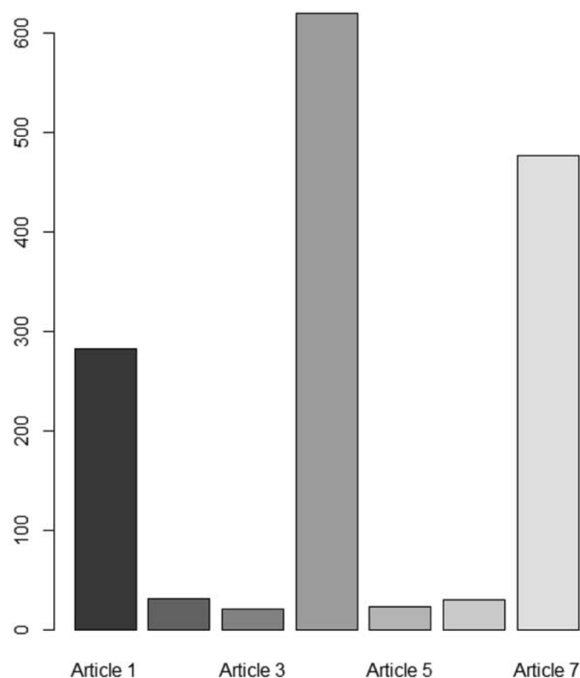

Figure 1. Frequency of *Acordada* articles cited by CSJN

evant docket documents—accounts for 97.27% of all appeal rejections based on *Acordada*.

To test our first hypothesis of party capability effects, we follow Wheeler et al.'s (1987) classification of litigants into classes. We distinguish between individual litigants, business or corporate litigants, public prosecutor, and government as parties. Individuals are assumed to have, on average, fewer resources than businesses, which are assumed to have, in turn, fewer resources than the government. We separate government from public prosecutor because the Argentine Constitution since 1994 has established that the public prosecutor's office is independent of any other branch of government. Nevertheless, we believe that the public prosecutor's office, as a state agency, shares much of the same litigation advantages as the government.

As shown in table 2, Article 280 opinions represent 76.3% of total non-*Acordada* opinions in 2012, while the decisions on the merits represent 23.7%. Table 3 presents the appellant status results of appeals rejected under *Acordada*, dismissed under Article 280 (the rough equivalent to certiorari denied), or decided on the merits, as well as the weighted average of non-*Acordada* appeals. Given that the Article 280 sample size is roughly one-fourth of the population of Article 280 opinions for 2012, and that we have census information for the other types of opinions, we assigned weights to the average proportion of each category of non-*Acordada* opinions.

Table 2. Total Number of Non-*Acordada* Decisions Issued by CSJN during 2012

	Number of Decisions	Percentage of Decisions
Article 280	1,997	76.3
On the merits	621	23.7

As hypothesized in Section III, we find that individual (government) appellants are more (less) likely to have their appeals rejected for formal reasons. As shown in table 3, the weighted non-*Acordada* opinions that came from individual appellants represent 55% of all the non-*Acordada* opinions. This figure is 8% lower than the one for *Acordada* opinions, and the difference is statistically significant at the 1% level (p = .0001). Additionally, 23% of the weighted non-*Acordada* opinions derived from government appeals. This figure is 9 percentage points higher than the one for *Acordada* opinions, and the difference is significant at the 1% level ($p < .0001$). Contrary to our expectations, the percentage of *Acordada* opinions brought up by corporations (22%) is larger than the percentage in non-*Acordada* opinions (20%). This difference is statistically significant at the 5% level. Surprisingly, even giant corporations, such as Petrobras, Schlumberger, Bayer, and Procter & Gamble, have had cases dismissed on *Acordada* grounds. While we are not sure what is driving our corporate appellants' results, we suspect that our inability to further weave out the corporation category based on other proxies for party capability—such as number of employees, annual revenue, annual profits, type of company, and so on—could help explain this outcome.[27]

In order to explore whether all individuals are equally affected by *Acordada*, we looked at the percentage of opinions for the subset of only female appellants. Table 4 presents the results. As hypothesized above, we find that the percentage of female appellants is higher in *Acordada* opinions (23%) than in non-*Acordada* ones (16%). The difference is significant at the 1% level. In the same vein, the percentage of *Acordada* decisions arising out of at least one male appellant is lower (76%) than the one in non-*Acordada* opinions (84%). This difference is statistically significant at the 1% level.

Some areas of law lend themselves to systematic differences among litigants' resources. Labor law and criminal law are clear examples of areas in which individuals typically face uphill battles while confronting corporations or the state. As we hypothesized above, we found evidence of a higher proportion of cases rejected due to formal errors in subject matter areas in which disparity among litigants tends to be large. Table 5 reports data of different types of CSJN opinions by area of law. More than one-third of the appeals rejected on *Acordada* grounds (39%) are labor law appeals. This figure is much larger than the one for the non-*Acordada* opinions (16%).[28] The difference is statistically significant at the 1% level.

27. This may be especially problematic in Argentina, where very few firms are public companies and small and medium-sized firms abound.

28. In unreported results, we also found that, among labor law cases filed by individuals, the proportion of female appellants is larger in *Acordada* (23.6%) than in non-*Acordada* opinions (21.7%).

Table 3. Proportion of Appeals Decided in Each Category, by Type of Appellant

	Appeals by Corporations	Appeals by Government	Appeals by Individuals	Appeals by Public Prosecutors
Acordada	.22	.14	.63	.01
Article 280	.15	.20	.64	.01
On the merits	.35	.29	.28	.07
WAVG of non-*Acordada* decisions	.20	.23	.55	.02

By contrast, criminal law appeals did not yield the expected results. They represent a smaller percentage of *Acordada* (14.7%) than non-*Acordada* (31.5%) appeals. The difference is highly statistically significant ($p < .0001$).[29]

To test whether the above empirical patterns held up in the multivariate context, we ran logistic multiple regression models. In each case, the dependent variable is whether the appeal is dismissed on formal grounds (coded as 1) or analyzed on its merits (coded as 0). As independent variables, we included appellant status, appellant gender, appeal subject area (where the baseline category group is composed of all cases for which the subject area is neither labor law nor criminal law), jurisdictional origin (where the baseline category group is composed of cases coming from the federal justice system, which is compared to cases coming from national, national/federal, or provincial jurisdiction), appeal type (whether it was REX or RHE), and respondent status. A description of the variables can be found in table 6. It should be noted that, while some studies (Tanenhaus et al. 1963; Caldeira and Wright 1988; Caldeira, Wright, and Zorn 2012; Black and Boyd 2013) have found amici briefs to influence the decision to grant certiorari, we did not include such a variable, because amici briefs were filed in only three cases in our data set.[30]

The regression results (see table 7) generally support the univariate analysis. First, appellant status coefficients follow the predicted direction. Individuals are more likely to have their cases rejected on formal grounds than are businesses (statistically significant at the 1% level).[31] In addition, public prosecutors are less likely to have their appeals rejected for *Acordada* reasons than are businesses (statistically significant at the 10% level). Second, areas of law with systemic asymmetry among litigants have a discernable effect. Labor law appeals are more likely to result in formal rejections than are appeals in nonsys-

29. In unreported results, we compared the ratio of *Acordada* appeals to appeals decided each year with the involvement of a specialized judicial department; the results are consistent with the ones presented above.

30. In addition, both dissent in the lower court opinion and circuit court conflict have been shown to play a role. Unfortunately, such information has yet to be codified in Argentina.

31. In unreported results, we ran additional regressions after distinguishing appellant status of local versus national government. The results remained essentially unchanged.

Table 4. Proportion of Appeals Decided in Each Category, by Gender

	Only Female Appellants	At Least One Male Appellant
Acordada	.23	.76
Article 280	.16	.84
On the merits	.18	.82
WAVG of non-*Acordada* decisions	.16	.84

temic asymmetry areas of law (statistically significant at the 1% level). Again, criminal law follows a strikingly different pattern, being less likely to be rejected on *Acordada* grounds (statistically significant at the 5% level). Third, jurisdictional source plays a role too. Appeals with a nonfederal origin are more likely to be rejected for formal reasons than appeals from federal courts (statistically significant at the 1% level). This result is consistent with the fact that a larger proportion of cases from federal jurisdiction reach CSJN, making lawyers litigating in that forum more likely to be familiar with *Acordada*. Fourth, as was expected given the formal nature of *Acordada*, respondent status is not statistically significant. The exception occurs with the public prosecutor as respondent category, which is negative and highly significant. This result is consistent with the criminal law result, as the public prosecutor appears as a respondent only in criminal cases in our sample. Finally, RHE appeals are more likely to be rejected on *Acordada* grounds than are REX appeals (statistically significant at the 1% level).

We ran additional regressions after dropping from our data appeals that were decided exclusively under Articles 3 or 6 of *Acordada*. Those articles could be interpreted as including nonformal tests, given that CSJN must assess whether the appellant provided "a clear refutation of each independent argument" given by the relevant lower court. Unsurprisingly, given that very few cases are decided on Article 3 or 6 grounds, the results remained unchanged and can be found in table 8.

Table 5. Proportion of Appeals Decided in Each Category, by Area of Law

	Acordada	Article 280	On the Merits	WAVG of Non-*Acordada* Decisions
Bankruptcy/corporate law	.03	.03	.03	.03
Constitutional law/health law	.00	.01	.03	.01
Contract law/financial contracts	.04	.04	.03	.04
Criminal law/criminal procedure	.15	.38	.11	.31
Family law	.01	.02	.01	.02
Human rights law	.00	.04	.02	.04
Labor law	.39	.17	.14	.16
Property law	.05	.05	.14	.07
Public law	.17	.08	.22	.11
Tax law	.04	.12	.12	.12
Tort law/insurance law	.10	.06	.15	.08

Table 6. Variable Names and Descriptions

Name	Description
Acordada	A dummy variable equal to 1 if CSJN decided on *Acordada* grounds and 0 otherwise
Appellant status	A categorical variable describing who the appellant was with four levels: corporation, individual, government, and public prosecutor
Subject area	A categorical variable describing the subject area of the dispute and taking the value "labor law," "criminal law," or "other"
Respondent status	A categorical variable describing who the respondent was with four levels: corporation, individual, government, and public prosecutor
Appellant gender	A categorical variable describing the gender of the appellant (where applicable, i.e., where appellant status equaled "individual") with four levels: corporation, individual, government, and public prosecutor
Appeal type	A categorical variable with two levels: RHE and REX
Jurisdictional source	A categorical variable with four levels: federal, federal or national, local, and national

Finally, we looked at case strength as a potential driver of our results. CSJN does not rely on the substance of the case to dismiss an appeal on *Acordada* grounds. Nevertheless, following the case selection hypothesis, it could be argued that haves' superior ability to decide which cases to settle would lead them to present stronger cases for appeals. As a result, the use of the *Acordada*'s exception would target haves' appeals, and our party capability results could be driven by case selection. To assess this possibility, we investigated dissenting votes in decisions on the merits. Of the 1,118 decisions on the merits we reviewed, 196 (17.5%) contained dissenting opinions, and in only 17 cases (1.5%) did one or more justices use *Acordada* grounds to justify their votes.[32] In unreported results, we reran our regressions excluding the cases in which one or more dissenting opinions were based on *Acordada* grounds. The results remained the same.

There are two additional reasons that suggest that case strength does not drive the results. First, the internal memo generated by the specialized judicial department is "more laconic" when formal errors are present.[33] Furthermore, for appeals lacking relevant docket copies, CSJN usually cannot complete its preliminary assessment due to insufficient information. Hence, further analysis of the appeal is made less likely by these circumstances regardless of case strength. This is especially true given CSJN's heavy workload.[34] Second, the case strength hypothesis suggests that the proportion of haves' appeals rejected on

32. Of those 17 cases, 9 were filed by corporations, 6 by individuals, 1 by the government, and 1 by the public prosecutor. The 9 cases filed by corporations were tort/insurance law cases. Such a low figure is consistent with interviewees' answers on the rare use of *Acordada*'s exception.

33. Interviews A-3, A-6. One interviewee illustrated this point by saying that *Acordada* is the certiorari of certiorari (interview A-3).

34. Interview A-13. For instance, if the appeal does not include a copy of the lower court's opinion or a copy of the REX, practical reasons lead CSJN officials to work only with the available scant and unverifiable information.

Table 7. Regression Results

	(1)	(2)	(3)	(4)	(5)	(6)
Government appellant	−.09		−.16		−.20	−.12
	(.14)		(.15)		(.17)	(.18)
Individual appellant	.60***		.53***		.35**	.61***
	(.12)		(.12)		(.14)	(.15)
Public prosecutor appellant	−.81*		−.78*		−.25	−1.27**
	(.42)		(.42)		(.45)	(.52)
Male		−.27*		−.19		
		(.16)		(.16)		
Criminal law			−.48**	−.78***	−.60***	
			(.20)	(.22)	(.20)	
Labor law			.88***	.46***	.56***	
			(.12)	(.17)	(.13)	
National jurisdiction	1.01***	1.03***	.71***	.88***	.21	.49***
	(.12)	(.19)	(.13)	(.19)	(.15)	(.17)
National/federal jurisdiction	−.47***	−.81***	.11	.01	−.63***	−.17
	(.17)	(.20)	(.24)	(.28)	(.25)	(.26)
Provincial jurisdiction	.99***	.88***	1.10***	1.17***	.32***	.55***
	(.14)	(.18)	(.15)	(.21)	(.17)	(.18)
Government respondent						.16
						(.18)
Individual respondent						.06
						(.15)
Public prosecutor respondent						−1.44***
						(.22)
RHE appeal					2.38***	2.40***
					(.16)	(.16)
Constant	−.69***	.20	−.76***	.06	−2.02***	−2.18***
	(.12)	(.18)	(.12)	(.19)	(.17)	(.22)
Observations	2,138	1,174	2,105	1,161	2,105	1,941
Log likelihood	−1,348.23	−718.71	−1,291.96	−695.84	−1,144.92	−1,036.60
Akaike information criterion	2,710.46	1,447.43	2,601.92	1,405.67	2,309.84	2,095.20

Note.—The dependent variable in all regressions is *Acordada*. Standard errors in parentheses.
* $p < .10$.
** $p < .05$.
*** $p < .01$.

Acordada grounds should be no different from the one for Article 280. However, this is not the case. In fact, the proportion of government appellants is higher in Article 280 appeals (20.5%) than in *Acordada* ones (14%), a difference that is statistically significant at the 1% level.

VI. DISCUSSION

Our main goal is to understand how litigants fare in the context of CSJN's use of *Acordada*. Our results show a strong relationship between representational advantages and how litigants fare. This relationship is unaffected by standard understandings of a legal

Table 8. Regression Results, Excluding Decisions Based Only on Articles 3 or 6

	(1)	(2)	(3)	(4)	(5)	(6)
Government appellant	−.09		−.16		−.20	−.13
	(.14)		(.15)		(.17)	(.18)
Individual appellant	.59***		.52***		.34**	.60***
	(.12)		(.12)		(.14)	(.15)
Public prosecutor appellant	−.81*		−.79*		−.26	−1.27**
	(.42)		(.42)		(.45)	(.52)
Male		−.25		−.19		
		(.16)		(.16)		
Criminal law			−.46**	−.76***	−.58***	
			(.20)	(.22)	(.20)	
Labor law			.89***	.47***	.57***	
			(.12)	(.17)	(.13)	
National jurisdiction	1.02***	1.04***	.72***	.89***	.21	.50***
	(.12)	(.19)	(.13)	(.19)	(.15)	(.17)
National/federal jurisdiction	−.46***	−.80***	.10	−.00	−.64**	−.17
	(.17)	(.20)	(.24)	(.28)	(.25)	(.26)
Provincial jurisdiction	.98***	.87***	1.09***	1.16***	.31*	.55***
	(.14)	(.18)	(.15)	(.21)	(.17)	(.18)
Government respondent						.15
						(.18)
Individual respondent						.06
						(.15)
Public prosecutor respondent						−1.43***
						(.22)
RHE appeal					2.39***	2.41***
					(.16)	(.16)
Constant	−.70***	.18	−.76***	.04	−2.03***	−2.19***
	(.12)	(.19)	(.12)	(.19)	(.17)	(.22)
Observations	2,132	1,168	2,100	1,156	2,100	1,94
Log likelihood	−1,345.76	−716.42	−1,289.73	−693.99	−1,141.83	−1,034.55
Akaike information criterion	2,705.52	1,442.83	2,597.45	1,401.99	2,303.67	2,091.09

Note.—The dependent variable in all regressions is *Acordada*. Standard errors in parentheses.
* $p < .10$.
** $p < .05$.
*** $p < .01$.

system's bias in favor of haves, as CSJN decisions are not based on substantive aspects of the law.

A. The Distribution of *Acordada* Decisions

A key finding of this study relates to the uneven distribution of *Acordada* decisions. Among the different underlying subject matters, labor law decisions enjoy the rare privilege of overrepresentation. When interviewees were asked to explain this result, a common set of answers arose, most of which are consistent with the representational aspect of the party capability theory. On the supply side, labor law plaintiffs usually hire high-volume lawyers

who take on many cases simultaneously to compensate for the smaller average amount of each claim. Therefore, those lawyers cannot afford to spend too much time on any of them.[35] In addition, labor law itself has a strong pro-worker structure. Judges in the early stages of a lawsuit would normally give lawyers' mistakes a pass in order to repair the underlying wrong.[36] By contrast, CSJN is without a similar lax attitude.

Appeals costs also play a role. Unlike any other subject area, labor law plaintiff appeals have no costs (besides plaintiff lawyers' opportunity costs), as they are not required to make the relevant deposit.[37] Furthermore, labor lawyers' clients are seldom repeat players, limiting their power to take away business if mistakes are made.

At the same time, appeal rejections by CSJN do not carry an important reputational cost. There are two main reasons for this phenomenon. On the one hand, most clients rely on their lawyers to learn about any decision made in a dispute. On the other hand, the boilerplate language that CSJN uses in its decisions does not facilitate a clear understanding of the lawyer's responsibility for the outcome. Therefore, labor law *Acordada* rejections carry lower costs to the appealing lawyers, which helps to explain their frequency.[38]

Finally, from the demand side, labor law cases are not very palatable to CSJN, except for those carrying constitutional issues—for example, labor discrimination disputes.[39] Hence, *Acordada* has generated a new balance favoring access by litigants supported by CSJN specialized lawyers.[40]

Criminal law's underrepresentation in *Acordada* opinions was initially more puzzling, especially since one interviewee mentioned that some chambers at the Federal Criminal Cassation Court do not even check compliance with *Acordada*'s formalities.[41] There seem to be at least five main drivers behind it. First, criminal law appeals are required to pay the deposit if the appeal is dismissed. As a result, many litigants may not appeal unless they

---

35. Interview A-15.

36. The same is true for criminal cases. Interview A-8.

37. Interview A-13. The appeals costs typically appear because CSJN requires a deposit in order to process the appeal. If the appeal is rejected, the deposit is lost.

38. One interviewee suggested also that CSJN has a lesser interest in labor law cases, as they typically involve mainly factual issues. Although we cannot discard this hypothesis, we believe the prevalence of those issues should be similar in other areas of law, such as contract law, tort law, or bankruptcy law, and we did not observe overrepresentation in those areas. Interview A-3.

39. Interview A-15. This is similar to what happens in the United States. Owens and Simon (2012, 1223) report that the number of union cases that the US Supreme Court hears per year has been diminishing over time.

40. Such a balance is consistent with findings elsewhere. For the US Supreme Court, see Lazarus (2009). (Lazarus shows that, while the number of cases heard by the US Supreme Court has declined by half since 1980, expert advocates' participation in petitions granted plenary review has increased by an order of magnitude in the same period—from 5.8% in 1980 to 55.5% in 2008.) It should be mentioned that individuals litigating against corporations often enjoy a solid representational position, as the procedure in labor cases—at least at the national level—is specific to these disputes and trade unions often provide workers with legal counsel specialized in labor law. Yet, these considerations do not apply to appeals before the Supreme Court.

41. Interview A-8.

believe they have a good case. Second, *Acordada* does not apply to *in pauperis* litigants. Many individuals accused of criminal conduct are jailed through the trial process. Several of them appeal *in forma pauperis*.[42] Third, defendants with fewer resources tend to be represented by the office of the public defender (*defensoría pública*). Public defenders, in turn, share some of the advantages of the haves, in that they are repeat players, they have a good knowledge of the legal system, and they enjoy the relevant social relations. Indeed, González Bertomeu (2016) recently found that public defenders are better than private counsel at complying with *Acordada*.[43] Fourth, officers in Judicial Department No. 3 have been opposed to the enactment of formal requirements under an *Acordada* decision by CSJN.[44] Finally, the nature of criminal cases may lead CSJN to be prone to reviewing criminal appeals on their merits and, as a consequence, to use more frequently *Acordada*'s substantive exception.[45] The latter fact is confirmed by the lower level of agreement among justices in these cases. In fact, 38% of all *Acordada* criminal law opinions have a dissenting or separate opinion, a figure that is almost four times as large as the mean for all areas of law.

B. Total Number of *Acordada* Decisions

Another important finding is that the number of appeals failing to comply with *Acordada* is surprisingly high, suggesting an access to justice problem.[46] The high number of appeals failing to comply with *Acordada* is especially remarkable for several reasons. First, at the time of our study, *Acordada* had been in effect for more than 4 years. Moreover, several interviewees considered that *Acordada* merely made explicit already existing requirements.[47] It is evident that lawyers have had a hard time adjusting to the rules. Second, *Acordada* requirements, while demanding, do not come across as formidable obstacles. The common understanding among judicial officials is that the requirements are easy to meet and that, thanks to *Acordada*, those requirements are publicly available.[48] Third, there is qualitative evidence that some of the lower courts have been very strict in the implementation of *Acordada* and that CSJN has informally encouraged them to check compliance with its requirements.[49] Finally, lawyers' economic incentives should discourage

42. On the conditions for this type of appeal, see the court cases *Gordillo, Raul Hilario s/corrupción calificada, etc.*, Fallos 310:1934 (1987) and, more recently, *Quinteros, Virginia s/presentación*, Q. 43. XLV RHE (2009).

43. Unpublished manuscript, on file with the authors.

44. Anonymous interviewee.

45. Interview A-3. For the exception, see Art. 11 discussed above.

46. It should be noted, though, that litigants who are denied review on *Acordada* grounds have already had their cases heard by at least four judges.

47. Interview A-14. Even though some requirements were preexisting, others were not. Most importantly, the sanction appeared only with *Acordada*. Previously, appellants would be asked to, for instance, bring in any missing copy.

48. Nonetheless, one interviewee explained that *Acordada* clarifications appearing in "revocatoria" opinions are not easy to find. Interview A-13. One interviewee believed that "anyone who uses a computer knows which program to use in order to comply with *Acordada*." Interview A-14.

49. Interview A-2.

them from letting their appeals be subjected to *Acordada* rejection. The Argentine law on professional fees instructs judges to assess professional fees according to lawyers' involvement in each stage of the litigation. But appeals rejected due to formal errors do not grant the right to professional fees' assessment.[50] This is especially important given that dismissals based on Article 280 do grant this right. Therefore, the economic incentives run against appeals containing formal errors.

Two groups of lawyers may be unaffected by those economic incentives. First, lawyers representing the federal government are required to obtain express and written authorization not to appeal a case all the way up to CSJN.[51] Violating this rule may make government lawyers liable to civil action, as well as cost them their jobs. Hence, and contrary to the party capability theory's expectations, government appeals commonly occur regardless of success probabilities or cost considerations. In addition, many government lawyers carry a very large caseload.[52] These two elements largely explain the relatively high number of error-prone appeals from government lawyers.[53] In effect, government entities are the only appellant for which we observe counsel representing the same client with several appeals dismissed on *Acordada* grounds.[54] Second, some corporate lawyers who routinely defend their clients have compensation schemes covering each stage of the trial.[55] For those lawyers, reaching CSJN may just be enough, as their compensation schemes do not distinguish between appeal rejections based on *Acordada* or Article 280.

The practicing lawyers we interviewed did not share the view that *Acordada* rules were innocuous. Indeed, *Acordada* raised a hurdle some viewed as already challenging. First, complying with *Acordada* rules is time consuming. One interviewee mentioned that just observing the appeal's front-page requirements takes a specialist lawyer about 2 hours, and even more for those less familiar with the rules.[56] Similarly, observing the maximum number of lines per page requirement routinely made lawyers adjust their electronic documents a few times before filing.[57] For lawyers, having just 10 business days to file their REX appeals and just 5 business days to file their RHE appeals, the time demanded by *Acordada* requirements is extremely onerous.

---

50. Interview A-3.

51. Interview A-2.

52. Anonymous interview; interviews A-15, A-13.

53. Interview A-15. Several interviewees mentioned that government lawyers are known to file appeals with very low success probabilities. Interviews A-3, A-2, A-13.

54. Remarkably, one lawyer representing an elderly care government entity (the Instituto nacional de servicios sociales para jubilidos y pensionados, better known as PAMI) had 15 cases rejected owing to formal errors. It is worth mentioning, though, that one lawyer from the province of Cordoba and representing different appellants in labor law cases had the greatest number of rejections (22) by CSJN owing to formal errors.

55. Interview A-15.

56. Interview A-5.

57. Two interviewees mentioned that they view the problem as serious enough to develop a computer program to assist them in complying with the requirement. Interviews A-1, A10.

Second, *Acordada*'s appeal extension rules place important constraints on appellants. CSJN has a long-standing appeal requirement rule mandating that appeal documents need to be self-standing.[58] Therefore, appellants must describe the complete history of the case, refute all the arguments provided by the lower court, and express all their claims in just 40 or 10 pages (depending on whether they are facing a REX or RHE appeal). The difficulty is compounded by the fact that CSJN does not allow appellants to include appendixes. To illustrate the practical difficulties that may arise due to the total page limit, one interviewee mentioned that once the limit was so stringent that his appeal ended up having just one long paragraph.[59]

Finally, several interviewees mentioned the added difficulties posed by the interpretation of *Acordada* rules.[60] For instance, in interviews conducted in the first half of 2014, several interviewees pondered whether the language of *Acordada* means a *limit* of 26 lines per page or whether 26 lines per page are *mandatory* (even on the last page).[61] The large number of dissenting and separate opinions we found suggests that there could be some validity to lawyers' uneasiness with *Acordada*'s interpretation.[62]

Despite the added difficulties, all the practicing lawyers interviewed took pride in the fact that they have never had an appeal rejected on *Acordada* grounds. One interviewee suggested that facing a client after an appeal is rejected on formal grounds would be highly embarrassing.[63] We believe this sentiment to be genuine for a sizable portion of practicing lawyers. At the same time, *Acordada* rejections affect a large number of lawyers, most of them with scant familiarity with CSJN. These lawyers may not perform a cost-benefit analysis of *Acordada* compliance before submitting an appeal. An anonymous interviewee exemplified the lawyer side of the problem by mentioning that a government unit that routinely, although not exclusively, files CSJN appeals started only in 2010—3 years after enactment—to train its lawyers on *Acordada*. As a result, we believe that the lack of lawyer Supreme Court specialization, institutional design, and limited resources play an important role in explaining the high number of *Acordada* decisions.

The existence of so many rejections on grounds of *Acordada* is of significant concern. Previous research on high courts has found legal counsel to rebalance a litigant's strengths in favor of the weaker party.[64] One of the main functions of legal counsel would then be to provide access to legal knowledge and legal know-how to reduce the asymmetry among litigants. The large number of *Acordada* rejections suggests this function is being poorly

58. This rule has been incorporated into *Acordada*.

59. Interview A-16.

60. Interviews A-5, A-17.

61. Interviews A-4, A-11, A-5.

62. In unreported results, we found 73 decisions carrying separate opinions and 48 decisions carrying dissenting ones.

63. Interview A-11.

64. Dotan (1999) found that success rates of "have nots" improve significantly when they are represented by legal counsel.

performed.[65] To explain this failure, some interviewees mentioned that some Argentine lawyers are plainly unaware of *Acordada*.[66] Another interviewee believes that some lawyers erroneously equate *mostly* complying with *fully* complying with *Acordada*.[67] As a result, one-shot litigants face unwarranted odds, as they are more likely to be represented by error-prone counsel.[68] This, in turn, affects their access to justice.[69] Interestingly, with a lone exception, none of the interviewees believed that *Acordada* disproportionately affects any group.[70]

VII. CONCLUSION

The tenets of the party capability theory have been supported by the evidence in numerous contexts. Nevertheless, disentangling the source of the haves' advantages has not been an easy task. Notoriously, the haves' effects found by previous studies could theoretically have been attributed to the haves' ability to select stronger cases for litigation. Our article takes advantage of a special rule enacted by CSJN—*Acordada*—and it is the first to present evidence confirming that representational advantages affect case outcome, independently of the strength of the appeal presented to CSJN.

While evidence on appeal rejections at the level of a high court is insufficient to evaluate access to justice in a society, the results presented above show that access to high courts can be highly uneven. As resource mobilization is required to preserve legal entitlements, resource inequality may affect outcomes, since disputes arise. While this problem is universal, it is especially important in the Global South, where the distribution of resources in the economy is highly unequal and legal needs are poorly addressed. The results presented above strongly suggest that more research should be done on access to justice, especially in the context of developing countries, where inequalities in access to legal services can be severe.

---

65. Interestingly, in their study of the Taiwanese Supreme Court, Eisenberg and Huang (2012) found that the likelihood of appeals being dismissed for formal reasons by represented appellants was higher than for unrepresented appellants.

66. Interviews A-8, A-9.

67. Interview A-3. Both of these issues are surprising, given that one interviewee suggested that "having an appeal rejected on formal grounds must be one of the worst things that a lawyer may face." Interview A-11.

68. The relationship between the quantity and quality of representation and the type of litigant has been shown, for instance, by Chen et al. (2014).

69. CSJN is aware of these effects. For instance, in a case involving a minor (*G.D. c/C.A.P. s/convivencia—régimen de visitas* [G. 346. XLVII. RHE]), and after applying *Acordada*, CSJN mandated the Juvenile Defense Office (Defensor de menores) to assess the feasibility of assigning the minor a specialized lawyer as a way to preserve the constitutional right of defense.

70. One interviewee believes that it affects litigants who do not have access to CSJN specialist lawyers. Interview A-4.

REFERENCES

Albiston, Catherine. 1999. "The Rule of Law and the Litigation Process: The Paradox of Losing by Winning." *Law and Society Review* 33:869–910.

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

Benedetti, Miguel A., and María J. Sáenz. 2016. *Las audiencias públicas de la Corte Suprema*. Buenos Aires: Siglo XXI.

Black, Ryan C., and Christina L. Boyd. 2013. "Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process." *Social Science Quarterly* 94 (4): 1124–44.

Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82:1109–27.

Caldeira, Gregory A., John R. Wright, and Christopher J. Zorn. 2012. "Organized Interests and Agenda Setting in the U.S. Supreme Court Revisited." Paper presented at the Seventh Annual Conference on Empirical Legal Studies. https://ssrn.com/abstract=2109497.

Chen, Kong-Pin, Kuo-Chang Huang, and Chang-Ching Lin. 2014. "Party Capability versus Court Preference: Why Do the 'Haves' Come Out Ahead?—an Empirical Lesson from the Taiwan Supreme Court." *Journal of Law, Economics, and Organization* 31 (1): 93–126.

Dotan, Yoav. 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 (4): 1059–80.

Eisenberg, Theodore, and Kuo-Chang Huang. 2012. "The Effect of Rules Shifting Supreme Court Jurisdiction from Mandatory to Discretionary: An Empirical Lesson from Taiwan." *International Review of Law and Economics* 32 (1): 3–18.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9:95–160.

Glenn, Brian J. 2003. "The Varied and Abundant Progeny." In *In Litigation: Do the "Haves" Still Come Out Ahead?* ed. H. Kritzer and S. Silbey, 371–81. Stanford, CA: Stanford University Press.

González Bertomeu, Juan. 2016. "Different Ways of Losing: Public and Private Counsel at the Supreme Court of Argentina." Working paper, Instituto Tecnológico Autónomo de México.

González Bertomeu, Juan, Lucia Dalla Pellegrina, and Nuno Garoupa. 2017. "Estimating Judicial Ideal Points in Latin America: The Case of Argentina." *Review of Law and Economics* 13 (1).

Haynie, Stacia L. 1994. "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court." *Journal of Politics* 56 (3): 752–72.

Johnson, Timothy R., Paul J. Wahlbeck, and James F. Spriggs II. 2006. "The Influence of Oral Arguments on the U.S. Supreme Court." *American Political Science Review* 100 (1): 99–113.

Kapiszewski, Diana. 2006. "La Corte Suprema y la Política Constitucional en la Argentina post-Menem." *Revista jurídica de la Universidad de Palermo* 7 (1): 5–46.

Kastellec, Jonathan P., and Jeffrey R. Lax. 2008. "Case Selection and the Study of Judicial Politics." *Journal of Empirical Legal Studies* 5 (3): 407–46.

Kritzer, Herbert. 1998. "Contingent-Fee Lawyers and Their Clients." *Law and Social Inquiry* 23:795–822.

———. 2003. "Why Does the Government Come Out Ahead in Appellate Courts?" In *In Litigation: Do the "Haves" Still Come Out Ahead?* ed. H. Kritzer and S. Silbey, 342–70. Stanford, CA: Stanford University Press.

Lazarus, Richard. 2009. "Docket Capture at the High Court." *Yale Law Journal* 119. https://www.yalelawjournal.org/forum/docket-capture-at-the-high-court.

McCormick, Peter. 1993. "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992." *Canadian Journal of Political Science* 26 (3): 523–40.

Muro, Sergio, Alejandro Chehtman, Jorge Silva Méndez, and Nelson Amaya Durán. 2016. "Dismissing Appeals on Formal Grounds: The Case of the Argentine Supreme Court." *Latin American and Iberian Journal of Law and Economics* 2 (1): 1–38.

Owens, Ryan J., and David A. Simon. 2012. "Explaining the Supreme Court's Shrinking Docket." *William and Mary Law Review* 53:1219–85.

Ruibal, Alba. 2009. "Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court." *Latin American Politics and Society* 51 (3): 59–86.

Sheehan, Reginald, William Mishler, and Donald Songer. 1992. "Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court." *American Political Science Review* 86:464–71.

Songer, Donald R., and Reginald S. Sheehan. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36:235–58.

Tanenhaus, Joseph, Marvin Schick, Matthew Muraskin, and Daniel Rosen. 1963. "The Supreme Court's Certiorari Jurisdiction: Cue Theory." In *Judicial Decision Making*, ed. Glendon Schubert, 111–32. Glencoe, IL: Free Press.

Wheeler, Stanton, Bliss Cartwright, Robert Kagan, and Lawrence Friedman. 1987. "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970." *Law and Society Review* 21:403–45.