Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court

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1. Introduction

One of the distinctive features of appellate decision-making in common law countries is that most decisions are accompanied by written reasons.[2] In addition, most written reasons for decision contain citations to previous cases as well as secondary sources such as journal articles and textbooks.[3] The cases which judges cite in their reasons are not always purely a matter of choice; some cases are cited because they are binding, while other cases are cited because of their persuasive value. However, when citing cases, judges sometimes go one step further and refer to other judges by name. This practice is unusual because it is relatively rare and frequently unnecessary. When a previous judgement is cited, standard practice requires only that the publication title, volume, page numbers and deciding court (if not obvious from the publication title) be identified. The judgment's author, or the composition of the court, need not be named.[4] This study attempts to measure the prestige of successive Justices of the High Court through counting the number of times that they are referred to by name in a sample of decisions of the High Court reported in the Commonwealth Law Reports from 1995 to 1999.

There are three related reasons why a study of judicial prestige in the High Court is worthwhile. The first is that little research has been done on the High Court itself or the Justices of the High Court. Writing in the mid-1980s, Lloyd suggested, 'Australia's High Court has generated a relatively meagre literature'.[5] This is still generally true today.[6] Hence with the Centenary of the High Court approaching in 2003, a study that attempts to measure the prestige of current and past Justices is timely. Secondly, there is considerable debate about the relative standing of specific High Court Justices. Sir Owen

1 This article is part of an ongoing project investigating citation practice, decision-making and voting patterns in Australian and New Zealand courts. The author thanks an anonymous referee of this journal for thoughtful comments on an earlier version that helped to clarify the important distinction between influence and prestige.

2 See Kirby M., 'Reasons for Judgement: 'Always Permissible, Usually Desirable and Often Obligatory' (1994) 12 *Australian Bar Review* 121.

3 For recent citation practice studies of Australian appellate courts see Smyth R., 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1998) 17 *University of Tasmania Law Review* 164; Smyth R., 'What do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria' (1999) 25 *Monash University Law Review* 29; Smyth R., 'Other than 'Accepted Sources of Law'? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 59; Smyth R., 'What do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51; Smyth R., 'Law or Economics? An Empirical Investigation of the Impact of Economics on Australian Courts' (2000) 28 *Australian Business Law Review* 5.

4 See Klein D. and Morrisroe D., 'The Prestige and Influence of Individual Judges on the U.S. Courts of Appeal' (1999) 28 *Journal of Legal Studies* 371, 375–376.

5 Lloyd C., 'Not Peace But a Sword! — The High Court Under Latham' (1987) 11 *Adelaide Law Review* 175, 175.

6 The ARC funded 'High Court Project' at ANU, which is scheduled to publish a volume on the High Court by Oxford University Press in 2001 is a big step towards changing this situation.

Dixon is often regarded as 'the greatest ever' High Court Justice.[7] This view has been recently questioned by Lord Cooke of Thorndon who suggests that 'Sir Anthony Mason was the best Chief Justice that the High Court of Australia ever had, not excluding Sir Owen Dixon'.[8] A study that provides quantitative evidence of judicial prestige can contribute to this debate. A third reason why this study is worthwhile is that there are a number of studies that attempt to measure judicial influence or prestige in North America, but there are no Australian studies.[9] This article is a first step towards remedying this situation.

The article is set out as follows. Section two considers the rationale for using citation counts to measure judicial prestige. It also examines the limitations on using citation counts to measure judicial prestige. Section three provides details about the construction of the data set and discusses the methodology that was used in the study. The results are presented and discussed in section four. First, the raw citation counts are presented. Following this, the results are subjected to a series of adjustments to take account of self-citations, the age of the citation and length of service on the Bench. The last section reiterates the study's contribution and discusses its main limitations.

2. The Theory

Rationale for Using Citation Counts to Measure Prestige

Measuring a Justice's prestige falls neatly within the obvious boundaries of citation analysis.[10] To measure the prestige of a judge, most previous studies in North America simply count the number of times that a judgement, which he/she has authored, has been cited in a latter case; irrespective of whether the citing judge refers to him/her by name.[11] The problem with this approach, however, as Klein and Morrisroe note, 'is that case citations are not connected clearly enough to individual judges . . . to be fully satisfactory measures of those judges' prestige'.[12] This is because although the decision to mention a judge's name is usually up to the citing judge's discretion, citation to previous cases depends on other factors, such as the nature of the proceedings before the Court and the cases that are cited by Counsel. Hence, Klein and Morrisroe count the number of times that a judge is specifically named in a subsequent case. This was the method that was followed in this study because, subject to some qualifications discussed below, the number of times that a Justice is specifically referred to by name seems to be a good proxy for prestige.

As the decision to refer to another judge by name is a matter of choice, studies such as this assume that a reference to a case accompanied by a phrase such as 'Dixon CJ speaking for the whole Court' must mean something to the citing judge(s).[13] This study

7 For example see Merralls J.D., 'The Rt. Hon. Sir Owen Dixon, O.M., G.C.M.G., 1886–1972' (1972) 46 *Australian Law Journal* 429; Sir Ninian Stephen, *Sir Owen Dixon* (1986).

8 Lord Cooke of Thorndon, 'The Dream of an International Common Law' in C. Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 138, 138.

9 See Currie D., 'The Most Insignificant Justice: A Preliminary Inquiry' (1983) 50 *University of Chicago Law Review* 466 (United States Supreme Court); Kosma M., 'Measuring the Influence of Supreme Court Justices' (1998) 27 *Journal of Legal Studies* 333 (United States Supreme Court); McCormick P., 'The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989–1993' (1996) 33 *Osgoode Hall Law Journal* 453 (Supreme Court of Canada); Klein and Morrisroe, note 3 (United States Courts of Appeal); Landes W., Lessig L. and Solimine M., 'Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges' (1998) 27 *Journal of Legal Studies* 271. Some studies attempt to measure the influence of specific judges. For example, see Posner R., *Cardozo — A Study in Reputation* (1990), Posner R., 'The Learned Hand Biography and the Question of Judicial Greatness' (1994) 104 *Yale Law Journal* 511.

10 Kosma, note 9, 338.

11 For example see Kosma note 9; McCormick, note 9; Landes, Lessig and Solimine, note 8.

12 Klein and Morrisroe, above note 4, 375.

13 For example, see *Egan v Willis* (1998) 195 CLR 424, 446.

is based on the premise that a judge, such as Sir Owen Dixon, who is frequently mentioned by name is more prestigious in the eyes of the citing judge than other Justices, such as Sir Charles Powers or Sir William Webb, who are rarely named. This impression is reinforced when one thinks of the reasons why a judge would refer to another judge by name. While there might be more than one reason, referring to a particularly distinguished judge by name (such as Lord Denning of the English Court of Appeal or Benjamin Cardozo of the United States Courts of Appeal and Supreme Court) is often used to buttress a conclusion or add force to the citing judge's reasoning.[14]

As McCormick puts it: 'Since the choice of whether or not to name the judge in a cited decision is presumably a logical one on the part of the citing judge, and since it results in a specific name being supplied only about one-third of the time, it seems reasonable to assume that the emphasis has a purpose and this purpose links to the judge being named'. He goes on to point out, 'it may well be the case that the practice of naming identifies the most highly regarded . . . judges, the more so as citations are almost never accompanied by negative comment'.[15] To put it in different terms, this study assumes that there are some judges whose decisions are more highly regarded because they are theirs.[16] When the citing judge refers to another judge by name, he/she is acknowledging this fact.

In the empirical literature on courts in the United States there is considerable debate about the concepts of influence and prestige. Some existing studies purport to use citation counts to measure judicial influence, while others claim to measure judicial prestige. I adopt the same distinction between prestige and influence employed by Klein and Morrisroe. They state: 'When we speak of judges as prestigious, we mean that their colleagues think highly of them. By influence we mean the extent to which the actions of one person have an effect on the views or behavior of others'.[17] In a study such as this, which considers cases decided over almost a century of the Court's history, an adjusted citation index is unlikely to measure current influence. If both cited and citing cases are taken from the whole time span of the Court's past, as in Kosma's[18] recent study of the United States Supreme Court, judges who had some influence for a time will score highly, even if they currently have neither influence nor prestige. If the citing cases are restricted to recent years, as in the present study, a judge who once had great influence, but whose doctrines are no longer followed, will still rate highly if he is the author of landmark judgements that must be mentioned even if they are respectfully discounted. In this case, what citation counts measure is continuing prestige rather than current influence.

Limitations on Using Citation Counts

The limitations on using citation counts to measure judicial prestige are well documented.[19] Some of the main difficulties are avoided by counting the number of times that judges are cited by name; however, some limitations persist. This section discusses some of the major

14 McCormick P., 'Judicial Citation: The Supreme Court of Canada and the Lower Courts: The Case of Alberta' (1996) 34 *Alberta Law Review* 870, 873. In some instances the citing judge will refer to the opinion of others to underscore the reputation of the cited judge. For example, in *Thompson v Australian Capital Television Pty. Ltd.* (1996) 186 CLR 574, 605 Gummow J referred to a decision of Gray J, mentioning him by name. Gummow J added in a footnote: 'Justice of the United States Supreme Court (1882–1902), described by Williston as the most learned American judge of his generation in his essay. . .'

15 McCormick, note 14, 887.

16 This paraphrases White's comments about the judgements of Justice Holmes. See G.E White, *Justice Oliver Wendall Holmes: Law and the Inner Self* (1993), 305 cited in McCormick, note 14, 873.

17 Note 4, 372.

18 Kosma, note 9.

19 For an exhaustive discussion of the limitations see Landes, Lessig and Solimine, above note 9, 271–276. For more general discussions of limitations on using citation counts to measure judicial influence and prestige see Blake V., 'Citation Studies — The Missing Background' (1991) 12 *Cardozo Law Review*1961; Stiverson K.A. and Wishart L., 'Citation Studies — Measuring Rods of Judicial Reputation?' (1991) 12 *Cardozo Law Review* 1969.

problems raised in the existing empirical literature. The first potential problem is self-citation, which occurs where a judge refers to one of his/her own previous decisions. Landes, Lessig and Solimine suggest that self-citations are a 'way for judges to promote or advertise their own opinions'.[20] This can distort citation counts as a measure of prestige because current members of the Court do, and retired members of the Court do not, have the opportunity to mention themselves in their judgements. However, problem is easily overcome by excluding self-citations from the citation count.

A second potential limitation is that judges might have ulterior reasons for citing another judge (in particular a colleague) by name. Klein and Morrisroe point out that, for example, some judges might cite others 'in hopes of reciprocation'.[21] If this is the case, citation counts are not measuring *prestige* in a meaningful sense, but as Klein and Morrisroe note, provided that most citations are to invoke the judge's name to underscore the point, citations by name should be a valid indicator of prestige.[22] A third possible problem is that no attempt has been made in this study to distinguish between positive and negative references. At one level, as we are attempting to measure *prestige* this should not matter. When speaking of prestige, rather than quality, there is no need to distinguish positive and negative citations. A judge will rarely cite another judge by name unless he/she thinks that the opinion of the cited judge is worth attributing to the author. As a practical matter, however, few judicial citations by name are critical, so this issue does not present any real problem for interpreting the results.

A more general problem is the notion of the 'superprecedent'. Landes and Posner define a 'superprecedent' as 'a precedent that is so effective in defining the requirements of the law that it prevents legal decisions arising in the first place or, if they do arise, induces them to be settled without litigation'.[23] The authors of such a 'superprecedent' (which obviously exerts great influence) would be under-represented in citation counts. However, as Landes and Posner emphasise, 'superprecedents' are unlikely to have a statistically significant effect.[24] Even when the Court does hand down a settlement-generating judgement, later Courts are still likely to recognise its influence and cite it and its authors.[25] For instance, an example of a superprecedent in the High Court would be *Cole v Whitfield*,[26] which clarified the law relating to section 92 of the Constitution. Nevertheless, this decision has still been frequently cited in later High Court cases.

A final issue concerns changes in the composition of the Court's workload over time. McCormick points out that in the Supreme Court of Canada 'private law cases are increasingly unlikely to be cited as the Supreme Court caseload becomes predominantly focused on public and criminal law'.[27] This means that, in the Supreme Court of Canada at least, judges strong in private law have less chance to be cited in judgements than judges strong in constitutional or criminal law, which, it might be argued, biases the measure of prestige. But, an important point, worth emphasising, is that citations by name are attempting to measure prestige and do not necessarily imply anything about merit.[28] If the caseload of the Court has changed over time, this simply means that judges which are

20 Landes, Lessig and Solimine, note 9, 274.
21 Klein and Morrisroe, note 4, 376.
22 Note 4, 376.
23 Landes W. and Posner R., 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 9 *Journal of Law and Economics* 249, 256.
24 Landes and Posner, note 23, 251
25 Kosma, note 9, 339.
26 (1988) 165 CLR 360.
27 McCormick, note 9, 458.
28 On the difficult relationship between influence, prestige and merit see McCormick, ibid 463–464 and Kosma, note 9, 340–341.

stronger in areas of the law that come before the Court most frequently will have more opportunities to influence the current jurisprudence of the Court.

3. Data and methodology

The sample cases in this study were all decisions reported in volumes 186 to 195 inclusive of the Commonwealth Law Reports, which covers cases decided over the period 1995 to 1999. These were the ten most recent volumes of the Commonwealth Law Reports available when the data were collected in January and February 2000. The fact that the sample does not include unreported decisions is a limitation, but it is still likely to cover the most important cases decided over the sample period. As McCormick puts it: 'Reported cases probably include a very high proportion of all the decisions sufficiently important to call for reasoned judgement based on authority'.[29] Each case in the sample was read and every time a current or retired Justice of the High Court was cited by name it was counted. If a Justice received repeat citations by name in the same paragraph it was counted only once. If the Justice was cited by name in subsequent paragraphs these were counted again, on the basis that the Justice was being cited for a different proposition and therefore the citation had separate significance. In order to give proper weight to citations in joint judgements, when calculating the total figure, citations in joint judgements were multiplied by the number of participating judges. However, on the few occasions where Justice A concurred with Justice B and Justice B cited another judge by name, Justice A was not attributed with having cited that judge.

There are three methodological issues that deserve specific mention. First, only citations to a judge writing in his/her judicial capacity were counted. The study did not include citation by name to a judge writing extra-judicially.[30] Secondly, shorthand references to periods in the Court's past, such as 'the Dixon Court' or 'the Mason Court' were not counted as citations to the respective Chief Justices. Thirdly, only previous citations to High Court cases were considered. If a High Court Justice was cited by name when authoring a judgement in another court, prior to elevation or (in the case of Evatt J) after retirement from the High Court, this was not counted. For example, if Deane J was cited by name when delivering a judgement in the Federal Court, or McHugh J was cited when delivering a judgement in the New South Wales Court of Appeal, this was not counted.

4. The results

Raw Citation Counts

The most frequently cited Justices in the sample cases are given in Table 1. There were 8577 citations by name in total. Of all the Justices who have been members of the High Court, only three were not cited by name in the sample cases: Piddigton J (who resigned without hearing a case) and Gleeson CJ and Hayne J (who were only appointed in 1998). Of the Justices at the lower end of the table, most are recent appointments (Gleeson CJ, Callinan, Hayne and Kirby JJ), were among the earlier Justices of the Court (Barton, Higgins, O'Connor and Powers JJ) or were on the Bench for a relatively short period (Walsh J). At the other end of the spectrum, there were eight Justices (Mason, Dixon and Brennan CJJ and Deane, Gaudron, Dawson, Toohey and McHugh JJ) who each supplied 5% or more of the total citations. One feature of table one is that Chief Justices are

29 McCormick P., 'The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority, 1922–1992' (1994) 32 *Osgoode Hall Law Journal* 272, 277.

30 Extra-judicial writing represents an alternative form of judicial influence — on academic scholarship — and can contribute to judicial prestige. See McCormick P., 'Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship' (1996) 45 *University of New Brunswick Law Journal* 139, who discusses this issue in the Canadian context.

Table 1
Most Frequently Cited Justices by Name
Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Justice	Times Cited		Excluding Self-Cites	
Mason*	997	(11.62)	997	(12.28)
Deane	756	(8.81)	756	(9.31)
Dixon*	717	(8.36)	717	(8.83)
Brennan*	699	(8.15)	636	(7.83)
Gaudron	628	(7.32)	403	(4.96)
Dawson	576	(6.71)	530	(6.53)
Toohey	507	(5.91)	459	(5.65)
McHugh	440	(5.13)	381	(4.69)
Barwick*	337	(3.93)	337	(4.15)
Gibbs*	336	(3.92)	336	(4.14)
Kitto	207	(2.41)	207	(2.55)
Windeyer	195	(2.27)	195	(2.40)
Wilson	175	(2.04)	175	(2.16)
Stephen	158	(1.84)	158	(1.95)
McTiernan	155	(1.81)	155	(1.90)
Fullagar	154	(1.79)	154	(1.90)
Latham*	142	(1.66)	142	(1.75)
Murphy	138	(1.61)	138	(1.70)
Isaacs*	134	(1.56)	134	(1.65)
Gummow	119	(1.39)	104	(1.28)
Starke	108	(1.26)	108	(1.33)
Taylor	106	(1.24)	106	(1.31)
Griffith*	87	(1.01)	87	(1.07)
Rich	79	(0.92)	79	(0.97)
Aickin	75	(0.87)	75	(0.92)
Jacobs	74	(0.86)	74	(0.91)
Menzies	63	(0.77)	63	(0.81)
Williams	58	(0.68)	58	(0.71)
Evatt	56	(0.65)	56	(0.69)
Owen	54	(0.63)	54	(0.67)
Knox*	45	(0.52)	45	(0.55)
Higgins	41	(0.48)	41	(0.50)
Walsh	36	(0.42)	36	(0.44)
Duffy*	33	(0.38)	33	(0.41)
O'Connor	26	(0.30)	26	(0.32)
Webb	23	(0.27)	23	(0.28)
Barton	20	(0.23)	20	(0.25)
Kirby	15	(0.17)	10	(0.12)
Powers	6	(0.07)	6	(0.07)
Callinan	2	(0.02)	2	(0.02)
Gleeson*	–	–	–	
Hayne	–	–	–	
TOTAL	8577		8116	

Notes:
(1) Bold typeface indicates current Justice of the High Court
(2) Asterisk denotes served as Chief Justice
(3) This table and following tables exclude Albert Piddington who was a Justice of the High Court from March 6 to April 5 1913, but resigned without hearing a case.

disproportionately represented at the top of the table. Of the ten most cited Justices, five served as Chief Justice. Another aspect of the table is the dominance of recent Justices of the Court at the top of the list. With the exception of Dixon CJ, each of the judges with more than 5 per cent of the citations were current members of the High Court at some point during the sample period (Brennan CJ, Gaudron, Dawson, Toohey and McHugh JJ) or had recently retired (Mason CJ and Deane J). This suggests that the raw figures might be distorted by self-citations or that judges cite their current or recently retired colleagues by name more than judges from earlier periods in the Court's history.

Adjusting for Self-Citations

The discussion in section two recognised that raw citation counts can be distorted by self-citations, because current members of the Court can refer to their earlier decisions. Self-citations account for about 5 per cent of all citations (461 out of 8577). Table 2 compares the number of self citations as a percentage of citations by the judge, with the number of self citations as a percentage of citations of the judge, for all Justices who were on the Bench in the sample period. A striking feature of table 2 is that all of the Justices cited themselves proportionately less than they were cited by the rest of the Court collectively. This suggests that self-citation is not a major issue in the sample. This conclusion is reinforced by the second column of table 1, which lists the number of times each Justice was cited, excluding self-citations by the Justices in table 2. With the exception of Gaudron and Gummow JJ, who both drop two places, the rankings remain unchanged.

Adjusting for the Depreciation of Precedent

As a measure of prestige, the problem with the citation counts in table 1 is that current, or recently retired, Justices get cited more than earlier Justices. This reflects the fact that more recent cases are cited more frequently than older cases, irrespective of the prestige of the Justice. Landes and Posner show that precedent (or legal capital) depreciates over time.[31] Others have also observed that the citation power of a decision declines over time. Merryman describes, what he terms, the 'citation half-life', which is the statistical probability that a citation of a case by the Court will be reduced by 50 per cent every x years.[32] Merryman found that the citation half-life in the Supreme Court of California was about ten years.[33] McCormick found that in the Supreme Court of Canada, the drop-off rate was sharper, with a citation half-life of four years.[34] There are various explanations for this phenomenon. One explanation could be that the stock of older decisions is reduced over time as cases are overruled either by latter decisions or statute. Another is that legal opinion evolves over time, so that even if earlier decisions are not overruled, their reasoning might not be as persuasive. A final factor is that latter cases are more relevant on the facts because the social context of earlier decisions have changed.[35]

Figures 1 and 2 show 'follow-up' citations in the High Court, regardless of whether a judge was cited by name. Follow-up citations refer to citations of previous decisions of the citing court.[36] Follow-up citations are broken down into constitutional, criminal, private and public law cases in figure 1. There were 13,223 follow up citations in total: 5143 in constitutional law cases; 3599 in private law cases; 2773 in public law cases and 1708 in criminal law cases. This reflects the importance of constitutional cases in the Court's caseload. Figure 2 shows clearly that the High Court prefers to cite its more recent

31 Landes and Posner, note 23.
32 Merryman J.H., 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1977) 50 *Southern California Law Review* 381, 395.
33 Note 32, 394–395
34 McCormick, note 9, 470.
35 Merryman, note 32, 395.
36 McCormick, note 9.

Table 2
Frequency of Self-Citation
Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Justice	Self-Cites as a Percentage of Cites BY Justice	Self-Cites as a Percentage of Cites OF Justice
Gaudron	11.43%	35.83%
Brennan	8.24%	9.01%
Dawson	7.19%	7.99%
Toohey	5.72%	9.47%
McHugh	5.59%	13.41%
Gummow	1.10%	12.61%
Kirby	0.45%	33.33%
Callinan	–	–
Gleeson	–	–
Hayne	–	–

decisions. There is a steady increase until the 1970s, followed by a sharp rise to citations in cases decided in the 1980s and 1990s. Citations of decisions after 1995 drop off, which reflects that the sample covered cases decided over the period 1995 to 1999. To properly compare the influence of Justices from different periods in the history of the Court, the citation scores in the second column of table 1 (excluding self-citations) were adjusted using a 'citation price index'. A citation price index is defined as follows:[37]

$$CPI_t = \frac{N_t}{\sum_{j=1}^{Nt} c_{tj}^0} \cdot \kappa,$$

where:

N_t is the number of judgements in year *t*,

c_{tj}^0 is the raw citation count for the jth judgement in year t.

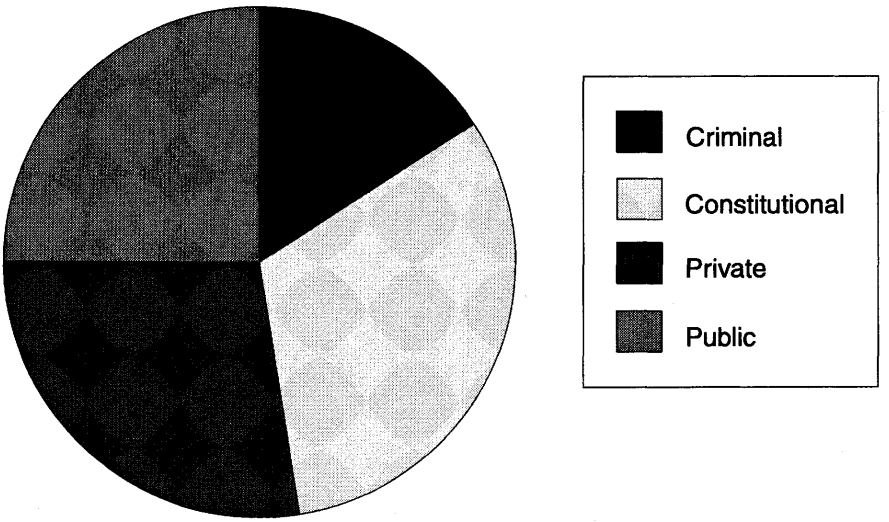
and κ is a normalization constant, such that the smallest index value will equal 1.

Following Kosma, the CPI values were smoothed via a five-year weighted average, to alleviate distortions caused by a single influential decision that causes an inordinate effect on the entire year's average.[38] A discount rate was calculated using the CPI. While it is difficult to estimate a single discount rate, it can be approximated as the average 'rate of inflation' in follow-up citations over time.[39] Using this approach, I got a discount rate of 17 per cent. This is similar to the Supreme Court of Canada, where McCormick used a discount rate of 15 per cent,[40] but is higher than the United States Supreme Court, forwhich Kosma used a discount rate of 6.5 per cent.[41] The discount rate was used to calculate prestige scores for each citation following the approach used by McCormick.[42]

The prestige score for each citation was 1.205 (or 1/.83) raised to the nth power, where n is the age of the citation in years.[43] The value is computed for each citation individually, rather than the average for each Justice. For purposes of simplification, consistent with

37 See Kosma, note 9, 343.
38 Kosma, note 9, 343. An example of an influential decision from relatively early in the Court's history is *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (Engineers Case)* (1920) 28 CLR 129.
39 Kosma, note 9.
40 McCormick, note 9.
41 Kosma, note 9.
42 McCormick, note 9.
43 McCormick, note 9, 470.

Figure 1
Follow-Up Citations in the High Court According to Subject



McCormick, this principle was qualified by the consideration that no citation received a score higher than its age in years.[44] McCormick adds the additional qualification that 'no citation receives a score higher than 40'.[45] However, this qualification seems arbitrary. The practical effect is that using a discount rate of 17 per cent (or 15 per cent as in McCormick's study) a citation to a case decided in 1959 is given the same weighting as a citation to a case decided in 1904. This discriminates against early decisions of the Court and was not used in calculating the weighted prestige scores.

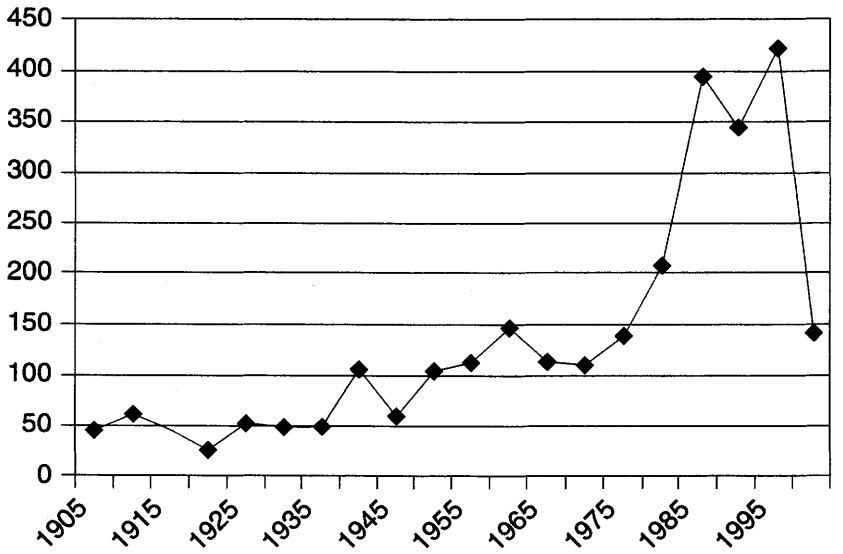
The total prestige score for each Justice is given in table 3. These weight the citations that each Justice receives according to the age of the citation. The picture that emerges from table 3 is rather different to table 1. Dixon CJ moves to the top of the list and Isaacs CJ moves into second place. Mason CJ drops from first to third. A feature of table 3 is that Chief Justices dominate the top of the list, even more so than in table 1. In fact Kitto J is the only judge in the top seven that did not serve as Chief Justice. The effect of weighting older citations more heavily is that Mason, Brennan and Gibbs CJJ and Deane J are the only judges from the last fifteen years that make it into the top twenty.

Adjusting for Period on the Bench

A final correction is to adjust for differences in terms of time spent on the Bench. Obviously judges that have served on the Court for long periods have more opportunities to be cited than judges who were on the Bench for comparatively short periods. Table 4 provides average prestige scores that overcome this distortion. Average prestige scores are calculated by dividing the total prestige scores by the number of years served on the Court. Hence, these give a measure of prestige per year served on the Court. Judges such as McTiernan and Rich JJ who were on the Court for long periods, and thus do quite well in table 3, drop down the rankings. At the same time judges such as O'Connor, Jacobs and Walsh JJ, who were on the Court for shorter periods of time, move up the list.

44 McCormick, note 9.
45 McCormick, note 9.

Figure 2
Follow-Up Citations in the High Court for 1903–1998



Towards the Notion of a High Court 'All Stars' or 'Super Court'

McCormick argues that the average prestige scores 'probably comes the closest to assessing merit *simpliciter*, correcting as it does for both length and recency of service'.[46] He goes on to suggest 'pushing harder than the provisional nature of the calculations may permit we can tentatively suggest a 'Super Court' including . . . judges with the highest ''influence generated per year of service'' score'.[47] Table 5 suggests a similar 'Super Court' or 'All Star Court' for the High Court, recognising the need for caution in interpreting the results, given the provisional character of the calculations. On the basis of average prestige such a court would consist of Dixon CJ, Fullagar J, Barwick CJ, Griffith CJ. Windeyer J, Latham CJ and Kitto J. On the basis of average prestige score, the Chief Justice would be Dixon CJ. The Court would consist of three members from Victoria, three from New South Wales and one from Queensland, which reflects the historical dominance of the populous states in the composition of the Court.

Is the composition of the High Court All Stars, based on average prestige, in table 5 consistent with prior expectations? The finding that Dixon CJ has been the most prestigious Justice on the High Court is not surprising, given he is widely regarded as Australia's greatest judge.[48] Sir Ninian Stephen records 'an eminent Justice of the United States Supreme Court' describing Dixon as 'the greatest judge in the English speaking world'.[49] Fullagar J ranks eleven in the total prestige scores, but moves up to second on the average prestige scores, having served on the Court only eleven years, before his death while still on the Bench. The finding that Fullagar J is the second most prestigious Justice might be

46 McCormick, note 9, 476.
47 McCormick, note 9. McCormick speaks in terms of influence rather than prestige, but acknowledges that influence is probably not the most appropriate term. See the discussion earlier in the text.
48 See the references in note 6 above. These contain references to further sources.
49 Stephen, note 7, 21.

Table 3
Total Prestige Scores
Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Justice	Times Cited[a]	Total Prestige Score
Dixon	717	35527
Isaacs	134	10459
Mason	997	9558
Barwick	337	9062
Kitto	207	8634
Griffith	87	7893
Latham	142	7851
Starke	108	7215
Windeyer	195	6771
McTiernan	155	6709
Fullagar	154	6690
Gibbs	336	6065
Rich	79	5412
Deane	756	4887
Brennan	636	4397
Taylor	106	3864
Evatt	56	3526
Knox	45	3377
Stephen	158	3223
Higgins	41	3219
Williams	58	2953
Dawson	530	2742
Murphy	138	2549
Duffy	33	2413
O'Connor	26	2376
Wilson	175	2296
Menzies	63	1983
Barton	20	1774
Toohey	459	1768
Owen	54	1751
Jacobs	74	1719
Gaudron	403	1448
Aickin	75	1458
McHugh	381	1306
Walsh	36	1022
Webb	23	1005
Powers	6	468
Gummow	104	179
Kirby	10	15
Callinan	2	2
Gleeson	–	–
Hayne	–	–

Notes:
a Excludes self-cites

Table 4
Average Prestige Scores
Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Justice	Average Prestige Score	Period in Office
Dixon	1015.06	1929–1964
Fullagar	608.11	1950–1961
Barwick	533.06	1964–1981
Griffith	493.31	1903–1919
Windeyer	483.64	1958–1972
Latham	461.82	1935–1952
Kitto	431.70	1950–1970
Isaacs	418.36	1906–1931
Mason	415.56	1972–1995
O'Connor	396.00	1903–1912
Deane	375.92	1982–1995
Stephen	358.11	1973–1982
Gibbs	356.76	1970–1987
Evatt	352.60	1930–1940
Jacobs	343.80	1974–1979
Knox	307.00	1919–1930
Brennan	258.65	1981–1998
Walsh	255.50	1969–1973
Aickin	243.00	1976–1982
Starke	240.50	1920–1950
Murphy	231.72	1975–1986
Wilson	229.60	1979–1989
Taylor	227.29	1952–1969
Dawson	182.80	1982–1997
Williams	164.06	1940–1958
Toohey	160.72	1987–1998
Owen	159.18	1961–1972
Rich	146.27	1913–1950
McTiernan	145.84	1930–1976
Higgins	139.96	1906–1929
McHugh	130.60	1989–
Menzies	123.94	1958–1974
Gaudron	120.66	1987–
Duffy	109.68	1913–1935
Barton	104.35	1903–1920
Webb	83.75	1946–1958
Gummow	44.75	1995–
Powers	29.25	1913–1929
Kirby	5.00	1996–
Callinan	2.00	1998–
Gleeson	–	1998–
Hayne	–	1997–

Table 5
The 'All Stars' High Court Based on Measures of Prestige Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Total Prestige		Average Prestige	
Dixon CJ	(VIC)	Dixon CJ	(VIC)
Isaacs	(VIC)	Fullagar	(VIC)
Mason	(NSW)	Barwick	(NSW)
Barwick	(NSW)	Griffith	(QLD)
Kitto	(NSW)	Windeyer	(NSW)
Griffith	(QLD)	Latham	(VIC)
Latham	(VIC)	Kitto	(NSW)

somewhat surprising, although he has been praised as a 'great judge'[50] and a 'great jurist'.[51] Fricke also points out that he was the author of a number of notable common law judgements, in particular in the field of torts.[52]

Barwick CJ is the third member of the Super Court. The finding that he had the third highest average prestige score might also be surprising. Rumble suggests: 'It is difficult to find many constitutional issues where Barwick CJ's thinking dominated or led the Court'.[53] Winterton expresses agreement with these sentiments. He states: 'He lacked the breadth of vision and depth of principle to leave a permanent judicial legacy in the class of Griffith, Isaacs or Dixon . . . less than two decades after his retirement his lasting impact on Australian legal doctrine seems slight'.[54] These comments appear harsh and are not supported by the empirical findings in this study. Barwick CJ is still heavily cited in criminal and private law cases. Of the 337 citations Barwick CJ received, 111 were in criminal cases, 105 were in constitutional cases, 95 were in private law cases and 26 were in public law cases. Given that constitutional cases account for the largest proportion of follow-up citations in the High Court (see figure 1), the high figure in criminal cases suggest that, in this area of the law at least, Barwick CJ's legacy has been substantial.

The other members of the Super Court are Griffith and Latham CJJ and Kitto and Windeyer JJ. The high ranking of Griffith CJ is as expected, given his stature in the early years of the Court's history. Fricke states that he 'shaped and dominated' the early High Court.[55] The high prestige scores of Kitto and Windeyer JJ are also consistent with prior expectations. Along with Fullagar J, both served in a 'golden age'[56] of the Court's history. Latham CJ is perhaps a more unexpected inclusion. Sir John Latham's greatest achievement is often regarded as persuading Sir Owen Dixon to join the High Court.[57] As a result, Marr states that 'Latham was required to work in Dixon's shadow'.[58] Sir Zelman Cowan suggests that 'a careful reading of [Latham's] writings leaves one with an impression of competence rather than of real distinction'.[59] Nevertheless, this study suggests that he is still fairly heavily cited by name in particular in constitutional cases.

Taking the Super Court as a whole, a striking feature of the Court is the proportion of

50 Sir Douglas Menzies, 'The Right Honorable Sir Owen Dixon O.M, G.C.M.G' (1973) 9 *Melbourne University Law Review* 3, 3.
51 Sir Richard Eggleston, 'Beyond Reasonable Doubt' (1977) 4 *Monash University Law Review* 1, 1.
52 Fricke G., *Judges of the High Court* (1986) 159–166.
53 Rumble G.A., *Sir Garfield Barwick's Approach to the Constitution* (Ph. D thesis ANU, 1983), 482 cited in George Winterton, 'Barwick the Judge' (1998) 21 *University of New South Wales Law Journal* 109, 115.
54 Winterton, note 53, 116.
55 Fricke, note 52, 20.
56 Galligan B., *Politics of the High Court* (1987), 201–202.
57 See Adam A.D.G, 'Sir John Latham: A Tribute' (1964) 38 *Australian Law Journal* 190.
58 Marr D., *Barwick* (1981), 49.
59 Sir Zelman Cowan, *John Latham and Other Papers* (1965), 59.

Menzies' appointments from the 1950s and 1960s. As noted above, this period, particularly under Dixon CJ, is regarded as a golden age for High Court jurisprudence. Fricke notes that Sir Robert Menzies, as an ardent admirer of Sir Owen Dixon, appointed 'career lawyers', who were in the Dixonian mould.[60] Consequently, under Dixon, the High Court built up a strong international reputation. Lord Denning suggests that when Dixon served as Chief Justice (1952–1964) and the members of the Court included Fullagar J (1950–1961), Kitto J (1950–1970) and Windeyer J (1958–1972), the High Court 'established a reputation which overtopped even that of the House of Lords'.[61]

A Constitutional 'Super Court'

McCormick points out that prestige scores will be different for different areas of law.[62] The biggest proportion of follow-up citations in the High Court are in constitutional cases, which make up almost 40 per cent of such citations (see figure 1). Because constitutional cases constitute such an important component of the Court's caseload, I calculated average and total influence scores for citations by name in these cases alone. To do this, when adjusting for depreciation of precedent, it was necessary to develop a separate CPI and calculate a specific discount rate for follow-up citations in constitutional cases. The discount rate for constitutional cases was 8.9 per cent (compared to 17 per cent for all cases), which suggests that the Court cites more of its older decisions on constitutional law than it does in other areas of the law.[63] Table 6 reports the top seven Justices with the highest average prestige and total prestige scores in constitutional cases. These Justices, together, make-up a Super Court on constitutional matters.

In terms of total prestige, five of the seven Justices are the same as the All Stars High Court. The difference is that Barwick and Mason CJJ drop out and are replaced by Starke and McTiernan JJ. The high ranking of McTiernan J, in particular, is unexpected. Coper states McTiernan 'was never a dominant force' in constitutional matters.[64] His high ranking in the total prestige score, however, reflects the long period he was on the Bench (1930–1976). In the average prestige scores he drops down the list. Starke J is the other new inclusion in the Constitutional Super Court. He, in contrast to McTiernan J, retains his place in the Constitutional Super Court based on average prestige. Fricke suggests: 'Starke's first decade on the High Court was one in which important doctrinal changes occurred. Although he was less conspicuous than Isaacs, Starke was influential with respect to these changes'.[65] Sir Owen Dixon has also emphasised the role Starke played in the interpretation of the Constitution throughout the 1920s. He states:

> The decade at the beginning of which he took office was one of great and rapid constitutional development. . . . No one who at that time was familiar with the Court could fail to understand that the strong judicial character, clear vision and notable legal equipment of Sir Hayden Starke had played a decisive role in establishing constitutional doctrines, which up to that time had not received the support of a majority of the Judges.[66]

In the Super Court based on average prestige, again five of the seven Justices are the same as the general Super Court. The two changes are that Isaacs CJ and Starke J replace Barwick CJ and Windeyer J. The fact that Isaacs CJ ranks high enough to be included in a Constitutional Super High Court was expected. His influence on the Constitution, through

60 Fricke, note 52, 143–144.
61 Lord Denning M. R. 'Let Justice be Done' (1975) 2 *Monash University Law Review* 3.
62 McCormick, note 9, 477–484.
63 The prestige score for each citation was 1.098 (or 1/.911) raised to the nth power where n is the age of the citation in years. As with the general figures, reported earlier, the prestige value is computed for each citation individually (in this instance citations in constitutional cases), rather than the Justice's average.
64 Coper M., *Encounters with the Australian Constitution* (1988), 115.
65 Fricke, note 52, 104.
66 'The Late Sir Hayden Erskine Starke' (1957) 97 CLR unpaginated, cited in Fricke, note 52, 105.

Table 6
Constitutional 'All Stars' High Court Based on Measures of Prestige
Reported Decisions of the High Court Volumes 186 to 195 of the Commonwealth Law Reports

Total Prestige		Average Prestige	
Dixon CJ	(VIC)	Dixon CJ	(VIC)
Latham	(VIC)	Latham	(VIC)
Isaacs	(VIC)	Griffith	(QLD)
Griffith	(QLD)	Fullagar	(VIC)
Kitto	(NSW)	Isaacs	(VIC)
McTiernan	(NSW)	Kitto	(NSW)
Starke	(VIC)	Starke	(VIC)

adopting a centralist position, in particular in the *Engineers* case,[67] was substantial. He also ranks eighth in terms of average prestige on all areas of the law, just outside the more general Super Court. Sir Owen Dixon is Chief Justice of the constitutional Super Court with the highest total and average prestige scores by a large margin. As in other areas, his influence on the evolution of constitutional interpretation has been substantial. Howard suggests Dixon had an intellectual dominance over the Court, which towards the end of his career made him seem to be part of the fabric of federation itself. It became difficult to believe there was not a section in the Constitution somewhere . . . which started 'until Sir Owen Dixon otherwise provides'.[68]

An interesting feature of the Constitutional Super Court, based on average prestige, is that five of the seven Justices are from Victoria. Hence, we do not get the neat geographical breakdown between Victoria and New South Wales, which is a feature of the general Super Court. While equitable geographical representation has never been a significant consideration in making appointments to the High Court (unlike the Supreme Court of Canada), historically, New South Wales has had more than one Justice. If this was considered relevant Starke J, from Victoria, could be replaced by Windeyer J, from New South Wales, who ranked eighth on the basis of average prestige. A final point worth emphasising is that these Super Courts are based purely on prestige as measured by citations by name and do consider how the Justices would interact with each other. There is no guarantee that the judges would function well together, even if it were possible to bring each of the Justices back in their prime. For instance it is well known that Griffith and Isaacs did not like each other,[69] and that when Latham was Chief Justice, Starke was contemptuous of McTiernan, likening him to a 'parrot' who always agreed with Dixon.[70]

5. Conclusions

In concluding, it is important to reiterate the main limitations on this sort of study. First, the study is based on the number of times judges are cited by name. There are some potential problems with counting citations, which were discussed earlier in the paper. However, counting the number of times judges are actually named represents an improvement in methodology over most of the previous studies that just count judgements, irrespective of whether the author is named. In addition, a number of adjustments have been made to the raw citation counts to take account of self-citations, depreciation in the value of precedent and differences in terms of time spent on the Bench.

67 (1920) 28 CLR 129.
68 Howard C., 'Sir Owen Dixon and the Constitution' (1973) 9 *Melbourne University Law Review* 5, 5.
69 See Fricke, note 52, 46–47.
70 Lloyd, note 5, 181.

Second, the data set is collected from a sample of High Court cases in ten volumes of the Commonwealth Law Reports. The fact that the sample is limited to reported cases is a limitation, although these are still likely to be the most important cases decided over the period. Moreover, if the sample were larger than ten volumes of the Law Reports, we would be in a stronger position to draw firmer conclusions. However, the sample size spans a similar period to previous overseas studies where the data has been collected through reading the reports.[71] Studies in the United States that have used electronic databases, such as Shephard's CD-ROM, have utilised bigger samples, but using electronic databases compromises the findings on other grounds. For example, counting citations using a search engine makes it almost impossible to exclude self-citations. Hence, most of the studies for courts in the United States include self-citations, which arguably distorts the results. A third limitation is that with the exception of constitutional law, rankings have not been calculated for specific sub-fields. Thus, a judge strong in criminal law or private law might score higher if these cases were considered in isolation.

These limitations mean that the rankings reported in this study should be seen as a first attempt to quantify prestige among High Court judges. The notion that we can define a Super Court is based on the assumption that our measure of average prestige comes close to a proxy for merit. As stated earlier in the paper and noted by others, such as McCormick, this might be pushing the provisional nature of the calculations too far. Having said this, one of the stated aims in the introduction was to contribute to the debate about the relative standing of specific High Court Justices. The results of a study such as this are never going to be a substitute for conjecture or opinion. This is not the objective of such a study. The aim, rather, is to provide quantitative findings that bear on the relevant issues through the systematic application of a specific methodology. The fact that most of the results, and in particular the stand out performance of Dixon CJ, are consistent with prior expectations should be seen as a major strength of the findings.

71 For example McCormick's, note 9, study covers 1989–1993.