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Which Governments Come Out Ahead?

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Abstract

Party capability theory assumes that governments, due to their immense resources and status as repeat players, hold a great advantage over individuals and organizations pursuing litigation in courts. Less known is whether all levels of government enjoy this advantage, how they fare against one another and how an institutional arrangement such as federalism complicates such relationships. These questions are investigated using decisions made by the high courts of Australia, Canada, and the United States. The descriptive findings indicate that institutional arrangements, such as federalism, in some ways, confirm and in others confound traditional notions of which governments come out ahead, which yields important implications for party capability theory, specifically, and federalism, generally.

Key-words

party capability theory, federalism, Australia, Canada, United States



Federal systems rely on formal arrangements that both define and limit the powers of each level of government and can be organized in two basic ways: vertical or horizontal federalism (Halberstam 2008: 142). Those states that have adopted the institutional framework of horizontal federalism have elected to create organizationally distinct levels of government each equipped with legislative, executive, judicial and fiscal powers. The proliferation of duplicative institutions within and across the levels of government multiplies the potential for conflict as each seeks to probe the limits of defined power. Far from being a set of static institutional arrangements, federalism is, in practice, dynamic governance (Watts 1998: 128) that is often plagued by the inability of governments to define clearly their respective jurisdictional boundaries (Burgess and Gagnon 1993). The need then for a dispute resolution mechanism is inherent in federal systems.

The dominant institutional strategy for resolving conflicts between governments in federal systems has been the referral of disputes to the courts, typically the highest court of the central or national government. The central logic is that such courts serve as “umpires” that are created to enforce the constitutional “rules of the game” against transgressions by each level of government (Field 1934). The fact that the umpire is potentially biased for the national or central government (Bzdera 1993; Dahl 1957; Wechsler 1954) has not been lost on some observers. Though others argue that these concerns have not materialized in fact (Eskridge and Ferejohn 1994; Wheare 1964). Still, the potential for bias and the problems it would create in the dispute resolution process in federal systems looms large. For constituent governments, in particular, a centralized judiciary biased against their interests could very well lead to a federal system dominated by the central government.

One particularly fruitful, but as of yet, unapplied strategy to assess how courts resolve disputes between levels of government, is party capability theory (PCT) (Galanter 1974). Party capability theory argues that litigants or parties that have more resources and experience will have an advantage over opponents who have fewer resources and experience in the context of appellate litigation (Kritzer 2003: 342). Previous analyses of PCT have been conducted at several levels in the United States (Brace and Hall 2001; Lindquist et al 2007; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987), Canada (McCormick 1993), Australia (Sheehan and Randazzo 2012; Smyth 2000), England (Atkins 1991), the Philippines (Haynie 1994; 1995), South Africa



(Haynie 2003) and comparatively (Haynie et al 2001; 2013) and have generally provided support for the theory that the resource advantage is present in litigation.

Surprisingly, previous studies of PCT have not yet considered what happens when governments face off against one another in the course of litigation. Since conflict between levels of governments is endemic to federal systems, the government with the most resources may be able to use the litigation process to tilt the “rules of the game” to their advantage. Using party capability theory to explore and assess the success of each level of government in litigation may yield important insights into the dispute dynamics of governments in federal systems. To make such an evaluation, the decisions of three high courts, the United States, Canada, and Australia, are used to construct net advantage scores in litigation for each level of government as individual parties and head-to-head conflicts. The descriptive results, though descriptive and qualified, are broadly consistent with party capability theory. The implications of the analyses for the application of party capability theory to the study of federal systems are further discussed in the conclusion.

1. Federalism and conflict

Federalism is a system of governance where there are multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority (Halberstam 2008: 142). Whether conceived of as a “constitutional bargain” or as a “creative commitment,” federalism enables inter-jurisdictional cooperation by placing limits on governments through the distribution of constitutional powers (Halberstam 2008: 143). Though perhaps counterintuitive, federal systems are not static structures but are dynamic and evolving entities that can pragmatically adapt to changing circumstances (Watts 1998: 128). This flexibility facilitates cooperation amongst units of government; however, competition between federal and state authority is also a characteristic of these systems as well (Dye 1990; Kenyon and Kincaid 1991). Since some constitutions are quite specific in the policy-making responsibilities of constituent government and some are not, the court system often becomes cluttered with cases that seek to clarify the lines of authority within certain policy areas (Tully as quoted in Schertzer 2016).



Scholars like Watts, Elazar, and Zimmerman among others have characterized federal systems in two main ways: horizontal and vertical, whereby horizontal federalism as a style is concerned with the intergovernmental relationships between sub-national units that, constitutionally, can express their desires to reflect regional differences, and vertical federalism is concerned with how the national and sub-national units related to each other. Federal systems, under their constitutional arrangements, are challenged by both types of relationships (Elazar 1987; Watts 2000; Zimmerman 2011). Federal systems, like the United States, Canada, and Australia, are emblematic of this type inter-jurisdictional competition (Breton 1996; Halberstam and Hills 2001) created by central and constituent state governments. These systems are characterized by independent political units of government sitting alongside one another, but with a full complement of powers including an independent democratic base, an independent fiscal base and the ability to formulate, execute and adjudicate its policies (Halberstam 2008: 145). The potential for conflict between governments balancing the demands of shared rule is thus inherent in the very design of such federal systems. The importance of creating safety valves to manage conflict is therefore of the utmost importance.

Most federations rely on the courts as a primary safety valve to resolve a conflict.¹ Courts fulfill the primary adjudicating role in the interpretation of the national constitution or the “rules of the game” and adapt the constitution to changing circumstances through the decision-making process (Duchacek 1970: 188-275; Watts 1998: 126). The courts protect the constitutional bargain by enforcing the boundaries of power against encroachment as each level of government seeks to expand their authority at the expense of another. This phenomenon has led scholars to refer to courts, such as the United States Supreme Court, as the “umpire of the federal system” (Braden 1942; Field 1934; Freund 1954; Lenaerts 1990). More explicitly, courts are responsible for “enforcing the legal and constitutional rules governing the mechanics of federalism—the rules governing the position in a federal system which the states occupy, or which the national government occupies (Field 1934: 233).

There is wide disagreement about the court’s role as umpire of a federal system with some arguing that it is needless, ineffective or even potentially destructive (Wechsler 1954; Choper 1980; Tushnet 1999: 123). Wechsler’s (1954) classic argument against judicial involvement is that there are already sufficient political safeguards in place that are inherent



in federal systems. Others maintain that the central judiciary is not independent enough to serve as an impartial umpire in disputes (e.g. Casper 1976; Dahl 1957). This argument follows from the central government's role in creating the central judiciary, supplying financial resources, and controlling appointments render the central judiciary a natural ally of the central government (Halberstam 2008: 147). Bzdera (1993) argues that there is a tendency for nationally appointed federal courts to use the power of judicial review to augment the powers of the national government at the expense of constituent sub-national units. Bzdera (1993: 28) goes on to suggest that there is a "failure of judicial review in the modern federal state" and that federal courts are complicit with the national government in "the exercise of centralized political control of member states."

Others have observed that "[i]n spite of the formal dependence of supreme courts on the executive and legislature of the general government; they have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers" (Wheare 1964: 60-61). In the United States, for example, there has been a steady ebb and flow of the Supreme Court endorsing and withdrawing support for a broad assertion of federal powers (e.g. Eskridge and Ferejohn 1994). There are some reasons why a central judiciary may not be biased against subnational or state governments. These include advancing the judiciary's personal substantive policy preferences (Segal and Spaeth 2002), asserting power vis-à-vis the legislature and the executive (Epstein and Knight 1998) or maintaining their authority, legitimacy, and respect for the rule of law (Gibson and Caldeira 2009). Courts, as a general matter, cannot abide a deep and enduring bias in the dispute resolution process because the perception its neutrality and fairness are inextricably linked to the legitimacy of its decisions and its ability to solicit compliance with those decisions (Shapiro 1981).

Federal systems, especially horizontal types, deliberately create an institutional arrangement that generates competition and conflict between levels of government. The commonly devised solution for positively managing these institutional skirmishes is for the courts to serve as impartial umpires that patrol the boundaries of federal power as each level of government seeks to guard and enlarge their authority at the expense of the others. The project of shared governance through federalism depends on the fair and efficient resolution of disputes by the courts. Gaining a greater understanding of and identifying potential biases in the decision-making process is of great importance.



2. Party capability theory

Galanter's (1974) classic framework for why the law favors the more powerful – the “haves” – as opposed to the less powerful – the “have nots” – depends on the former's ability to draw from and access resources advantageous to litigation. These resources include developing or securing experienced legal talent and specialists, relationships with institutions and established reputations (Galanter 1974: 98-99). Access to these resources skews the probability of litigation success, winning, towards those parties that develop and deploy them regularly – the haves – because the haves long-run interests coincide with developing rules that advantage their ability to absorb some losses while maximizing gains (e.g. a minimax strategy) over the long term (Galanter 1974: 100). It is this type of litigant that Galanter refers to as a “repeat player” because they play for rules, not just a single, particular outcome (1974: 100). These repeat players share the litigation field with have-nots or “one-shotters” who use the courts rarely, more often than not have a claim that outpaces their abilities and resources, and are singularly focused on winning (Galanter 1974: 97-98). It is unsurprising then that when repeat players and one-shotters collide in litigation, the outcome usually favors the repeat players because the rules will reflect the interests or preferences of the group that has been cultivating them – the repeat players (Galanter 1974: 119-124).

A host of studies have evaluated Galanter's general thesis – that more advantaged parties will be advantaged in litigation – in a variety of settings in the United States (Brace and Hall 2001; Lindquist et al 2007; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987), around the world (Atkins 1991; Haynie 1994; 1995; 2003; McCormick 1993; Sheehan and Randazzo 2012; Smyth 2000; Songer 2008) and even comparatively across many countries (Haynie et al 2001; 2013). Party capability theory seeks to determine whether a transitive relationship exists between types of litigants and their respective advantage or disadvantage in litigation. Litigants have traditionally been grouped into five categories: national government (including its agencies and officials), other subnational government agencies and officials, businesses (including corporations), groups (e.g., unions, interest groups, churches, and other associations) and individuals (Haynie et al 2013: 9). These categories are arranged based on assumptions of access to



greater litigation resources and where transitivity is assumed (e.g., Haynie et al 2001; 2013; McCormick 1993; Songer and Sheehan 1992; Wheeler et al 1987).

Party capability theory studies have, in general, found broad, but hardly universal, support for the argument that resource disparities systematically advantage the haves over the have-nots. Governments are, in general, strongly advantaged (Atkins 1991; McCormick 1993; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987). Kritizer (2003: 343) suggests that government's overwhelming advantage is easily traced back to its ability to make the rules or stack the deck in its favor and that the very courts that claim independence in adjudicating litigation are a part of the government and loyal to the regime (Dahl 1957; Shapiro 1964). These institutional realities create structural advantages for governments in litigation. Nevertheless, particular head-to-head match-ups appear to undermine that advantage. These studies usually involve individuals or businesses prevailing over national or subnational governments (e.g., Haynie 1994; Haynie et al 2001; 2013; Smyth 2000). What has yet to be fully explored is whether a given government's advantage in litigation is affected when its opponent is a different level or type of government.

"Government is a special kind of RP [repeat player]," (Galater 1974: 111) maybe even the ultimate repeat player. As Kritizer (2003) suggests, governments make the rules and engender regime loyalty of courts and judges, but what about the instances when two types of governments, both repeat players, clash in the course of litigation? Repeat players depend on low stakes outcomes where a loss today seldom affects winning tomorrow. Conflicts that are high stakes, between governments, for instance, are unlikely to be conflicts over who gets what, but likely to be value differences over whom is right (Galanter 1974: 111) and will require the intervention of a court as opposed to a settlement.

Federal systems are the most likely environments to observe types of government in regular conflict attempting to resolution through litigation. Conventional wisdom suggests that central or national governments will routinely win litigation contests between subnational or local governments because of their primacy in the constitutional order and the inherent bias that exists in the national courts against other levels of government (Bzdera 1993; Casper 1976; Dahl 1957; Shapiro 1964). However, if the courts must maintain and enforce a constitution that disperses power among the levels of government,



then there may be instances where lower levels of government prevail over national or central governments. To determine which governments come out ahead, cases involving each level of government in the United States, Canada, and Australia must be explored and examined.

3. Case selection

Canada, Australia, and the United States are three federal systems under examination for this analysis. Each has its traditions regarding how much, or little power is explicitly granted within their respective national constitutions, as well as their judicial traditions that may affect interpretations of inter and intra-state powers within each state. In Canada, constitutional development can largely be described in three phases: British rule, Canadian “independence,” and the post-Charter era. Originally, Canada had significant ties to Great Britain, its mother country and was considered a colony under British rule until 1931 (although the process of complete legal dependence wasn’t fully completed until 1982). Like, Great Britain, Canada was founded with a strong parliamentary system, and the British framers of the first “constitution” in Canada, wrote the British North American Act of 1867 with a special eye towards avoiding the conflicts seen in the United States over issues of state’s rights and federal supremacy over the issues of slavery. Unlike the United States at its creation, Canada’s courts were subordinate to the British crown, and inter-jurisdictional disputes were decided by the Privy Council (Baier 2006). Upon full severance from British rule, the Supreme Court of Canada gained independence over all legal decisions.

The Canadian federal government in this initial governing regime were given the powers thought to be essential in creating a new economic union—thus had jurisdiction over trade and commerce, interprovincial transportation, banking and currency, postal service and the like. The federal government also had jurisdiction to create laws regarding Aboriginal peoples and protection of some minority and religious rights. Powers of taxation were given to the federal government as well. Section 91 of the British North America (BNA) Constitutional Act of 1867 gave the federal government in Ottawa the power to maintain laws for peace and order throughout the nation and “declaratory power” which would allow the central government to bring provinces under federal



control (Abelson, James, and Lusztig 2002; Bickerton and Gagnon 2000). Between 1867 and 1931 Canada entered into a nation-building phase and with those changes, the BNA changed fifteen times to clarify the lines of inter-jurisdictional disputes. In 1982, Canada passed the Canadian Constitution Act and enshrined in this new constitution were the following important provisions that frame the context of this analysis. First, the ability of the supreme court to nullify legislation, not only in areas of division-of-powers disputes but also by civil rights listed within the Charter of Rights and Freedoms. Second, the ability of the courts to apply “remedies the court sees as appropriate and just,” establishing the power of judicial review throughout the nation (Manfredi 1994).

In present-day Canada, the federal government and the provincial governments have specific and enumerated powers (sections 91 and 92 of the Constitution, respectively). Additionally, provincial governments are given exclusive powers regarding education (section 93). The federal and provincial governments have concurrent powers in matters of agriculture and immigration, and the provincial government has limited (and controversial) powers of taxation (Smiley 1974; Simeon 2000).

In Australia, another British territory with a strong parliamentary system, a move towards independence began earlier in 1890. Like Canada, Australia integrates executive and legislative power, whereby the prime minister is chosen from the legislature after the national election, the judicial branch is independent. The Commonwealth government of Australia, like the United States, enumerates federal powers but does not detail the specific powers given to constituent sub-national units. Unlike the United States and Canada, Australia does not have a Charter of Rights and Freedoms, nor a Bill of Rights within their constitution, thus setting up issues related to conflicts over Aboriginal rights, property right disputes, as well as clashes over natural resource protections (Ghosh 2012). Australia has a judicial tradition of siding with the Commonwealth in the event of conflicts in laws created by states or the self-governing territories. Consistently, the judicial branch has invalidated State and or territorial laws that conflict with Commonwealth law (see Baier 2006 for an extensive discussion). As such, the judicial branch has tended to favor unification and federal supremacy as opposed to protecting states’ rights. The High Court does, however, use the constitutional review to resolve differences between central and component courts (Saunders and Foster 2014).



The United States is commonly referred to as the first modern federation. At its founding, the framers of the constitution codified within the document the concept of enumerated powers. Thus, the American national government, unlike its state subunits, is one of specifically granted and limited powers. Unlike, Australia and Canada, the United States has separate executive and legislative branches of national government; the judiciary is independent as well. Further, the United States never had a judicial system that was subordinate regarding decision-making to another country. The practice of judicial review (i.e., giving courts the responsibility and power to interpret the constitutionality of sub-national laws) also originated in the United States with the *Marbury vs. Madison* decision in 1803. The use of judicial review, however, varies dependent on the clarity of enumeration of the powers and responsibilities given to federal government and sub-units as well as legal traditions within the country (Epp 2005; Shapiro 2002). Thus, we can expect that in Australia and the United States, that the lack of enumeration to sub-national units will drive higher rates of conflict, particularly in areas where state and national responsibilities are not clearly defined. Further, based on our understanding of PCT we could also expect that the judicial branch may favor federal supremacy for two reasons: to promote federal unification as we have seen historically in Australia, or because the national level of government is traditionally more resourced and experienced in trying cases against other litigants.

4. Data and measures

The data is drawn from the High Courts Judicial Database, which includes decisions by the United States Supreme Court 1953-2005, the Supreme Court of Canada 1969-2003 and the High Court of Australia 1969-2003 (Haynie et al 2007). Cases involving each type of government (national, subnational^{II} or local^{III}) were identified and, consistent with previous party capability theory studies, all “boards and agencies established by and operating under the authority of the respective levels of government, as well as ministers and agency heads acting in their official capacity”, were included in each government category (McCormick 1993: 527; Songer and Sheehan 1992). Additionally, since we are interested in “who won the appeal in its most immediate sense, without attempting to view the appeal in some larger context” (Wheeler et al 1987: 415); cases where the winner was ambiguous (e.g.



decisions that affirm in part and reverse in part) were excluded from this descriptive analysis.

Previous studies of party capability theory have relied on a key measure of the relative advantage of parties referred to as “net advantage.” The net advantage measure was first introduced by Wheeler et al (1987: 418) and is calculated as follows:

$$\text{Net Advantage} = \text{Success Rate as Appellant} - (100 - \text{Success Rate as Respondent})$$

The formula has a theoretical range of -100 to +100 where negative values indicate net disadvantage and positive values indicate net advantage and can be read as percentages. It is commonplace to observe appellate courts, with docket control, as more likely to overturn a lower court by siding with the appellant than upholding a lower court decision by siding with the respondent; appellants tend to prevail at a higher rate than respondents. Importantly, the measure of net advantage takes into account the differences between success rates as an appellant as opposed to a respondent and therefore provides a better indication of a given party’s advantage in litigation. Table 1 includes the number of cases, the success rate as appellant, respondent, overall (appellant and respondent) and the overall measure of net advantage by country and type of government.

**Table 1. Number of Cases, Success Rates and Net Advantage**

<i>Country</i>	<i>Level of Government</i>	<i>Number of Cases</i>	<i>Success Rate as Appellant</i>	<i>Success Rate as Respondent</i>	<i>Success Rate as Appellant and Respondent</i>	<i>Net Advantage</i>
United States						
	National	3006	75.16	58.32	65.10	33.48
	Subnational	3083	61.14	50.41	53.60	11.55
	Local	404	57.60	43.09	48.40	0.69
Canada						
	National	647	56.41	66.59	63.00	23.00
	Subnational	1363	57.56	65.72	63.10	23.23
	Local	246	46.74	57.14	50.90	3.88
Australia						
	National	712	54.23	51.05	51.50	5.28
	Subnational	335	51.88	47.53	48.50	-0.59
	Local	73	34.29	36.84	30.90	-28.87

It is instructive to note the difference in the number of cases that each level of government has been involved. In both the United States (3083 cases) and Canada (1363 cases), subnational governments have been the leading level of government involved in litigation before their respective high courts, whereas the national government (712 cases) leads in Australia. The fact that subnational governments in the United States and Canada appear more often than their counterparts appears to suggest that the high courts have indeed become a venue to address the proper limits of subnational power. The level of government least likely to be engaged in litigation before their nation's high court, numerically, is a local government unit in all three of our case countries. This suggests that high courts are primarily concerned with the national-subnational division of powers.

Additionally, Table 1 reports the relative success rates of each level of government as appellant, respondent and both. What is particularly striking when observing the success rate as both appellant and respondent is that six out of nine levels of government have a greater than 50% success rate overall. Only local governments in the United States and



Australia and subnational government in Australia are below the 50% success rate threshold; it would appear that governments do, in general, enjoy a distinct litigation advantage.

The net advantage values are even more illustrative of how levels of government fare in litigation across each of these three countries. Seven of the nine levels of government enjoy a net advantage against all other parties in litigation before their country's respective highest court. For example, the national government of Canada holds a 23% net advantage against other parties, as either an appellant or respondent, when it stands before the Supreme Court of Canada. The subnational governments of Canada hold a 23.23% net advantage, and the local governments of Canada hold a 3.88% net advantage. Again, net advantage indicates the differences between parties in successful litigation before a high court. These descriptive results suggest that governments of all levels in the United States and Canada hold a litigation advantage against all other parties. Interestingly, it appears that the subnational and local governments of Australia are operating under a litigation disadvantage against all other parties before the High Court of Australia.

Party capability theory suggests that there is a rank ordering between types of government based on the respective ability of each level of government to access resources that are critical for successful litigation. The implication is that the net advantage will be highest for national governments, followed by subnational governments and then local governments. The net advantage column in Table 1 indicates that this rank ordering holds in the United States (33.48% > 11.55% > 0.69%) and Australia (5.28% > -0.59% > -28.87%), but not in Canada (23.00% < 23.28% > 3.88%). The descriptive analysis indicates that the subnational governments in Canada have a slightly higher net advantage than the national government.

The net advantage for each type of government in each country reflects their respective advantage against *all* other parties *not* specifically against other government parties. In that respect, Australia appears to be the anomaly compared to the United States and Canada. In the United States and Canada, each type of government wields a net advantage against other parties while subnational and local governments in Australia are net disadvantaged against other parties (though the national government in Australia is net advantaged). Kritzer's (2003) argument that government represents an advantaged litigant class is, on the whole, consistent with the measures of net advantage presented here.



To fully assess whether a particular type of government has an advantage in litigation, the net advantage of governments in head-to-head match-ups are evaluated.

5. Which governments come out ahead?

The descriptive results of comparisons of net advantage for each type of government against the others are reported in Table 2. The table provides net advantage scores, ranging from -100 to +100, where positive values indicate an advantage and negative values indicate a disadvantage, for each country and level of government. Each level of government's overall net advantage is provided for reference along with the specific match-ups with other levels of government. National governments are compared to subnational and local governments, subnational governments to national and local governments and local governments to national and subnational governments. These comparisons will indicate which levels of government have an advantage or disadvantage when engaged in litigation against another government party.

Table 2. Comparisons of Net Advantage

<i>Net Advantage</i>	<i>United States</i>	<i>Canada</i>	<i>Australia</i>
National Overall	33.48	23.00	5.28
National v Subnational	43.00	3.85	28.21
National v Local	-6.67	40.00	-33.33
Subnational Overall	11.55	23.28	-0.59
Subnational v National	-42.99	-3.85	-28.21
Subnational v Local	3.57	17.05	-50.00
Local Overall	0.69	3.88	-28.87
Local v National	6.67	-40.00	-66.67
Local v Subnational	-3.57	-17.04	50.00

To begin, the head-to-head comparisons of national governments in the United States, Canada, and Australia against subnational governments are evaluated (National v



Subnational^{IV}). As is expected according to party capability theory, national governments wield a net advantage against subnational governments in all three countries. The national governments in the United States (43.00%) and Australia (28.21%) are strongly advantaged in litigation against their subnational counterparts, while the Canadian national government (3.85%) is only slightly advantaged. Overall, national governments hold a decisive net advantage over subnational governments in each country and have therefore been more likely to win in head-to-head matchups before each country's highest court. These results are anticipated by party capability theory and have important implications for whether subnational governments face institutionalized disadvantages when they face a conflict with their national governments before a national high court. In other words, the decisions by high courts in the United States, Canada, and Australia have resulted in the national government holding a net advantage over subnational governments in direct conflict litigation between the two levels of government.

The dominance of national governments in these three nation's high courts does not necessarily extend to cases involving local governments (National v Local^V). The national governments of the United States (-6.67%) and Australia (-33.33%) are net disadvantaged against local governments. These results are inconsistent with the expectations of party capability theory as national governments have much greater access to resources that lead to litigation success compared to local governments. Interestingly, the opposite result is observed in Canada, where the national government has had a 40.00% net advantage in litigation against local governments. The contrast between decentralizing decisions in the United States and Australia compared to the centralization in Canada is striking.

The final set of comparisons of net advantage is between subnational and local governments (Subnational v Local^{VI}). Party capability theory suggests that more resourced parties, in this case, subnational governments compared to local governments should have a net advantage in litigation. Subnational governments in the United States (3.57%) and Canada (17.05%) have had a net advantage in litigation against local governments as expected. However, subnational governments (-50.00%) in Australia have been net disadvantaged against local governments, which is unexpected.

The overall descriptive results of the comparisons of net advantages by levels of government largely conform to expectations of party capability theory. National governments are advantaged over lower levels of government, subnational governments



are disadvantaged against national governments and advantaged over local governments, and local governments are mostly disadvantaged against the well-resourced governments above them.

To be sure, there are instances where the comparisons did not conform to expectations. First, national governments in the United States and Australia are at a net disadvantage against local governments. Second, subnational governments, in Australia, are disadvantaged against local governments. And third, in the United States, local governments are advantaged against the national government. These anomalies stand outside of expectations of party capability theory, but they are consistent with the courts acting as umpires of the boundaries of power in federal systems and not purely, in all instances, siding with the better resourced party.

6. Conclusion

This article has sought to investigate whether party capability theory can provide useful purchase in understanding the dynamics of federalism in the United States, Canada, and Australia. All three countries are examples of federal systems where the likelihood of conflict between levels of government is built into the institutional frameworks. In these systems, courts play the crucial role of serving as a venue for dispute resolution but also function as an independent arbiter or umpire of the boundaries of power. Scholars have acknowledged the concern that national courts may be biased for the national government when clashing with subnational or local governments over issues that implicate the limits on power in federal systems (Bzdera 1993; Dahl 1957; Wechsler 1954). Party capability theory suggests that parties with the most resources will have an advantage in litigation against parties with fewer resources (Galanter 1974). The question investigated here is whether litigant resources do offer an advantage to different levels of government. The descriptive findings presented here suggest that resources do in fact advantage parties in litigation.

Decisions from the High Courts Judicial Database (Haynie et al 2007) allowed for the comparison of the net advantage of each level of government against all parties as well as head-to-head match-ups between governments. The net advantage of all three levels of government in the United States and Canada conform to expectations, but contrary to



expectations subnational and local governments in Australia do not benefit from the expected resource advantage. In the head-to-head match-ups between governments, the subnational governments in Canada performed at a higher net advantage that would be expected theoretically. Also, local governments exhibited a higher net advantage against national governments in the United States and Australia, contrary to PCT. These deviations from expectations are, however, entirely consistent with the courts serving as “umpires of federalism.” If national governments seek to expand or extend their authority beyond the boundaries of federalism, then the courts should and apparently do decide against them despite their resource advantage.

Despite these notable exceptions, the most striking observation from the descriptive analyses is that national governments are net advantaged against subnational governments in all three countries. The most regular conflicts take place between national and subnational governments and the implications for the balance of power in these three federal systems is important to consider. In the United States (43.00%), Canada (3.85%) and Australia (28.21%), national governments are net advantaged against their subnational counterparts. These results indicate that in conflicts over the boundaries of federalism, over at least a three-decade period, national governments have won an enduring shift in the centralization of power against subnational governments at the expense of shared governance.

The descriptive findings presented and discussed here must be elaborated upon with future research. First, the net advantage scores for each level of government include all legal issue areas, but richer and more complex relationships among governments may emerge when disaggregated into specific issues. Second, a case-by-case analysis may be required to gain leverage over instances where resource advantages have not proven effective. Lastly, it is of crucial importance to understanding the general utility of party capability theory to continue to investigate its applicability in other countries and contexts, especially emerging and consolidating democracies.

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^I Elazar (1993) stresses the existence of a supportive federal political culture characterized by constitutionalism, tolerance and the recognition of distinctive regional groups.

^{II} Subnational governments include state, regional, provincial or territorial governments.

^{III} Local governments include city or other local governments.

^{IV} In Table 2, note that “National v Subnational” and “Subnational v National” is equivalent; any differences are due to rounding errors.

^V Again, in Table 2, note that “National v Local” and “Local v National” is equivalent; any differences are due to rounding errors.

^{VI} Once again, in Table 2, note that “Subnational v Local” and “Local v Subnational” is equivalent; any differences are due to rounding errors.

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