An Institutional Explanation of the Formation of Intergovernmental Agreements in Federal Systems

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Abstract

Intergovernmental agreements are a common and useful instrument in federal systems, serving a variety of purposes from establishing new social programs, regulating agricultural practices, and even changing a country's constitution. Despite their importance, there have only been limited attempts to understand agreements in a comparative context or to provide a theoretical framework for their study. This dissertation addresses both of these deficiencies by comparing the use of agreements in seven federations and considering why certain federations form more agreements than others.

In order to understand these differences in intergovernmental agreement formation, this thesis proposes an institutionalist approach with two components. First, agreements are defined as intergovernmental institutions, and thus, their creation is characterized as a process of institutional formation. Second, seven institutional variables are proposed as factors which are expected to affect the likelihood that a federation will form agreements. These are: the constitutional division of powers (including centralization and overlap), the existence of intrastate federalism, the size and status of the federal spending power, the size of the welfare state, the number of constituent units and the presence of lasting forums for intergovernmental relations. To test these hypotheses, data were gathered from seven federal systems, including two nascent ones: Australia, Canada, Germany, South Africa, Switzerland, the United Kingdom and the United States. Each federation and its record of intergovernmental agreement formation is examined qualitatively in light of each of the seven variables. The results of the

individual country studies are then compared to determine whether the institutional approach provides a consistent explanation of agreement formation.

This analysis finds that the formation of intergovernmental agreements seems to be greatly influenced by the institutional environment. While each hypothesis was not confirmed in every case, in unison they provide a comprehensive explanation for the record of agreement formation in six of the seven federations. The institutional approach provided only a partial explanation in the German case, however, indicating that there are some shortcomings to this theory. Despite these limitations, this thesis represents an effective comparative approach to the study of agreements and a successful application of institutional theory in comparative politics.

Keywords: Federalism; intergovernmental relations; comparative politics; institutionalism; intergovernmental agreements; Australia; Canada; Germany; South Africa; Switzerland; United Kingdom; United States.

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Of course, any errors made in this dissertation are the author's alone and not the responsibility of any of the individuals listed here.

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Chapter One: Introduction

In 1964, William Riker began his seminal work *Federalism: Origin, Operation, Significance* with the declaration "This is an Age of Federalism".[1] He justified this grand statement by observing that the 20th century had seen the emergence of multiple federations (from only six to a total of eighteen) and that half of earth's landmass was governed by countries claiming to be federal in character. Almost half a century later, Riker's observation may have even greater veracity. In 2011, there are twenty-five federations that cover 45% of Earth's landmass, contain 40% of all citizens and account for nearly half of global Gross Domestic Product.[2] Moreover, these totals do not include nascent federations such as the United Kingdom or decentralized unions like Italy; nor do they take account of modern confederal arrangements, such as the European Union, which have been greatly influenced by the theory of federalism. As federalism remains a proven method of balancing the competing forces of unity and diversity, it will continue to remain important both to governments and to the study of politics.

Given the prevalence of federations, it is more important than ever for political scientists to understand the structures and functions of these political systems. Many aspects of federal systems have already been studied extensively, both in individual federations and in comparative analyses, including the design of constitutions and representative institutions, the balance of power between national governments and constituent units, the systems of fiscal transfers, and the processes of intergovernmental relations. Despite the significant existing scholarship concerning federalism, many

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[1] William Riker, *Federalism: Origin, Operation, Significance*, (Boston: Little, Brown, 1964), 1.
[2] All figures from the CIA World Factbook. The number of federations was taken from Ronald Watts' *Comparing Federal Systems,* 3rd ed., (Montreal: McGill-Queen's University Press, 2008), 12-18.

aspects need further study, notably the ways in which governments within a federation act collectively. In particular, the topic of intergovernmental agreements, their creation and their role in federal systems is one area that deserves serious consideration and further study.

The term "intergovernmental agreement" encompasses a large category of intergovernmental arrangements, all of which are useful means of achieving coordination within federal systems. Intergovernmental agreements are known by a variety of names, including accords, concordats, frameworks, compacts, memoranda of understanding and interstate treaties. They may be formal or informal: from a well-publicized, written and legally-enforceable document to an ad hoc arrangement between officials. Agreements may also serve a variety of purposes, from grand bargains that change a federation's constitution to simple accords through which governments recognize each others' drivers' licenses. By considering a few examples of intergovernmental agreements, their importance and versatility to policy-makers and the public will be made clear.

In the more than two dozen federal and confederal systems, there are hundreds of intergovernmental agreements pertaining to virtually all aspects of government activities. In many federations, the introduction of new government programs requires collaboration between national and subnational authorities. The introduction of public hospital insurance in Canada required an agreement between the federal government and the provinces.[3] In the United States, forty-six states have signed the Compact for Education, in order to provide for a common educational policy forum.[4] For Australians, even counter-terrorism policy is subject to a formal accord, the Intergovernmental Agreement

[3] Canada, *Hospital Insurance and Diagnostic Act Agreement*, 1958.
[4] United States, *Compact for Education*, 1965-1980.

on Terrorism and Multijurisdictional Crime, which clarifies responsibilities and coordinates the joint action of governments to deal with national security threats.

Another common type of agreement concerns the management of shared resources. In the United States, dozens of agreements have been created to control the management of interstate water supplies. Agreements have been used to create independent commissions to oversee the use of major rivers such as the Arkansas, the Colorado, and the Rio Grande.[5] India also uses agreements to manage shared water resources as it is home to dozens of interstate accords governing agricultural management and common water usage.[6] Sometimes, agreements are even formed to manage resources that governments are not normally known to possess, as was the case in a 1955 Swiss concordat concerning the "prospecting and exploitation of oil".

Occasionally, intergovernmental agreements are used to initiate major constitutional or political change in a country. Nowhere is this more apparent than in the United Kingdom. Although not formally a federation, the United Kingdom's continuing process of devolution has increasingly endowed the country with federal features, such as fully functional subnational governments, a division of powers and a system of fiscal transfers. In addition to being passed into national law, the entire framework of devolution was also ratified by an intergovernmental agreement between the national government and the new administrations in Northern Ireland, Scotland and Wales.[7] Thus, the UK provides an example of an intergovernmental agreement serving, at least in part, as the framework for the entire nascent federal system.

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[5] See: the *Arkansas River Basin Compact*, 1971-73, the *Colorado River Compact* 1922-44 and the *Rio Grande Compact*, 1939, all in the United States.
[6] A recent of example of this is the 1994 Agreement to create the Upper Yamuna River Board in India.
[7] United Kingdom, *Memorandum of Understanding - Devolution*, 1999.

While there are not many examples of countries using agreements to establish entire federal systems, other federations have also relied upon agreements to serve as the foundation for major constitutional developments or institutional changes. In 1999, the Commonwealth and state governments in Australia agreed to a significant reform of Australia's system of taxation and fiscal transfers.[8] This agreement restructured the system of equalization, made more tax revenue available to the states and established a new council to monitor fiscal relations. Ten years later, the governments of Australia came together to create another major fiscal agreement, though this time the focus was on reforming government spending on major programs such as education, health care and welfare.[9] Agreements can also create new institutions to allow for collaboration between governments. A good example of this occurred in Switzerland, where all twenty-six cantons participated in a 1993 agreement to form the Conference of Cantonal Governments. This body is now the peak institution for Swiss intergovernmental relations and an important forum for Swiss governments. Of course, even when governments can agree on significant alterations to a federation's constitution and political institutions, actual changes may not be forthcoming. Canada's attempts at "mega-constitutional" reform in the 1980s and early 1990s failed when intergovernmental agreements between the Prime Minister and the Premiers failed to win the approval of enough legislators or citizens.[10] Despite lack of success, this reaffirms the important role played by agreements in constitutional reform.

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[8] Australia, *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, 1999.
[9] Australia, *Intergovernmental Agreement on Federal Financial Relations*, 2009.
[10] These two Canadian agreements were the *Meech Lake Accord* of 1987 and the *Charlottetown Accord* of 1992.

While all of these are good examples of agreements serving as measures to coordinate the policies of governments within federations, many of these might seem distant and abstract to the average citizen. Yet intergovernmental agreements are not solely concerned with changing constitutions, managing rivers or establishing elaborate fiscal transfer systems; many agreements are formed to address specific matters, a number of which are immediately relevant to citizens. Nowhere is this more apparent than in the field of education, a policy area which tends to be fertile ground for intergovernmental agreements. German governments have used agreements to determine the number and distribution of university places which will be opened to prospective students.[11] American states attempted to tackle teacher shortages (and surpluses) by signing the NASDTEC interstate agreement, which allows for the recognition of educational qualifications from other states.[12] Australia, Canada and Switzerland have all, at one point or another, used intergovernmental agreements to fund post-secondary education and grant scholarships to students.[13] Education is not the only field in which agreements can have a noticeable impact on the public. Turning on the television in Germany might expose one to the effects of an agreement as broadcasting rights and fees are governed by a series of accords formed by the länder. In Switzerland, the sale of salt is regulated by an intergovernmental agreement.[14]

Given the important roles that intergovernmental agreements play in federations, it is surprising that there have been few efforts to study them and their formation. Generally, intergovernmental agreements receive only passing consideration within wider

[11] Germany, *Agreement regarding the distribution of university places*, 1972.
[12] United States, *National Association of State Directors of Teacher Education and Certification*, 2000.
[13] For example, see: Australia, *Commonwealth-State Policy on Financial Assistance to Group Apprenticeship Schemes*, 1979, Canada, *Adult Occupational Training Act Agreement*, 1967, and Switzerland, *Intercantonal University Agreement*, 1997.
[14] Switzerland, *Intercantonal agreement on the sale of salt*, 1973.

investigations of federalism and intergovernmental relations. When they are the focus of scholarly inquiry, the context is usually a specific federation or policy area, with limited theoretical analysis as to what agreements are and how and why they are created.

With such a noticeable gap in the literature on federalism and intergovernmental relations there is a need for a comparative and theoretical study to provide new insight into intergovernmental agreements. This investigation attempts to fill both voids: it compares the use of agreements in seven federations and uses this to test a set of hypotheses concerning the factors that are most likely to affect agreement formation. Specifically, the goal will be to understand those accords which bring about change to the entire federation: the creation of national intergovernmental agreements.[15] As there is no definitive theoretical treatment for the study of intergovernmental agreements available, this project draws upon existing institutional theory to construct a new framework for the study of these accords. Specifically, two elements of institutional theory will be used in this examination of agreements. First, agreements will be defined as a specific type of intergovernmental institution. While this is consistent with the existing literature, the lack of a definitive theoretical understanding of agreements makes this a necessary first step. Second, and more contentiously, this study will propose a set of institutional factors that best explain why some federations seem to form more agreements than others. By studying intergovernmental agreements through an institutionalist perspective, these institutions can finally be understood in a comparative context.

In addition to the literature review, Chapter Two will propose a core set of hypotheses. There are several reasons why governments might seek to form particular

[15] A national intergovernmental agreement is an agreement that is adopted by all (or nearly all) of a federation's subnational governments. This is explored further and defined more explicitly in both Chapters Two and Three.

agreements, and these can be understood in light of rational choice theory. But the questions driving this dissertation concern the overall propensity of agreement formation in federations. This is a systemic feature. Thus, Chapter Two lays out the hypotheses that are the focus of this analysis. Seven institutional features are proposed as having an effect on the likelihood of intergovernmental agreements being formed in any federation. These institutional variables are:

1. The degree of constitutional overlap that exists.
2. The degree of centralization in the constitutional division of powers.
3. The size and status of the federal spending power.
4. The size and scope of the welfare state.
5. The existence of lasting forums for intergovernmental relations.
6. The number of subnational governments at the state/provincial level.
7. The existence of intrastate federalism.

A more complete explanation of each of these variables is provided at the end of Chapter Two. Suffice it to say here that this study explores the working of these variables in seven very different federations.

Chapter Three describes the methodology used in this investigation. It provides an operational definition for intergovernmental agreements that is used throughout the rest of the study. The chapter also describes each of the seven institutional factors in greater detail and identifies the data sources used to compare these variables across the seven cases: Australia, Canada, Germany, South Africa, Switzerland, the United Kingdom and the United States of America. The bulk of this chapter is devoted to an explanation of how the data were acquired for the seven federations included within this

comparative analysis as well as a description of other potential cases and why they were not included.

The individual country analyses begin in Chapter Four with Australia. An archetypal modern, industrial federation, Australia provides a good beginning for examining the seven institutional hypotheses. Australia's notable institutional features include a system of overlapping jurisdictions, frequent use of the federal spending power and an extensive network of bodies and forums devoted to the conduct of intergovernmental relations. These features provide a fertile environment for intergovernmental agreements and help to explain why Australia ranks third in this study in the number of accords that it has created.

Chapter Five continues the analysis with a discussion of Canada. An older federation, Canada developed a federal system to balance the cultural and linguistic cleavages of the English and French citizens who had settled there. Federalism was also a response to the competing regional identities that had grown, in part, from Canada's vast and diverse geographical setting. Canada is an interesting case as it is one of the more decentralized federations, particularly when compared to the other countries included in this study. Canada's system of intergovernmental relations also features a small, but highly active spending power and, as with Australia, a large and well-developed system of intergovernmental forums and institutions. Canada is one of the most prolific federations in the creation of intergovernmental agreements, ranking second in this study.

Chapter Six introduces the first European federation in this comparison, the Federal Republic of Germany. Germany has a long history with various forms of federalism and multilevel government, going back to the Holy Roman Empire of the Middle Ages. More recently, the Federal Republic has become the model for integrated,

cooperative federalism, with both the federal government and the länder sharing jurisdiction over most policy areas, including a large welfare state. Together, both orders of government must work together to create and implement policy. Some of this collaboration occurs through the federal upper chamber, the *Bundesrat*, which allows the subnational governments to participate directly in the federal legislature. With the largest number of agreements, it seems that at least some of the necessary intergovernmental coordination is being fulfilled by these intergovernmental institutions.

The focus of Chapter Seven is South Africa, an interesting example of a new and developing federation. In addition to substantial ethnic and linguistic diversity, South Africa`s federal system must cope with the demands of a developing economy as well as the historical legacy of apartheid. South Africa is a good example of a very centralized federation in virtually all aspects, including the constitutional division of powers, the institutions of fiscal federalism and the role of the African National Congress, the dominant political party. South Africa is also unique in this comparison as it is the only case in which no intergovernmental agreements have been created.

Chapter Eight returns to a more established federation by examining Switzerland. Though Switzerland is the smallest federation, both by land area and population, it is one of the most diverse, with multiple cultural, linguistic, religious and regional cleavages. Switzerland`s twenty-six cantons often organize along these cleavages within intergovernmental institutions and relations. In addition, Switzerland is an interesting case for an institutional analysis as it possesses a system of administrative federalism that centralizes legislative power in the federal government while still empowering the cantons with substantial authority and flexibility to design and implement government

programs. Switzerland ranks fifth in terms of the number of intergovernmental agreements in this study.

Chapter Nine introduces the nascent federation of the United Kingdom. While not technically a federation, the UK`s system of devolution has many of the same features as a federal system, including enumerated powers for subnational governments, separate subnational legislatures, financial arrangements and intergovernmental relations. Most importantly for this investigation, the UK also possesses a formal system for intergovernmental agreements allowing for an examination of these accords within a new federal system. As a country in transition from a unitary state to the beginnings of a federation, the UK is still quite centralized, particularly in the system of fiscal transfers between London and the devolved administrations. The early returns of agreement formation in the first decade after devolution place the UK in fourth place in this analysis.

Chapter Ten concludes the individual country analyses by examining the oldest federation, the United States of America. The US began as the model for classical federalism, possessing powerful subnational governments with clearly defined that jurisdictions allowed for minimal overlap. While this may have been the original theory for the American federation, the practice of federalism over more than two centuries has led to increased overlap and centralization. The large number of states make national intergovernmental relations very difficult - simply gathering senior representatives from all fifty states can be problematic. Together, these factors have made it difficult for the states to form national agreements in America, as the federation places sixth out of the seven cases.

The final substantive section, Chapter Eleven, provides a comparative analysis based on the results of the individual country chapters. This comparison has four primary

components. First, this chapter examines each of the seven variables that were hypothesized to have an effect on intergovernmental agreement formation. These hypotheses are evaluated individually against the findings in seven case studies to determine whether certain ones are more consistent with the data than others. Second, the variables are combined into a single "formula" which is then reapplied to each of the federations in order to determine how effective these variables are when used in concert. This analysis will determine whether the institutional approach proposed by this study can successfully explain the differences in agreement formation among these seven federations. Third, the results of the previous analysis are then considered, with specific attention paid to any cases which are not fully explained by the institutional hypotheses. Finally, the chapter situates this study and its findings within the wider literature concerning federalism and institutional theory. This discussion is followed by Chapter Twelve, which concludes this study by summarizing the findings and suggesting directions for future research.

As a whole, this study of intergovernmental agreements attempts to fill a significant gap in the literature on federalism and intergovernmental relations. Existing research on federations has previously focused on topics such as understanding federal institutions, discussing the operation of federal systems and studying how and why change occurs. By examining intergovernmental agreements, this investigation sheds light on an understudied, yet important element of the institutional environment in federal systems. Through the consideration of variables which may affect the formation of agreements, this study also adds to our understanding of how federations function and why these operations differ between countries. Additionally, this research provides an institutional explanation for change in federal systems.

More specifically, this study provides a theoretical framework for the study of agreements which is not restricted to a single policy area or national context. This investigation also provides data on agreements in seven federations, as well as an analysis of their institutional features. Finally, this analysis offers an explanation for why certain federations form more intergovernmental agreements than others, providing a foundation for future comparative research on this topic.

Chapter Two: Theory and Literature Review

The goal of this investigation is to examine the formation of intergovernmental agreements within federal systems. Specifically, it will compare the characteristics of seven federations in order to determine whether certain institutional features increase or decrease the likelihood that agreements will be created. This chapter will begin this analysis by setting out the theoretical paradigm through which these questions will be considered. First, the object of this study - intergovernmental agreements - will be defined. Second, an institutional perspective will be proposed as the most appropriate means of defining agreements in a theoretical sense. This will be supported by a review of the existing scholarship on intergovernmental agreements. Third, this chapter will argue that institutionalism is also the best way to understand the formation of agreements, compared to competing alternatives. Fourth, six reasons for why an agreement might be formed will be described. Fifth, this chapter will conclude by proposing seven institutional features of federations which are believed to have an effect on the likelihood of intergovernmental agreements being created. These will serve as the hypotheses that will be tested throughout the rest of this comparative study.

By their very nature, federations require coordination between different spheres of government in order to function effectively. Officials across all areas of government must work with their counterparts among national, subnational and local governments in order to design, fund and implement policy. This need for coordination can be met in a number of ways, but one of the most common means is through the formation of intergovernmental agreements. These agreements range from promises to exchange information and contact lists, to the establishment and funding of new government

programs, or even to changes of a country's constitution. Agreements also come in many forms, including negotiated outcomes of intergovernmental meetings, written compacts between ministers and large-scale, publically scrutinized accords. Despite their impact and variety however, intergovernmental agreements remain an understudied phenomenon, particularly in a comparative context. The existing research tends to pertain to a specific domestic context[16] or as a secondary consideration within the wider scope of intergovernmental relations and federalism.[17] In order to advance the study of comparative federalism as a whole, this topic needs theoretical consideration. This chapter will explore these theoretical foundations by proposing that intergovernmental agreements should be viewed as a form of institutionalization. It will examine the explanatory power of the institutionalist perspective by canvassing the existing literature on intergovernmental agreements, and will then use this institutional approach to suggest six motives for the formation of agreements. It will conclude by discussing the seven factors that affect a federation's likelihood of creating these institutions, which is the focus of this investigation.

Definition and Scope

When studying intergovernmental agreements in a comparative context, it is clear that there are a number of differences that exist between countries, including the number, format, legality and even the appellation of agreements.[18] In order to bridge these

[16] Some examples of this include the works of Saunders (1995), Poirier (2004), Ridgeway (1971) and Zimmerman (2002). These will be described in greater detail later in this chapter.
[17] Some works on intergovernmental relations that also consider agreements include Painter (1996), Bolleyer (2009), Linder (1994) and Elazar (1965).
[18] Intergovernmental agreements have been given a variety of labels and names; sometimes, multiple terms exist for these within the same federation yet there may be no significant substantive or legal difference between the documents. The terms used for an agreement in English include, but are not limited to: accord,

differences and give focus to this investigation, a common definition is required. For this comparative investigation, intergovernmental agreements are defined as formal, written accords between the recognized agents of two or more governments within a single federal state. More specifically, the agreements that will be the focus of this research will be national agreements - those which involve virtually all of a federation's subnational governments of the provincial/state order.

There are two elements of this definition that require further clarification: the dual restrictions that agreements must be formal and national in order to be included in this study. In both cases, there is a theoretical and methodological justification for setting these parameters (and the methodological issues will be more fully explored in the following chapter). Formal agreements are the focus of this investigation because informal, unwritten agreements between officials or politicians must be excluded for three reasons. First, if minor, ad hoc and unwritten agreements are included, there is little to distinguish an intergovernmental agreement from the processes of intergovernmental relations as a whole. A decision between officials to keep each other informed of new agricultural regulations could count as either an informal agreement or as an element of intergovernmental relationships. While these activities are certainly important and worthy of study, intergovernmental relations are already the subject of much scholarly inquiry. Second, this definition treats agreements as specific institutions in order to consider the process of agreement formation as an example of the creation of an institution. This approach allows for the application of institutional theory, so that a comparative and theoretical conception can be constructed. Finally, acquiring sufficient

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concordat, common framework or scheme, compact, joint program or task, memorandum of understanding and treaty. Country-specific terms will be discussed in later chapters.

data on informal agreements would be difficult enough for a single federation and virtually impossible for seven.

The reason for focusing on only national agreements is similarly two-fold. National agreements are particularly interesting because they act as changes, even in small ways, to the scope and function of a federal system. These agreements may be horizontal - solely between subnational governments (i.e. state-state accords) - or vertical - between different orders of government (i.e. federal-state arrangements) - but in either case, they affect the politics and policies of the entire federation. From minor highway policies to constitutional amendments, national agreements mark alterations and adjustments to federal countries and provide insights into how federations develop over time. As a methodological issue, acquiring a complete set of all bilateral and multilateral agreements would be exceptionally difficult. Although these agreements remain interesting elements within intergovernmental relations, the data available for them does not approach the level of completeness required for this comparative analysis.

While the current literature does not make such explicit distinctions, it is important to keep this definition in mind when reviewing the existing contributions. The focus on formal, national agreements will be of particular importance when considering the variables that are hypothesized to affect a federation's likelihood of forming such accords.

Institutional Approaches:

Because intergovernmental agreements are an understudied (yet important) element of federalism, they have been given only limited theoretical attention in existing scholarship. This is especially true in the comparative context as there is no essential or

seminal work on agreements which can provide an established theoretical framework to serve as a foundation for this investigation. This is not to suggest that the literature is devoid of theoretical considerations or that it cannot provide insight into the best ways to approach the study of agreements, only that a comprehensive theory of intergovernmental agreements is not available. Specifically, there are three elements of intergovernmental agreements that merit deliberate theoretical exploration. First, what are agreements in a generalized and theoretical sense? As previously mentioned, this comparative investigation will argue that agreements are intergovernmental institutions, an uncontroversial contention based on the existing literature. This question will be the focus of the discussion in the current section. Second, why do governments seek to form agreements? While there is less explanation for this in the existing literature on agreements, rational choice theory will provide a foundation for understanding agreements in a "micro" context. Third, what factors affect the likelihood that agreements will be created? This question gets the least consideration in existing studies of intergovernmental agreements (either directly or indirectly) and thus the literature offers the fewest "guideposts" for the development of hypotheses. Institutionalism will serve as the theoretical basis for the hypotheses that seek to explain why certain federations form more agreements than others. Given the lack of current literature, the institutionalist paradigm provides a useful beginning because of its common usage in the study of comparative politics and federalism. This "macro" level of analysis is the primary focus of this dissertation.

Since the focus of this investigation will be on the first and third of these questions, some description of institutional theory is required in order to construct a theoretical approach to intergovernmental agreements. Before delving into the existing

literature on intergovernmental agreements, it is necessary to define this institutional approach that will be applied in this study.. As one of the principal approaches to the study of political science, the study of institutions is well-developed. Although it is not possible to sample even a small portion of the existing institutional literature, certain select sources can be drawn upon to provide a definition for institutions that can be integrated with the study of agreements.

As a general introduction, the *Blackwell Dictionary of Political Science* defines institutions as "a public body with formally designated structures and functions, intended to regulate certain defined activities which apply to the whole population".[19] While this is far from an operational definition, it does preview many of the key concepts of institutionalism: some form of structure, constraints for participants and the existence of the institution as a public or recognizable body. A more complete definition can be found in Douglass North's famous, cross-disciplinary approach to institutionalism, *Structure and Change in Economic History*. He defines institutions as "a set of rules, compliance procedures and moral and ethical behavioural norms designed to constrain behaviour of individuals in the interests of maximizing wealth or utility of principals".[20] This definition provides a more complete and specific understanding of institutions, combining less formal and explicit norms-based arrangements as well as the effects of rules and laws. Such an approach is appropriate for a comparative study of intergovernmental agreements given the differences in institutionalization between countries.[21] North's work is also useful as it explicitly clarifies that institutions are sites for interaction and do

[19] Frank W. Bealey, *The Blackwell Dictionary of Political Science*, (Oxford: Blackwell Publishers Ltd., 1999), 166.
[20] Douglass Cecil North, *Institutions, Institutional Change, and Economic Performance: Political Economy of Institutions and Decisions* (Cambridge; New York: Cambridge University Press, 1990), 201-202
[21] Nicole Bolleyer, *Intergovernmental Cooperation: Rational Choices in Federal Systems and Beyond* (Oxford: Oxford University Press, 2009), 18-20.

not necessarily produce cooperative outcomes, an important consideration for intergovernmental relations, where conflict is always a possibility.

While these provide reasonable definitions for the focus of this study - agreements as institutions - more details are needed to create an operational definition that can be used for this research. A more comprehensive account is provided by B. Guy Peters, from his 1999 work *Institutional Theory in Political Science.* In particular, he identifies four attributes that distinguish institutional research from other approaches:

1. The study of institutions must involve some form of structure which must transcend individual actors; it cannot simply be broken down into its individual components while retaining its same qualities.
2. An institution must be enduring over time; the structure must outlast the individuals who comprise it. Otherwise, it can be classified as a meeting or gathering, but not an institution.
3. Institutions must affect individual behaviour, or more specifically, they must constrain behaviour. The degree to which an institution accomplishes this is a measure of its potency.
4. Finally, there must be some sense of shared meaning or norms for a structure to be classified as an institution. Without a level of common understanding, an institution cannot function effectively as its qualities may be misunderstood.[22]

These attributes that Peters observes among all institutional approaches to the study of politics create parameters for crafting a theory of institutions within the field of

[22] B. Guy Peters, *Institutional Theory in Political Science: The New Institutionalism*, (London; New York: Pinter, 1999), 18-19.

federalism and intergovernmental relations. Within this context, these four stipulations can be applied to focus on governments as the individual actors.

This brief sampling of definitions of institutions and institutional approaches to political science is not meant to be exhaustive, or even a true literature review. Rather, it is meant to provide a basic understanding of what the study of institutions includes so that this approach can be applied to the existing study of federalism and specifically of intergovernmental agreements.

Intergovernmental Agreements and Institutional Theory

This effort to construct an institutional basis for the comparative study of intergovernmental agreements can be broken down into three components: how do intergovernmental agreements fit within institutional theory, why do governments seek to create these institutions, and what factors might help or hinder their formation? Unfortunately, current scholarship on intergovernmental agreements – somewhat limited to begin with – is seldom so theoretically deliberate. Much of the focus is on particular national contexts, or restricted to a particular policy area. More commonly, scholarly works briefly examine agreements as but one part of the vast area of study that is federalism and intergovernmental relations. Despite this, the existing literature does provide insights into these three areas, and particularly into how agreements can be considered intergovernmental institutions.

The study of comparative federalism certainly supports an institutional approach to the study of agreements. Much of the literature compares the institutional features of federations, such as constitutions, government types (specifically responsible government

versus separation of powers models), upper chambers and finances.[23] The study of intergovernmental agreements extends from this tradition, as their creation is often influenced by the state of these institutional configurations. Agreements may amend federal constitutions, or help to determine authority in areas in which there is no clear direction. They also assist in the functioning of fiscal federalism, by coordinating spending and programs across different governments, and they clarify responsibilities when new policies and programs are enacted.. As such, intergovernmental agreements remain a logical, but unexplored, area in the existing institutional studies of comparative federalism.

As described earlier, Peters' four criteria of institutions can provide a broad guideline for examining literature specific to intergovernmental agreements. His first two criteria – that institutions must transcend individual actors and must endure over time – have been addressed in the literature on agreements, if often indirectly. Daniel Elazar, for example, has characterized intergovernmental agreements within the wider scope of mechanisms of intergovernmental relations by dividing them into two categories. Informal mechanisms, including meetings and the exchange of personnel or expertise and services, are more common, but are not enforceable or permanent. Formal mechanisms, which include intergovernmental agreements, are more infrequent, but are also lasting, even permanent, and add to the existing structure of the federal system.[24] In this, Elazar

[23] It would be impossible to entirely list all the works of comparative federalism that include institutional elements in their analyses, but any list would surely include the seminal works of K.C. Wheare (1963) and William Riker (1964), as well as the recent works by Ronald Watts (1999, 2008). More recent texts include Bolleyer (2009) and the "Forum of Federations" series, including Kincaid and Tarr (2005), Majeed, Watts and Brown (2006) and Shah (2008) which are contemporary examples of broad comparative reviews of the institutional elements of federations.

[24] Daniel J. Elazar, "The Shaping of Intergovernmental Relations in the Twentieth Century," *Annals of the American Academy of Political and Social Science* 359, Intergovernmental Relations in the United States (May, 1965): 10-22.

sees agreements as extending the initial compact of the federal system and the devices that affect the functioning of governments.

The concept that institutions must transcend individual actors can also be found in a number of agreements that form agencies to monitor and administer their provisions.[25] This is a common practice in the United States, where the Constitution (under Article I, Section 10) empowers state governments to enter into treaties with each other; these are often regulated by commissions so that their administration is beyond the particular interests of the participating governments. While this is most often used in the United States, the formation of new bodies to implement the provisions of an agreement is not uncommon in Australia, Canada and Switzerland as well.[26] Although such institutions represent only a portion of intergovernmental agreements, it does indicate that agreements can possess a high degree of formality and institutionalization. More broadly, they create obligations that need to be fulfilled by whatever governments and officials are in place.

The issue of an agreement's legality and enforceability is one common theme throughout the literature, and one that has a bearing on issues of structure and longevity. In the Swiss context, concordats are legally binding treaties between governments, with the same force as any law.[27] Similarly, intergovernmental agreements in Spain are also entered into law, as are many German accords.[28] In the United States, interstate compacts

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[25] Joseph F Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements*, (Westport, CN: Praeger Publishers, 2002).

[26] The Council of Australian Governments lists a number of Australian examples on their website (http://www.coag.gov.au/intergov_agreements/index.cfm), and Linder and Vatter briefly discuss the Swiss context. Wolf Linder and Adrian Vatter, "Institutions and Outcomes of Swiss Federalism: The Role of the Cantons in Swiss Politics," in *The Swiss Labyrinth: Institutions, Outcomes and Redesign,* ed. Jan-Erik Lane, (London: Frank Cass, 2001), 95-122.

[27] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105.

[28] See: Cheryl Saunders, "Constitutional Arrangements of Federal Systems," *Publius* 25, no. 2 (Spring, 1995): 72 and Christoph Vedder, *Intraföederale Staatsverträge: Instrumente der Rechsetzung im Bundesstaat,* (Hannover: Deutches Institut für Föederalismusforschung, 1996)..

must be passed by both state legislatures and the national Congress, thereby becoming national and state law.[29] In all of these cases, the legally binding nature of many intergovernmental agreements provides structure that transcends individuals and persists over time as a statute would.

Given the differences between federations, however, the legality of agreements alone is not an effective standard for institutionalization. Examining the development of the economic union in Australia and Canada, Douglas Brown briefly addresses intergovernmental agreements and their enforcement, observing that while agreements are often constructed in legislative form, they are not meant to be justiciable - at least in the Australian and Canadian contexts.[30] Even when parliaments and legislatures pass implementing legislation – a more common practice in Australia than Canada – some governments have chosen parliamentary supremacy as opposed to trusting the courts. Poirier confirms this in her study of intergovernmental agreements in Canada, which focuses on the legal status (or lack thereof) of these institutions.[31] Saunders finds that any signatory in the Australian and Canadian federations can abrogate agreements independently, citing the 1990 *Canada Assistance Plan Reference* by the Supreme Court of Canada as well as decisions by Australia's high court, including *Tasmania v. Commonwealth* in 1983 the Railway Line case between South Australia and the

[29] Marian E. Ridgeway, *Interstate Compacts: a Question of Federalism*, (Carbondale: Southern Illinois University Press, 1971), 19-22.
[30] Douglas M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada,* (Montreal: McGill-Queen's University Press, 2002), 164.
[31] Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics," in *Reconsidering the Institutions of Canadian Federalism,* ed. J. Peter Meekison, Hamish Telford, Harvey Lazar, (Montreal & Kingston: McGill-Queen's University Press, 2004), 430-435.

Commonwealth.[32] Yet these are rare examples, testimony again to the institutional nature of agreements.

Even lacking an independent commission or strict legality and enforceability by the judiciary, intergovernmental agreements can still fulfill the first two institutional conditions. Australia and Canada are quite active in the formation of intergovernmental agreements, many of which are renewed due to their continued relevance.[33] Moreover, agreements such as the Intergovernmental Agreement on Federal Financial Relations in Australia and the Agreement on Internal Trade in Canada demonstrate that even significant national issues can be addressed in an agreement that remains important to the functioning of the federation, even if it lacks strict judicial enforcement.

Beyond the question of structure and permanence, do intergovernmental agreements fulfill Peters' third criterion? Do they constrain behaviour? Many agreements commit governments to the disbursement of funds, which would restrict them from spending on other government priorities. Tanja Borzel finds that agreements may occur for a few reasons, including: cooperation and coordination, the realization of greater economic or political gains, and – most importantly for this discussion - the ability for nation-wide institutions to constrain the power of the national government as well as allow sub-national actors to access its resources.[34] Arthur Benz also confirms that economic and political incentives play a strong role in intergovernmental mechanisms,

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[32] See: Saunders, , "Constitutional Arrangements of Federal Systems," and Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s*, (Cambridge: Cambridge University Press, 1998).
[33] Examples of continually renewed agreements include the Housing Agreements, Medicare, and Crime Coordination agreements in Australia, whereas Canada has seen the renewal of many agricultural accords (including Marketing Board agreements), hospital insurance exchanges between the provinces, and transportation coordination agreements, to name only a few.
[34] Tanja A. Borzel, "From Competitive Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies," *Publius* 30, no. 2 (Spring, 2000): 17-18, 38-40.

including the creation of new federal institutions.[35] Specifically, he notes that conflicts surrounding the distribution of resources can be a significant area of disagreement, prompting measures to encourage cooperation, such as the formation of new agreements. Brown found that agreements can influence behaviour in less direct ways, with their chief functions being communication and administrative guidance .[36] Ridgeway meanwhile argues that agreements can also be used by subnational governments to prevent the intrusion of federal authorities.[37] In her examination of compacts in the United States, Ridgeway observes that one of their uses is to address cross-border issues between states before the federal government imposes its own agenda. All of these examples show how intergovernmental agreements can constrain governments.

The final element of Peters' description of institutionalism raises a major point of contention in the literature on institutions in political science, one which has important consequences for intergovernmental agreements. The question of whether institutions can exist solely as a system of norms, as opposed to rules and laws, is significant given that the conduct of intergovernmental relations possesses an important informal element.[38] March and Olsen argue that institutions can constrain behaviour by creating a set of norms which participants acknowledge and follow.[39] Atkinson elaborates on the informal qualities of institutions, arguing that their salient quality is the "networks of organizational capacity", and the connections between individuals and groups which

[35] Arthur Benz, "From Unitary to Asymmetric Federalism in Germany: Taking Stock After 50 Years," *Publius* 29, no. 4 (Autumn, 1999): 57.
[36] Brown, *Market Rules*, 109.
[37] Ridgeway, *Interstate Compacts.*
[38] Watts, *Comparing Federal Systems*, 3rd ed., 118.
[39] James G. March and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *The American Political Science Review* 78, no. 3 (Sept, 1984): 744.

present a sense of structure.[40] On the other side of the spectrum, some theorists argue that rules and laws, rather than norms, are the key aspects of institutions. Weaver and Rockman see institutions as "important frameworks of rules, capabilities and constraints which determine (in part) the behaviour of actors".[41] These create explicit boundaries that strongly affect any participants or their activities, including policy outcomes in government. Writing in the field of international relations, Robert Keohane somewhat reconciles these positions by defining international agreements as "explicit rules agreed upon by more than one state" - and regimes - which arise "when states recognize these agreements have continual validity".[42] This distinction acknowledges that institutions, at least internationally, require continued participation and consent to remain relevant (echoing the contention in Peters' fourth argument).[43]

The need for some shared norms or understanding for the functioning of an institution, has a small, but important, effect for intergovernmental agreements. An institution cannot function without at least some common understanding among members. As is the case in international relations, the degree of independence possessed by governments in a federation means that this common understanding is crucial, for without it, there is often no compelling force to keep participants involved and the institution functioning. This is especially true in federations in which there is no independent

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[40] Michael Atkinson, *Governing Canada: Institutions and Public Policy*, (Toronto: Harcourt Brace Jovanovich Canada, 1993), 11.
[41] R. Kent Weaver and Bert A. Rockman, *Do Institutions Matter? Government Capabilities in the United States and Abroad*, (Washington, D.C.: The Brookings Institute, 1993), 9.
[42] Robert O. Keohane, "Institutionalist Theory and the Realist Challenge After the Cold War," in *Neorealism and Neoliberals: The Contemporary Debate*, *New Directions in World Politics*, ed. David A. Baldwin, (New York: Columbia University Press, 1993), 28.
[43] This confluence of norms and rules found in Keohane's definitions of agreements in International Relations has added significance for intergovernmental agreements given the commonalities between the two fields, notably the focus on governments as the principal actors and the presence of divided sovereignty.

authority, such as the judiciary, that can govern or enforce an agreement. Without a common purpose, these agreements would be ineffective – for example, how can an agreement involving the exchange of prisoners between jurisdictions in the United States be effective if one party believes it does not need to maintain the prison capacity to accommodate its obligations? The continued formation and functioning of such agreements demonstrates that this dilemma is overcome constantly in numerous agreements across most federations, as participants share an understanding of the behaviour required by the agreement.

The existing literature clearly allows the classification of intergovernmental agreements as a type of institution. What is less obvious, however, is whether institutionalism is the best approach to study and explain agreements and their creation. As previously mentioned, the limited literature on intergovernmental agreements rarely attempts to construct a complete theoretical picture of these institutions. Bolleyer's 2009 study, *Intergovernmental Cooperation*, provides one of the only examples of how institutional theory and the study of intergovernmental agreements can be brought together. It also serves as one of the few studies of agreements that uses a comparative approach, examining Canada, Switzerland and the United States. She contends that agreements exist within the wider context of "intergovernmental arrangements" - a very broad category comprising elements of intergovernmental institutions and the practice of intergovernmental relations - and their formation further institutionalizes the system of interactions between governments.[44] Bolleyer argues that the structure of governments, and specifically the difference between power-sharing and power-centralizing systems, along with the level of institutionalization in intergovernmental relations will determine

[44] Bolleyer, *Intergovernmental Cooperation*, 1-3, 172.

how formal and (legally) binding agreements are and the degree to which they will constrain their participants.[45]

While this is one of the few examples of an attempt to study intergovernmental agreements in a comparative context, Bolleyer's approach is best used as an example of institutional analysis, rather than a theoretical base for this study. There are several reasons for this. First, Bolleyer's analysis of agreements is focused more on their quality, as opposed to their quantity. Her primary inquiry concerning agreements is why some seem to provide greater constraints in certain federations and not in others.[46] This is in contrast to the focus of this study which seeks to understand why agreements are formed and what factors affect their creation. This quality (Bolleyer) versus quantity (this study) distinction also leads to different points of emphasis in examining the data. Bolleyer focuses only on certain agreements in 2004 and 2005 in order to explore their particular characteristics, whereas this investigation attempts to examine all written and national agreements since the end of World War II in an effort to analyze the effects of federal institutions on agreements over time.

A second reason why Bolleyer's study cannot serve as the theoretical basis for this project is that her operational definition of agreements is somewhat inconsistent, being both too broad and too narrow, compared to what is used here. Bolleyer's definition includes any written document forged between government officials, encompassing anything from a meeting summary to a constitutional treaty, such as an interstate

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[45] Bolleyer is thus, not interested so much in the frequency of agreements, but rather their particular qualities. Specifically, she is trying to determine if there is a relationship between a federation's system of government and how formal or institutionalized its intergovernmental arrangements are. Intergovernmental agreements, as a type of arrangement in Bolleyer's rubric, are affected by these differences as well as by the existing level of institutionalization that exists within the system of intergovernmental relations (i.e. how formal and structured existing forums, bodies and other arrangements are). See: Bolleyer, *Intergovernmental Cooperation*, 180-182, 204-205.

[46] Ibid., 171-172.

compact.[47] A meeting summary may be nothing more than a recap of events, committing the governments involved to no future action or responsibilities. Using such a broad definition, it becomes difficult to distinguish agreements from the written process of intergovernmental relations. At the same time, her focus is too narrow to be applicable here because she is only concerned with agreements that come out of specific, national intergovernmental arrangements (effectively, forums for intergovernmental relations). This would exclude any agreements that are made simply through ad hoc contact between officials or through less formal bodies.

Finally, she proposes only two possible variables that affect agreement formation: the type of government institutions and the role of "intergovernmental arrangements". The first variable concerns the degree of power-sharing found in representative institutions within governments (both national and subnational), such as the difference between parliamentary systems and presidential models. While Bolleyer uses this to explain levels of formalization among agreements, this is less useful for this study as agreements here do not necessarily involve legislatures. For example, in the United States there are two types of formal, written agreements: interstate compacts and administrative agreements. While the former requires the approval of state legislatures - and thus is subject to the power-sharing dynamics that Bolleyer is interested in - the latter needs only executive approval. In this study, both are counted equally as examples of formal agreements. The second variable that Bolleyer considers - the role of intergovernmental arrangements - is too broad in its original iteration to be applicable here. One element of this category, forums for intergovernmental relations, does provide the basis for a useful hypothesis and is included in the seven variables discussed at the

[47] Ibid., 173.

end of this chapter. However, this variable alone is not sufficient to provide a thorough explanation of agreement formation across federations. As will be demonstrated in the examination of each of the cases as well as in the comparative analysis in Chapter Eleven, the seven variables proposed here provide an effective explanation for a federation's record of agreement formation.

What does this brief review of the literature concerning intergovernmental agreements and institutional theory tell us about the state of existing research and the potential for future studies? First, intergovernmental agreements are indeed understudied, especially in a comparative context. Most current works focus on a single national context and even a specific policy area. Second, there is limited scholarship on the theories behind agreements, particularly why they are formed and what factors might help or hinder their creation. Third, while agreements are generally understood to be political institutions, there have been few attempts to determine the best approach to analyzing them, whether via an institutionalist, rational-choice, socio-economic or some other approach. Without clear guidance from existing examples, this investigation is left to propose its own approach to intergovernmental agreements and deal with alternative approaches in a hypothetical manner.

Alternatives to Institutionalism

This chapter began by outlining the theoretical propositions of this investigation into intergovernmental agreements in two ways. First, agreements were defined as "intergovernmental institutions", thus framing the central questions of this study in terms of institutional formation and the factors that are most likely to affect it. The existing literature on agreements as well as Peters' four criteria of institutionalism confirm the

appropriateness of this position. Second, and perhaps more contentiously, institutionalism was selected as the theoretical paradigm which would help to explain differences in agreement creation between federations. This will be explained in greater detail in the final section of this chapter. Stated simply, the broader theoretical contention here is that agreements are institutions and the likelihood of their formation is explained best by the institutional features of a federation.

To paraphrase William Livingston however, institutionalism is not the only - or even the best - approach to the study of federalism.[48] Other research methods and paradigms have been used to analyze issues pertaining to federalism and intergovernmental relations and some of these could be applied to intergovernmental agreements as well. In particular, a sociological understanding of federalism, as advanced by Livingston, and a rational choice approach exemplified in the works of Jon Elster and, more specific to federalism, Barry Weingast are two potential alternatives. Before continuing with this institutional understanding of agreements, it is worth briefly considering whether either of these approaches might provide a better potential explanation of the patterns of intergovernmental agreement formation in these seven federations.[49]

The sociological approach argues that federalism is an institutional response to economic, social, political and cultural forces.[50] According to Livingston, federalism is a reaction to certain conditions in a country, specifically diversity:

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[48] William S. Livingston, *Federalism and Constitutional Change*, (Oxford: Clarendon Press, 1956), 1.
[49] Note: these two approaches are not an exhaustive list of all possible alternative means of studying intergovernmental agreements. They are, however, two established paradigms in the study of federalism and two of the most applicable to the topic of agreements.
[50] Livingston, *Federalism and Constitutional Change*, 1-2.

> Differences of economic interest, religion, race, nationality, language, variations in size, separation by great distances, differences in historical background, previous existence as separate colonies or states, dissimilarity of social and political institutions - all these may produce a situation in which the particular interests and qualities of the segments of the larger community must be given recognition.[51]

Applied to the study of agreements, this approach would confirm that agreements are institutions, but would argue that underlying social, political and economic factors are much more likely to explain their formation than institutional variables. Rather than considering the effects of the number of subnational governments or of the constitutional division of powers for example, a sociological understanding might identify the number of languages that are spoken in a federation or whether the practitioners of intergovernmental relations usually strive for a consensus as key features of an explanation of intergovernmental agreements.[52]

Without constructing a complete sociological theory of intergovernmental agreements (a task for another study), it is impossible to identify which potential factors might have the greatest effect on agreement formation. While this degree of specificity may not be feasible, the concept that agreements might be affected more by political culture and social variables than institutional ones can still be considered in a generalized sense. For example, a sociological approach might predict that the relative cultural and linguistic homogeneity of Australia and the United States makes those federations more likely to form more national agreements than heterogeneous countries such as South Africa and Switzerland. Other potential factors from this paradigm might include: the differences between an adversarial and cooperative political culture, economic disparity among the constituent units, the existence of past conflicts (such as civil war) and

[51] Ibid., 4-5.
[52] Ibid., 14.

variations in the distribution of the population. These ideas will be revisited during the analysis of the results (chapter eleven) in order to determine whether they provide a convincing alternative explanation to the institutional analysis of this study.

Rational-choice theory provides a second possible alternative to institutional theory as a means of studying intergovernmental agreements. The formation of agreements could be viewed as the process of collective action or bargaining, which Elster defines as a process through which actors attempt to resolve conflicting preferences regarding cooperative arrangements.[53] More germane to the study of federalism and intergovernmental relations, Weingast argues that the institutional structure of fiscal federalism provides subnational governments with incentives and constraints that will guide their behaviour.[54] Officials and decision-makers will operate in consistent patterns based on their particular contexts, and this can be understood as rational actors responding to stimuli. Applied to the study of intergovernmental agreements, these rational-choice approaches would view these accords as the collective action of governments acting on incentives to cooperate within the particular rules and strictures of a country's system of intergovernmental relations. Differences between federations and their records of agreement formation may reflect differences in the incentives and constraints facing the actors, the rules of the game, and even the number of participants.

Unlike the challenge provided by the sociological approach to federalism, rational-choice models are not incompatible with an institutional approach to

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[53] Although rational-choice theories of bargaining usually involve two person games, they may also involve ones in which universal participation is sought. This all-or-nothing model could present a possible analytical framework for considering national agreements where unanimity (or near-unanimity) is essential. See: Jon Elster, *The Cement of Society: A Study of Social Order*, (Cambridge: Cambridge University Press, 1989), 50-52.

[54] Barry R. Weingast, "Second generation fiscal federalism: The implications of fiscal incentives," *Journal of Urban Economics* 65, no.3 (2009): 280-283.

intergovernmental agreements. Indeed, when looking at agreements in aggregate - as this study does - as opposed to individual agreement creation, it could be argued that the approaches are quite consistent. Institutions are already an important element of the theory as they provide the rules, incentives and constraints which influence actors and their decision-making.[55] At the level of individual agreements, it is possible to consider the actors and their choices, but when comparing federations and their entire records of agreements, it is only useful to evaluate the structural factors which can affect all accords. It would be impossible to consider the rationality, motivations and specific goals of the thousands of officials and politicians across dozens of national and subnational governments. Yet, these approaches remain interconnected as a federation's institutional variables determine how easy it is for rational actors to form individual agreements by providing the constraints, resources, norms and rules for their interactions.[56] While rational-choice theory may be an effective means of studying the formation of individual agreements, it does not challenge the utility of institutional theory when comparing aggregate records among federations.

Thus, two different approaches can be taken, depending on the level of analysis. When examining the creation of individual agreements (the "micro" level), a rational-choice approach is a useful method of analysis. The following section will briefly describe a set of hypotheses regarding the formation of individual agreements that is consistent with rational-choice theory. The analysis of a federation's entire record of intergovernmental agreements (the "macro" level) requires a broader approach that

[55] Jon Elster, "Introduction," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad, (Cambridge: Cambridge University Press, 1988), 8-10 and Weingast, "Second generation fiscal federalism," 280-282.
[56] Sven Steinmo, "Historical Institutionalism," in *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, ed. Donatella della Porta and Michael Keating, (Cambridge: Cambridge University Press, 2008), 126.

institutionalism can provide. The relevant institutional factors will be discussed in the final section of this chapter and analyzed over the remainder of this comparative study.

Reasons for Forming Agreements

While a federation's institutions may be the best explanation for why some countries are more likely to form agreements than others, this does not provide an explanation for why specific agreements are created. A federation's constitution or the structure of its government can provide strong incentives and constraints for government actors, but it cannot provide reasons for why a particular new health care accord, for example, was signed. A separate set of hypotheses is required to understand and study these processes. While an analysis of these variables is not undertaken by this study, they are briefly listed here in order to clarify the differences between analyzing agreements individually and in aggregate. Six reasons can be identified for why governments would create intergovernmental institutions through the formation of agreements.

First, governments may seek to construct an enduring relationship. Agreements have the advantage of creating a structure which, if effective, can outlast their original participants. While it may be argued that behavioural norms alone may achieve similar effects, institutions have the advantage of being public and less ambiguous in terms of the responsibilities and privileges that they create. Institutions can help to establish a permanent and continual relationship, where interaction might otherwise be one-off or infrequent.[57] As an example, the formation of the Council of Australian Governments (COAG) has created an institutionalized setting for the practice of executive federalism, leading to at least one meeting per year since its inception in 1992. By contrast, First

[57] Peters, *Institutional Theory in Political Science*, 51-52.

Ministers' Meetings in Canada occur on an ad hoc basis, by invitation of the Prime Minister, and only ten have been held during this same eighteen-year period.[58]

Second, governments may seek to codify existing norms, strengthening them through an institution. A formal agreement may strengthen norms by providing clarity through the creation of explicit rules and providing a means of enforcement. A policy-oriented instance of this can be found in the establishment of bilateral and multilateral agreements in Switzerland between the cantons entrenching and improving coordination among them in the field of post-secondary education, thus institutionalizing less formal cooperation.[59]

Third, governments may seek to form agreements in order to realize more effective cooperation. Theorists cite institutions as a means to overcome the dilemmas involved in securing lasting cooperation.[60] This is achieved through the characteristics that an institution may possess: they can create a means to disseminate information among participants; they can clarify rules and procedures whose ambiguity may have impeded cooperation; and they can increase the likelihood of continued interaction between the participants which can limit the possibility of defection.[61] Natural resource management is a policy area where this is common. The Murray-Darling Basin Agreement in Australia, the Swiss concordats governing fishing in lakes that cross cantonal borders (such as Lake Zurich) and any of the water management compacts of the

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[58] Information regarding meetings of the COAG can be found at their website www.coag.gov.au/coag_meeting_outcomes/archive.cfm while a listing of Canadian First Ministers' Conferences can be obtained from the Canadian Intergovernmental Conference Secretariat, http://www.scics.gc.ca/pubs/fmp_e.pdf . Also see: Poirier, "Intergovernmental Agreements in Canada."
[59] Thomas Fleiner, "Swiss Confederation," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 276-277.
[60] Robert M. Axelrod, *The Evolution of Cooperation,* (New York: Basic Books, 1984).
[61] Benz, "From Unitary to Asymmetric Federalism in Germany," 57.

United States (such as the Arkansas River Basin, Great Lakes Water Resources or the Delaware River Basin Compacts, to name but three) illustrate the desire of governments to create permanent institutions to help manage shared resources (all of these include permanent, independent commissions to assist with management). Without the institutionalized setting provided by intergovernmental agreements, these resources could be mismanaged as individual actors attempt to maximize individual utility to the detriment of all.

Fourth, national and subnational governments may create agreements as a means of resolving conflicts. They may be a solution to existing disputes or simply a means of preventing or reducing the incidence of future conflicts. This was one of the goals of the Social Union Framework Agreement in Canada, which attempted to resolve a dispute between the federal government and the provinces concerning the reliability of federal transfer payments following cutbacks in the 1995 Federal Budget. Because Quebec refused to sign the agreement, it was ultimately not fully successful in achieving the goal of resolving the conflict.

Fifth, agreements may be used for political reasons, specifically making an explicit statement or action on a particular issue. Among their qualities, these intergovernmental institutions are visible and more easily observed than less formal interactions and thus, policymakers can use them to demonstrate that they are addressing topics of concern to citizens and interest groups. Intergovernmental agreements provide something tangible that politicians and bureaucrats alike can refer back to when questioned about what they have done to address concerns. While also made for substantive reasons, the Intergovernmental Agreement on Federal Financial Relations in Australia, the Millennium Scholarship Agreements in Canada and the Emergency

Management Assistance Compact in the United States have all been publicized by governments to demonstrate action on important files.

Finally, intergovernmental institutions can be the result of a powerful government that seeks to address a specific policy goal that it cannot achieve by itself. This scenario can occur when other reasons for institutionalization are not present while at the same time the government possesses the resources to compel other governments into an agreement. This is similar to the effects of a hegemonic power in international relations theory. This can often be seen in Australia, when the federal government generally possesses the financial means to initiate a new program, as well as concurrent legislative authority, but lacks the ability to fully administer it.[62] The 1983 Medicare and 1984 Commonwealth-State Housing Agreements provide examples of the federal government`s power in action. This process is also not uncommon in Germany, where the federal government has used its resources to form new agreements in the fields of media and education policy.

In order for an intergovernmental agreement to be formed, there must be an impetus and one of these six factors may be the reason for the accord. Without at least one of these reasons, governments may still conduct intergovernmental relations, but they will not embark on the process of agreement creation as the actors will have no incentive to institutionalize. This should not be taken as a guarantee that the presence of even one of these variables will necessarily lead to a formal agreement, however, as these are necessary, not sufficient conditions. Negotiations may break down as participants possess different goals, disagree over outcomes or lack the resources to implement the

[62] Martin Painter, "The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism," *Publius* 26, no. 2 (Spring, 1996): 101-120.

agreement. Moreover, the institutional characteristics of the federation will provide general opportunities or impediments to the creation of agreements. These "macro" characteristics will be detailed in the next section.

The Federal Environment: Fertile for Agreements or Not?

Although the question of why individual agreements are formed is an interesting one, it is not the focus of this investigation. Instead, the focus of this inquiry is the federation as a whole and the institutional variables that affect the likelihood that agreements will be formed. The development of intergovernmental agreements does not exist in a vacuum; as with all aspects of political activity, these institutions emerge from within particular contexts or systems that may affect their form, substance and number. These systemic factors are composed of a variety of institutional variables that define the environment in which government actors function and intergovernmental agreements can be constructed. The status of these variables may affect the degree of institutionalization in federations and the number of agreements formed, as they provide a framework which can encourage or discourage their creation.[63] A modern federal system is composed of a plethora of different institutions and thus, there are a number of potential factors that might influence the formation of intergovernmental agreements. The goal of this study is to identify and analyze those variables. While not necessarily exhaustive, this investigation focuses on seven institutional features that are hypothesized to have a clear

[63] It should be noted, however, that the existence of a favourable environment for institutionalization does not guarantee that a particular agreement will be made, only that the systemic factors may allow or even encourage the development of these and other intergovernmental institutions. There must still be a reason for government actors to actually create a specific agreement.

effect on the likelihood that a federation will create national, formal intergovernmental agreements. The hypothesized variables include the following:

1. The Degree of Constitutional Overlap
2. The Degree of Centralization in the Constitutional Division of Powers
3. The Size and Status of the Federal Spending Power
4. The Size and Scope of the Welfare State
5. The Existence of Lasting Forums for Intergovernmental Relations
6. The Number of Subnational Governments at the State/Provincial Level
7. The Existence of Intrastate Federalism

What follows is a description of the seven variables and their expected effect on intergovernmental agreement creation. These hypotheses are relatively straightforward and will not be extensively described here since they will be operationalized in the methodology chapter and further fleshed out in the individual country chapters. As there is limited theoretical literature that proposes factors for agreement formation, these seven hypotheses are drawn primarily from prominent institutional features of federal systems. After examining these, other possible alternative institutional variables will be briefly considered before concluding this chapter.

1. The Degree of Constitutional Overlap

The first variable is the degree of constitutional overlap and shared responsibilities that exist within a federal system. Specifically, this variable examines whether a federation has a "watertight" division of powers, with separate spheres for national and

subnational governments, or whether it allows more than one order of government to act in a single jurisdiction. This is not solely a measurement of concurrent jurisdiction - those areas in which both orders of government are explicitly granted shared power; it also includes policy areas in which both governments are active based upon separate, but overlapping competencies.[64] It is expected that the greater the degree of constitutional overlap in competencies, the greater the number of agreements that will occur. This is due to the need to coordinate policies within a field in which more than one government has the legal authority to legislate; the more areas in which this occurs, the greater the need for coordination, which can lead to intergovernmental agreements. As Watts acknowledges, "overlaps and intergovernmental interdependence... require a variety of processes and institutions in order to facilitate intergovernmental collaboration."[65] For instance, during a recession, federal and state governments might approach economic policy in contradictory ways. The federal government could implement a new industrial subsidy program to spur growth while state governments might be revoking tax breaks for corporations in order to reign in budget deficits. Because both orders of government have jurisdiction over the same area, they run the risk of their policies conflicting without some form of coordination, such as an intergovernmental agreement. Another potential example could involve a federal government seeking to establish a new infant health program. If the subnational governments have jurisdiction over hospitals however, an agreement would be required to ensure the implementation of this policy. Thus, federations with many areas of overlap are expected to form more agreements. This

[64] A Canadian example of this is the role of both the federal and provincial governments in post-secondary education. Provinces have authority in this area because of their explicit jurisdiction over education, while the federal government claims a role based on its jurisdiction over labour market policy and training.
[65] Ronald L. Watts, "Comparative Conclusions," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 323.

could be the case in Germany - a federation with a large degree of constitutional overlap - where we would expect to see governments engage in numerous agreements in order to allocate the responsibilities of each government and engage in joint policy actions.[66]

2. The Degree of Centralization in the Constitutional Division of Powers

The second variable pertains to how centralized or decentralized is the constitutional division of powers. In a highly centralized federal system, the national government is more able to create policy without the consent of subnational governments than it is in a federation with a decentralized constitution. When the central government is able to act unilaterally in a large number of national matters, this reduces the need for coordination and negotiation between the constituent units.[67] Other things being equal, if the national government decides it is advantageous to institute a new government program and they have the power to do so, they will do it. In more decentralized federations, the central government will likely have to negotiate with subnational governments to achieve the same results. South Africa and Malaysia, with their strong central governments, are good examples of this, as the national administrations hold ultimate power over a large number of policy areas. In a more decentralized federal state, the central government has less ability to address national matters unilaterally. When subnational governments are more powerful, their cooperation with national policy becomes more important as their participation can mean the difference between success or failure. Likewise, subnational governments that can act autonomously may coordinate between themselves to address common, national concerns, a situation not uncommon to

[66] Watts, *Comparing Federal Systems*, 3rd ed., 194-198.
[67] Joseph F. Zimmerman, *Congressional Preemption - Regulatory Federalism*, (Albany: State University of New York Press, 2005), 21.

the provinces in Canada. Rather than wait for federal leadership, strong provincial or state governments in a decentralized system might seek to pursue agreements deal with national matters, such as common agricultural policies. Thus, there are additional opportunities for cross-territorial issues to be addressed with an agreement rather than through the existing authority of a more powerful national government.

3. The Size and Status of the Federal Spending Power

The third variable addresses the constitutional allocation of taxation and spending powers, as well as the ability of governments to spend outside their immediate constitutional jurisdiction. In a large number of federations, national governments possess greater revenue raising powers than needed, based on their required expenditures (sometimes known as a "vertical fiscal gap").[68] The federal spending power is the ability of a national government to use these greater financial resources to spend money in areas outside its normal jurisdiction.[69] The use of this power may be controversial in certain federations such as Canada, as subnational governments feel that it violates their jurisdiction and does not respect their priorities.[70] Yet it is this interdependence that spending creates that imbues the spending power with its hypothesized effect on the formation of intergovernmental agreements. More than simply a case of overlap, the use of the spending power often creates obligations for subnational governments and opens up new policy areas to potential coordination between governments. A national

[68] Anwar Shah, "Comparative Conclusions on Fiscal Federalism," in *The Practice of Fiscal Federalism: Comparative Perspectives*, ed. Anwar Shah and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2007), 380-383.
[69] Ronald L. Watts, *The Spending Power in Federal Systems: A Comparative Study*, (Kingston: Institute of Intergovernmental Relations, 1999), 64.
[70] Herman Bakvis and Grace Skogstad, "Canadian Federalism: Performance, Effectiveness, and Legitimacy," in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, ed. Herman Bakvis and Grace Skogstad, (Don Mills: Oxford University Press, 2008), 12-15.

government seeking to fund a new prescription drug plan can transfer funds to subnational governments to enact such a program, but there must be further measures - such as an intergovernmental agreement - to ensure this money is spent as intended. As such, agreements may accompany the use of the federal spending power to ensure money is spent as intended and the policy goals of both federal and state governments are coordinated. Nigeria, Mexico and Malaysia are all examples of federations where the national government possesses great financial resources.[71] Australia also provides a notable case of this because the federal government possesses a large share of total government revenue and is able to spend this in state jurisdiction, often forming agreements concerning programs such as housing, pensions and medical insurance.[72] This last example is especially important as it illustrates that it is not enough for a national government to simply possess substantial financial resources - it must also be willing and able to spend in provincial or state jurisdiction. The use of the spending power may be constrained by rules limiting its application, such as in Switzerland, or it may be politically controversial, as it sometimes is in Canada.[73] Permissive spending rules and the established role of federal spending in subnational jurisdiction help to explain the common use of the spending power in federations such as Australia.

4. The Size and Scope of the Welfare State

[71] Watts, *Comparing Federal Systems*, 3rd ed., 105.
[72] Ibid., 177.
[73] In the Swiss cases, the restrictions on the spending power are difficult to enforce because only a national referendum can constrain federal spending, not the courts. See Chapter Eight on Switzerland for more details.

The fourth variable that may affect the formation of intergovernmental institutions is the size and scope of the welfare state, a measurement of the size of government.[74] The more areas in which governments create policies and programs, the greater number of areas in which there is a potential for them to interact, conflict and enter into cooperative agreements. The welfare state is particularly interesting as policies in this field often involve both orders of government because subnational governments traditionally play a large role in developing and implementing welfare policies, notably education and healthcare. Unlike many of the other variables in this study, this is not a static measurement as the welfare state changes overtime when new programs are added or spending is reduced in austere times. For virtually all countries, the overall direction of this change has been significant growth, especially since the Second World War, yet this does not always occur in a linear manner.[75]

A larger welfare state should provide more opportunities for the formation of intergovernmental agreements, leading to the hypothesis that the broader the scope of government activity, the greater the degree of institutionalization that should occur. For example, a federation with only public hospital insurance for the poor has fewer areas in which cooperation is possible compared to a federation with full public health and dental coverage for all its citizens. While there is no guarantee that the second federation will form a national agreement pertaining to dental coverage, it is not possible for the first federation to do so because such a program does not exist. Similarly, a group of provincial or state governments seeking to set up a national scheme for dealing with out-

[74] Richard Simeon defines the scope of government activity as: "the range of matters which are subject to public choice and in which governments are involved". This may be observed in government expenditures, legislation, regulation, and other government activities. See Richard Simeon, "Studying Public Policy," *Canadian Journal of Political Science* 9, no. 4 (December, 1976): 559-561.
[75] Evelyne Huber and John D. Stephens, *Development and Crisis of the Welfare State: Parties and Policies in Global Markets*, (Chicago: University of Chicago Press, 2001), 113-115

of-territory patients can only do so if this area is covered by government policy. It is expected that a larger welfare state, such as Austria's or Germany's would create more need for coordination (and thus agreements) than that found in the United States, for example. Because of the dynamic nature of this variable, a country's record of agreement formation can also be compared against changes in its own welfare state over time to determine whether these shifts are sufficient to affect the creation of new agreements.

5. The Existence of Lasting Forums for Intergovernmental Relations

The fifth variable to consider is whether lasting forums for intergovernmental relations exist in a federation. Established or institutionalized bodies for intergovernmental relations provide for regular and structured interaction between government representatives.[76] As Bolleyer argues, intergovernmental agreements are, in part, the product of their institutional environments. While she contends that intergovernmental forums affect the degree of institutionalization of arrangements, the same relationship can be hypothesized for the number of agreements.[77] The more interaction that exists, the more opportunities that are available for governments to discuss common concerns and create institutions. If a single government (national or subnational) seeks to form a new air pollution agreement, it will be much easier to do so if environmental ministers meet regularly and are already accustomed to working together. Moreover, such regular meetings between politicians and officials can help identify new areas where coordination through an agreement would be advantageous.

[76] Ibid.
[77] Ibid, 199-201.

Other things being equal, these forums should increase the total number of agreements created. In contrast, federations which have a more infrequent and less institutionalized system of intergovernmental relations are likely to have fewer opportunities to form agreements. A specific example of this is the First Ministers' Meetings in Canada. Unlike their Australian counterparts who operate in the regular and structured Council of Australian Governments, the meetings of Canadian Premiers and Prime Ministers are scheduled on an ad hoc basis and are not supported by a specific, permanent secretariat. This could decrease the likelihood of national agreements in Canada. Similarly, a more developed system of forums for intergovernmental relations, such as regular ministerial and deputy-ministerial committees, can also increase the likelihood that agreements will be created. In this way, Bolleyer's general observation that the structure of intergovernmental arrangements has an effect on intergovernmental agreements can be incorporated into this study.

6. The Number of Subnational Governments at the State/Provincial Level

The sixth variable is the number of subnational governments that exist within a federation. This reflects a classic coordination problem: the more participants in a negotiation, the harder it becomes to reach a mutually acceptable resolution. With every new participant, it becomes more difficult for all agents to acknowledge or understand common incentives and benefits to cooperation, while non-compliance becomes easier as punishments become more complicated to enforce.[78] Likewise, in a federation, the greater the number of governments, the more difficult it is to reach an agreement, as each

[78] Samuel Bowles and Herbert Gintis, "Cooperation," *The New Palgrave Dictionary of Economics Online*, Palgrave Macmillan, http://www.dictionaryofeconomics.com/article?id=pde2008_C000597 (accessed September 22, 2011).

additional government increases the potential that disagreement will emerge.[79] A government seeking to create a new national accord can more easily do so with four or five partners than with dozens. Furthermore, in federations with a large number of subnational governments, such as the United States, India or Switzerland, it can be difficult to get policymakers in the same place at the same time to develop agreements.

While federations with a large number of subnational governments will have more difficulty in forming national agreements than those with only a small number, this is not expected to be a linear relationship. There may be no observable difference in the difficulty of coordinating nine provinces in South Africa compared to ten provinces in Canada. Likewise, there may or may not be a specific "tipping point" - a number of constituent units after which it becomes increasingly difficult to form national agreements. Yet, even if these strict mathematical relationships cannot be identified, the coordination problems caused by this variable should manifest themselves in the largest federations (in terms of the number of subnational governments). In this way, the process of forming intergovernmental agreements becomes increasingly complex and difficult as the number of subnational governments increase, creating a substantial barrier to institutionalization.

7. The Existence of Intrastate Federalism

The seventh and final variable that could affect agreement formation is the existence of intrastate federalism. According to Donald Smiley, "intrastate federalism (is)

[79] Bolleyer briefly discusses the possibility that the number of governments might affect the degree of institutionalization found in a federation but quickly dismisses it as providing a limited explanation for her analysis. Bolleyer, *Intergovernmental Cooperation*, 49.

the channelling of territorial particularisms within the central government itself."[80] Generally, this occurs within the national legislative institution, usually through a separate second chamber. As Ronald Watts observes, most federations maintain bicameral legislatures, in which the second or upper chamber exists as a forum for the representation of the interests of regions or subnational units.[81] In theory, those federations which have effective and active chambers of regional or subnational representation have the ability to resolve issues of common concern within this body, as opposed to doing so through processes of intergovernmental relations. Specifically, this requires the full participation of representatives of subnational governments (such as in the German Bundesrat) as opposed to simply including representatives elected by each of the constituent units (such as in the American Senate). The former is an example of *full* intrastate federalism while the latter is only a *partial* degree. While the elected representatives may address matters important to subnational governments, they cannot speak for these administrations and thus, cannot serve as a substitute for direct intergovernmental relations. As well, each subnational unit should also have equal or at least disproportional representation compared to the share it might earn based solely on its population. Without disproportional influence for smaller states, governments may be inclined to pursue executive federalism as a means of intergovernmental collaboration because representatives may have a more equal voice in these forums (even if they do not all possess the same capabilities).

The expected consequence of full intrastate federalism would be the formation of a smaller number of intergovernmental agreements, as opposed to those federations that

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[80] Donald V. Smiley, "Federal-Provincial Conflict in Canada," *Publius* 4, no. 3 (1974): 15.
[81] Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Montreal: McGill-Queen's University Press, 1999), 92.

lack effective means of intrastate federalism, such as Canada or Malaysia. If subnational governments have the ability to address common matters through national political institutions, they may choose to do so instead of undertaking the process to form a separate intergovernmental agreement. A subnational government seeking to harmonize interstate trade tariffs may opt to pursue this goal through the national legislative process instead of an agreement. Because direct representatives or delegates of subnational governments can consent to such arrangements within the federal legislative process, the existence of a body for intrastate federalism provides an alternative to national agreements and this may decrease the likelihood of their creation.

These seven factors affecting the formation of intergovernmental agreements provide useful hypotheses for the further examination of agreements. While the "micro" hypotheses can explain why a single agreement is formed, these institutional features contribute to our understanding of the differences between federations and why some have a greater propensity to form agreements than others.

As previously mentioned, these seven institutional factors are not the only possible variables that could have an effect on intergovernmental agreement formation. While it is not reasonable to attempt to identify all other potential hypotheses and explain why they were not included, a sample of potential alternatives can be briefly discussed. Three alternatives specifically stand out: the type of government institutions (i.e. Bolleyer's hypothesis); the structure of the political party system; and differences between the constituent units.

The first alternative institutional hypothesis would apply Bolleyer's focus on the type of government institutions to this study on the formation of agreements. Rather than

focus on the level of institutionalization, this hypothesis might argue that the degree of power-sharing required by government institutions will affect the likelihood of agreement formation.[82] For example, because governing power in the United States is divided among two legislative bodies and a separately-elected executive branch, securing the agreement of all three for an intergovernmental accord might be a significant obstacle. As mentioned earlier, however, this comparative investigation does not restrict its definition of agreements solely to those passed into law. Using America as the example, there are two categories of formal agreements: interstate compacts - which require legislative and executive approval as laws - and administrative agreements - institutions which may be formed solely by the executive. While the government institution hypothesis could certainly explain differences in first type of agreement, it offers little explanation for the second. As well, most federations are Parliamentary, so differences in power-sharing between them may not be as pronounced, reducing the effectiveness of any explanation of intergovernmental agreement formation. Because of these shortcomings, it was not included in this analysis.

The second alternative hypothesis is inspired by William Riker's work on federalism. Riker argues that the degree of centralization in the party system is the key variable in ensuring the federal bargain is maintained.[83] A decentralized party system diffuses power away from the centre and allows for subnational governments to maintain their autonomy. Applied to the study of intergovernmental agreements, such a hypothesis might suggest that the degree of centralization or decentralization in the party system can explain differences in agreement formation. Unfortunately, it is not at all clear whether a

[82] Ibid., 180-182.
[83] Riker, *Federalism*, 91.

more integrated or a more devolved party structure would lead to more agreements. A centralized party system could allow for likeminded members of the same party to quickly reach agreements due to a lack of ideological or political differences. Conversely, coordination might be achieved without a formal agreement because members of the same party could cooperate within their existing party organization. The first scenario would make a decentralized party system more likely to produce a larger number of agreements, but it is unclear if this possibility is more likely than the second scenario. Given the lack of a clear hypothesis for the relationship between the party system and the creation of intergovernmental agreements, this variable does not have the clear causal logic as the seven that were included.

Finally, the differences between the constituent units could provide a possible institutional explanation for agreement formation. An argument could be made that the differences in size - in terms of either population or economies - between the states, provinces, cantons or länder might make the creation of national agreements particularly difficult. Extreme disparities in size and wealth may limit the number of areas in which a national consensus can be reached and agreements formed. Moreover, single, large subnational governments might possess sufficient resources to "go it alone" if their demands are not sufficiently addressed.[84] Unlike the previous two hypotheses, this variable does have some ability to generate a potential explanation that is relevant to this study. It is not, however, sufficiently different from "the number of subnational governments" variable, and as the analysis in Chapter Eleven (Comparative Analysis) will demonstrate, it does not add any further insight to this institutional explanation.

[84] Bolleyer, *Intergovernmental Cooperation,* 48.

While there are a number of interesting alternative institutional explanations that can be advanced, many of these - as indicated by these three examples - have notable shortcomings. They will be revisited in Chapter Eleven in order to confirm these shortcomings and delineate the more effective explanation provided by the seven institutional hypotheses that were originally presented.

Variables in Concert: How the Hypotheses Explain the Cases

With the seven institutional variables established as the focus of this study, it is necessary to describe the two ways in which this theory will be applied. First, each hypothesis will be considered independently in every case study in order to analyze what effects, if any, they have on the formation of intergovernmental agreements. This investigation will be used to determine whether certain institutional features seem to have a greater impact on agreement formation than others and whether they are applicable in all of the federations included here. Second, these variables will be considered together in order to determine whether they present a convincing and coherent explanation for the record of agreement formation in each of the seven federations. In order to accomplish this second task, the seven variables must be categorized according to their expected effect on agreement formation.

While all seven institutional features are hypothesized to have an effect on the likelihood of agreement formation, it is clear that these effects are not identical. The presence of certain features is likely to increase the likelihood of agreements, while others should decrease this potential for agreements. Specifically, the seven variables can be divided into three general categories based on their effects: those factors which are conducive to national agreement creation, those which inhibit new agreements and those

which reduce the potential for agreements by providing alternative sources of coordination. The first category (factors conducive to agreements) is the largest and it includes five of the institutional variables: Constitutional Overlap (1), the Degree of Centralization (2), the Size and Status of the Federal Spending Power (3), the Size and Scope of the Welfare State (4) and Institutionalized Forums for Intergovernmental Relations (5). Depending on the intensity of their individual manifestations, these factors create the conditions which are conducive to intergovernmental coordination, a necessity for any agreement. The remaining two variables - the Number of Subnational Governments (6) and the Existence of Intrastate Federalism (7) - reduce the likelihood of agreement formation, but in different ways. The former variable inhibits or reduces the likelihood of agreements while the latter provides an alternative means of coordination, which can also reduce agreement formation.

Categorizing the variables along these lines is helpful as it provides a clearer understanding of the combined effects of this institutional approach. If these institutional hypotheses are to provide an effective explanation of the record of agreement formation in each case study, then it is not enough for the variables to simply be present; as a whole, these factors must be consistent with the agreements observed for each federation. This means that in a federation with a large number of agreements, we would expect to see several factors which are conducive to agreement formation, with minimal barriers provided by the variables which inhibit agreements or allow for alternatives. Likewise, a federation with few agreements would be expected to have a limited number of conducive institutional features, but substantial barriers to agreement formation.

This relationship between the variables can be summarized in a simple expression:

CON – INH – ALT = IGA

"CON" represents the five variables that are conducive to intergovernmental coordination (and thus agreements), "INH" represents the factor inhibiting agreement formation, while "ALT" stands for alternative means of coordination. "IGA" is a federation's overall likelihood of forming agreements. This is a simplified and orderly way to present the results of the analyses from each of the federations, allowing for easier comparisons.[85] This "summary formula" is not meant to be a precise model that can calculate specific values or replace the analysis of the country case studies. Instead, it is meant to serve as an analytical summary device to reference the findings of the country chapters and reiterate their basic relationships. In Chapter 11, the comparative analysis will return to this conception of the institutional theory in order to review whether it is an effective approach for explaining intergovernmental agreement formation in federal systems.

Conclusion:

By drawing on the existing literature of institutionalism, this chapter has provided a theoretical framework for the existing study of intergovernmental agreements, while also proposing an avenue for future scholarship. Intergovernmental agreements meet the four criteria set out by Peters in his definition of institutions and current research has clearly treated agreements in this vein, if perhaps indirectly or implicitly. Moving beyond the existing consensus on agreements as institutions, this chapter proposed six reasons for why they are created as a means of explaining just what sort of institutions these agreements are and what roles they play in federal systems. More centrally, agreements

[85] It must be stressed that this is, in no way, an attempt to create a numerical value for a federation's potential to form agreements. Instead, this formula should be taken as a generalized summary of the analysis and conclusions from each country chapter.

were examined in a wider context – looking at the effects of other institutions on their formation, the focus of this investigation. Examining these seven variables will provide new understanding and a fresh perspective on agreements, while also contributing to the existing literature on comparative federalism and intergovernmental relations.

Chapter Three: Methodology

The purpose of this chapter is to set out the definitions, parameters, data sources and methodologies of this comparative investigation. It will begin by building on the discussion of the previous chapter by specifying the operational definition for intergovernmental agreements that will serve as the foundation for the rest of this study. This will be followed by a brief explanation of the qualitative approach to the analysis and comparison of agreements. Next, the sources of data for the seven factors which are hypothesized to have an effect on agreement formation will be described. Finally, the chapter will conclude by explaining how the data were obtained for the federations that were included in this study as well as the difficulties presented by other potential cases that could not be incorporated into this analysis.

An Operational Definition for Intergovernmental Agreements

The literature review of the preceding chapter indicated that intergovernmental agreements are understudied in many national contexts and virtually neglected in a comparative setting. This discussion also built on the foundation of existing scholarship to ground this investigation in an institutional paradigm. While defining the study of intergovernmental agreements as an investigation of intergovernmental institutions is a necessary step in crafting hypotheses and establishing the theoretical basis of this work, it provides limited guidance in clarifying exactly the type of data that must be gathered. As intergovernmental agreements cover a broad range of structures from informal contact between two government officials, such as a telephone conversation, all the way to national constitutional amendments, a specific definition is a necessary step for any

investigation. Unfortunately, there are few models to draw upon in order to craft an operational definition for intergovernmental agreements that can be used as a starting point for this research. As such, this comparative inquiry will propose its own definition and parameters for the study of agreements, rather than attempt to rely on any existing notions.

This study will define an intergovernmental agreement as a single policy project that is formal, written and national in scope. By being a single policy project, this restricts an agreement to a single topic, but not necessarily a single document. This is best illustrated by an example: over the last decade, the Canadian federal government has signed a series of bilateral immigration agreements with each of the ten provincial administrations. While there are ten separate documents, they are all part of a single federal effort to coordinate immigration responsibilities with the provinces. Under this definition, such a project would be counted as a single agreement, rather than ten.[86] This stipulation also excludes renewals of the same agreement. The requirement that agreements must be formal and written simply means that they must be publically accessible and have an agreed-upon text.[87] This is a methodological necessity rather than a dismissal of informal instances of intergovernmental agreements. It is possible to identify and study public, written agreements and compare them among a number of federations; it would be difficult, if not impossible to effectively assemble anything

[86] This approach also avoids "agreement inflation" for federations that have a larger number of states or provinces or those which use a "hub and spoke" model to national agreements, with the federal government signing similar - if not quite identical - agreements with each subnational government rather than participating with all units in a single document.

[87] Note: this definition of agreements makes no distinction between agreements based on their legal status. Agreements that can be enforced via a judicial process are as valid as those which cannot be, provided they meet all of the criteria.

approaching a complete database of informal connections and accords in a single country, let alone several.[88]

The reason for studying national intergovernmental agreements - as opposed to all formal accords, regardless of the number of participants - is two-fold. First, as described in the theory discussion, national agreements represent changes made to an entire federation and thus, are interesting elements of a federal system's evolution. This is true whether agreements are formed solely among the constituent units or when the national government is involved (state-state agreements and federal-state agreements). Two - and more germane to this methodology chapter - studying all intergovernmental agreements, even bilateral ones, across multiple federations would be exceedingly difficult. For those federations for which there is not a pre-existing and accessible database of all agreements (i.e. almost all of them) a federation's complete listing of agreements could only be constructed by obtaining complete records from every subnational government within a country. The likelihood that every province, state, canton or länder in a federation possesses a complete and publically accessible record of all agreements is highly unlikely for even one country, let alone seven.[89] For methodological as much as theoretical reasons, the focus of this comparative inquiry is on national agreements only.

Because of these considerations, only agreements which include more than 90% of a federation's subnational governments will be counted in this study. This threshold was selected to ensure that all the agreements included in this analysis had an overwhelming majority and fully-national participation rate without discounting large

[88] As an example of the difficulty, consider Zimmerman's description of informal agreements in the United States, where "thousands" of these have been created. Zimmerman, *Interstate Cooperation*, 163-165.
[89] This assumption was only confirmed by this research. In only one case, the United Kingdom, was there anything approaching a complete record of agreements for each of the constituent units.

agreements because they did not achieve strict unanimity. For example, an agreement in the United States that had been signed by forty-nine states could certainly be described as "national", but if the threshold of this study was unanimity, it would be disqualified based on the actions of one government in fifty.

The final parameter that must be established is the time frame for this comparative inquiry. The general time period that will be studied begins in 1945, at the end of the Second World War, and concludes in 2008. This is the "general" time period because only a handful of federal systems have existed since 1945. Even a federation as paradigmatic as Germany has not functioned as a federal system for the entire period, to say nothing of newer examples such as South Africa or Bosnia-Herzegovina. Because of the potential differences in time periods between the federations in this comparison, a yearly average (by country) will feature in this analysis in addition to the consideration of the complete records of national agreement formation. This average of agreements created per year will serve as the principle means of comparing the number of agreements found in each federation and ranking them relative to the other cases in this study.

Using these definitions and parameters, records of national intergovernmental agreements were found for the following seven federations: Australia, Canada, Germany, South Africa, Switzerland, the United Kingdom and the United States of America. The final section of this chapter will discuss the selection of these cases, the sources of the data, and the other cases for which sufficient information could not be found.

Studying Intergovernmental Agreements: Quantitative versus Qualitative Measurements

The principal goal of this investigation is to increase our understanding of intergovernmental agreements and attempt to determine how a federation's institutional characteristics affect the frequency of their creation. This will be accomplished by analyzing a federation's record of agreement formation - the number of agreements, potential patterns in the frequency of their creation, and, where possible, the policy areas they occupy - and comparing this against the seven institutional features hypothesized to affect agreement formation. This approach should not be mistaken for a form of quantitative methodology that would rely on statistical methods to determine correlations. With only seven federations, there are simply not enough data to examine the statistical relationship between the number of agreements and various institutional features.[90] Even if the data set was large enough, a purely quantitative approach would not be desirable because features such as the constitutional division of powers are better addressed through a qualitative methodology which can adequately explore and compare the various nuances of federal constitutional arrangements.

Although this is not a statistical analysis, the central measurement of intergovernmental agreements is numerical as opposed to a more qualitative approach. The measurement of the frequency of agreement formation was chosen instead of another measurement, such as the importance of an agreement (in monetary or constitutional terms) or the longevity of certain agreements for two reasons. First, the data required to list an agreement's title, the date it was agreed upon, and its signatories are the most basic, and thus the most accessible, information that could be sought regarding agreements. The intention behind this decision was that this approach would allow data to be gathered for

[90] Seven federations still represents more than a quarter of the approximately twenty-five federal countries that currently exist (plus or minus three, depending on the definitions used). Yet, even if 80% of these federations could be included, the data would still be too limited for proper statistical analysis.

a much larger number of federations than might be possible using a method which required greater detail.[91] Second, focusing on the number of agreements removes the need to establish some kind of qualitative measurement that might privilege certain types of agreements over others. For example, rather than examine intergovernmental institutionalization by analyzing the number of agreements, one might instead examine the proportion of funds which are dependent upon agreements or perhaps the number of laws, federal or state, which arise from an agreement. Even assuming that such information could be found, it might produce a perspective on institutionalization that is more applicable to some federations than to others. If one federation's welfare programs are governed by a series of agreements, but a second federation has the same for its criminal justice system, is the first federation necessarily more institutionalized if money is used as a unit of measurement? Counting the number of institutions, while by no means perfect, avoids this difficulty.[92] Each agreement made is a decision point - political actors in a country can choose to institutionalize or not. The quantitative data provide a benchmark for comparison among countries. They also permit systematic study of the relationship between agreement formation and the measurable (or estimable) position of the federation on the independent variables. Thus, the frequency of

[91] Given the difficulty in finding even basic information regarding agreements in several countries, this proved to be a prescient concern. See the last section of this chapter for more details regarding the search for agreements.

[92] While there is not enough information to conclusively demonstrate this, there seems to be some correlation between the frequency of agreement formation and their importance. Looking at the federations' records of agreements (found in the appendices) and the types of agreements formed suggests that those countries which form the most agreements, also seem to be forming agreements that are "larger" in terms of money spent and legal/constitutional consequences. At least among these cases, there is not a good example - with the possible exception of the nascent federal system in the UK - of a federation with a small number of agreements that exclusively address highly significant (defined in legal or monetary terms) policy matters.

agreements serves as the best and least ambiguous method of evaluating intergovernmental agreements and the institutional environment of a particular federation.

Testing the Hypotheses: Sources of Data for the Seven Variables

Chapter Two provided an explanation of seven factors that may have an effect on a federation's propensity to form national intergovernmental agreements. While this discussion provided reasons why these variables would affect agreement formation, it left the question of how they will be operationalized largely unanswered. In the best case scenario, consistent and unambiguous measurements would exist across all seven federations which would aid in the analysis and comparison of the cases. Although this may be possible in the consideration of certain variables such as the number of subnational governments, it is not sufficient, possible or even desirable for all of them. For instance, it would be difficult to fully summarize and explain the nuances of decentralization in a federation only through the use of a single numerical variable. Thus, a comprehensive approach relying on multiple sources, instead of simply one "silver bullet", provides a broader foundation for considering these factors.

For all seven of the variables, secondary sources provide a large proportion of the information used in the analysis. While intergovernmental agreements may be understudied, there have been a number of works on other features of federalism such as the constitutional division of powers, second chambers and intergovernmental relations that provide useful insight into these variables. This investigation will utilize both comparative works on federalism as well as country-specific studies. Where possible, quantitative measurements - of factors such as government spending - have been used to provide an additional metric that can apply similarly in all cases. Each variable will be

investigated separately at first, before considering some of the relationships between these features in Chapter Eleven (Comparative Analysis).

1. The Degree of Constitutional Overlap

In addition to the other secondary sources, the analysis of the effect of constitutional overlap also utilized one comparative measurement. In *Comparing Federal Systems*, Ronald Watts includes an appendix comparing "the distribution of powers and functions in selected federations".[93] This chart lists more than fifty different common policy areas and it notes which order of government, federal or state (subnational), has jurisdiction, as well as whether jurisdiction is shared.[94] While this is not a perfect comparison - several powers, such as nuclear energy, must be inferred from other enumerated powers - it allows for standardized evaluations of several federal constitutions. With respect to overlap, this comparison allows for a universal measurement of how many policy areas (in both raw totals and percentages) in each federation involve the activities of more than one order of government. Again, this information requires further explanation and context from other sources, but provides at least one means of simplifying and generalizing a topic that is normally difficult to quantify and compare.

Aside from an over-reliance upon this measurement, the one notable difficulty is the limited number of federations included in Watts' original appendix: while five of the seven federations studied here are included, South Africa and the United Kingdom are not. An attempt was made to replicate Watts' exercise using the division of powers found

[93] Watts, *Comparing Federal Systems*, 3rd ed., 193-198.
[94] Watts' comparison distinguishes two types of shared jurisdiction: "concurrent" and "separate, but overlapping" responsibilities of both orders of government.

in those two countries in order to provide the data for a full comparison among all seven federations.[95] While this may have created some slight inaccuracies (for example, Watts' original work seems to have relied more upon inferring powers from broad authority), the results are both unambiguous (both South Africa and the United Kingdom have a clear predisposition to either overlap or centralize) and consistent with the other five cases in terms of the total policy areas enumerated. In this way, it was possible to incorporate the two missing cases into this comparison, allowing it to serve as a common measurement of constitutional overlap.

2. The Degree of Centralization in the Constitutional Division of Powers

As with overlap, the centralization variable relies on Watts' comparison of federal constitutions and their divisions of powers. The process is effectively the same, with the sole difference that while overlap is concerned with shared jurisdiction, evaluating the degree of centralization puts the focus on areas of exclusive jurisdiction. While it is not a definitive measurement, a federation with a large number of policy areas held exclusively by the national government, and fewer by the subnational governments, is likely trending towards centralization. Again, this is measured by both considering the raw totals of the jurisdictions as well as the percentages of the total policy areas. This observation is even more salient when studying intergovernmental agreements: the more policy areas in which the federal government can act upon unilaterally, the fewer areas which may require some form of intergovernmental coordination, including agreements.

[95] As the United Kingdom has no single, written constitution, the division of powers found in the Devolution Acts of each national administration were used. Please see the chapter on the UK for more information.

3. The Size and Status of the Federal Spending Power

As one of the two variables with an explicit financial element, the size and status of the federal spending power lends itself to comparative quantification. Specifically, the size of the spending power can be measured by determining how reliant subnational governments are upon federal transfers. As the volume of these transfer payments increase, the opportunities for intergovernmental collaboration will do so as well. The primary measurement of this was the data gathered from the International Monetary Fund's (IMF) *World Financial Yearbook*. This annual publication lists a category measuring the percentage of subnational revenue that is received from federal grants. This source provided data for six of the seven cases - as the United Kingdom is not officially a federation, information regarding transfers between London and the devolved administrations was not included. Fortunately, the data on the UK`s transfers were available within the budgets of the governments of Northern Ireland, Scotland and Wales. Although this may not be measured by exactly the same criteria that the IMF used, it provides some basis for comparison. Additional sources, notably Ronald Watt's extensive discussion of federal transfers, were used to bolster and confirm this data.[96]

While the size of the spending power was easily quantifiable and comparable, the status of this power - its usage, legal standing and role in intergovernmental relations - is equally important and requires a more nuanced approach. Secondary sources and federal constitutions provided the information necessary to understand the workings of the spending power in each case.

4. The Size and Scope of the Welfare State

[96] See: Watts, *Comparing Federal Systems*, 3rd ed., 104-112.

Much like the size of the federal spending power, any evaluation of the welfare state requires some kind of comparable quantification. Although no attempt is made to try to determine a precise relationship between each additional dollar spent on welfare and the likelihood of more agreements - such an effort would be quixotic at best - the relative levels of spending do provide a clear and comparable measurement, if not a complete one.

Surprisingly, it was difficult to find a consistent measurement of welfare state spending that included all seven federations studied here. Because of this, two different, and thus not entirely consistent, measurements were utilized, in addition to country-specific secondary sources. The first set of data comes from the Organization for Economic Co-operation and Development's (OECD) "Social Expenditure Database", which is available online.[97] This provides a measurement of welfare spending as a percentage of Gross Domestic Product (GDP). While this database provides a useful comparable indicator between the cases, it does not include South Africa. Although a similar figure (spending as a percentage of GDP) could be found for South Africa, different methods of measurement make this a less-than-perfect comparison.[98]

The IMF's *World Financial Yearbook* provides an alternative measurement of welfare spending that does include results from South Africa. Measuring welfare state expenditures as a percentage of total government spending, the IMF provides data on all seven federations from the early 1970s until the present (albeit with a few missing years in which countries did not report all their necessary information). While these data do not

[97] The original data table is available from the OECD at: http://stats.oecd.org/Index.aspx?datasetcode=SOCX_AGG.

[98] It is fortunate that, by any measurement, South African welfare spending as a percentage of GDP remains the lowest of the seven cases. Thus, even though data for South Africa is not from the same source as the other federations, this does not seriously impede analysis and comparison. See Chapter Seven (South Africa) for more information.

match up precisely with the OECD's findings, in terms of the cases' relative rankings, it provides a second common measurement of welfare spending that allows for the comparison and evaluation of the cases.[99]

5. The Existence of Lasting Forums for Intergovernmental Relations

Evaluating and comparing the institutional arrangements for intergovernmental relations is an exercise similar to determining the degree of intrastate federalism: no single, quantifiable measurement may exist but such comparisons are neither difficult nor complicated. The basic criteria for evaluating the bodies devoted to intergovernmental relations are straightforward and include questions such as: is there a peak institution for intergovernmental relations? Does a federation have separate forums for ministers or specific policy areas? How often do such bodies meet? Are meetings organized and supported by staff or some formal secretariat? How long have these forums been in operation? In all federations, the answers to these questions were readily available through secondary sources and government documents as well as the publications issued by many of these forums.

6. The Number of Subnational Governments at the State/Provincial Level

This variable was, by far, the easiest to quantify and compare but only once clear definitions were established. As was noted earlier in this chapter, a national intergovernmental agreement is any formal, written accord which is approved by 90% or more of a federation's subnational governments. When attempting to determine the

[99] It should not be unexpected that two different measurements will return potentially divergent results. Where these occur, they are noted in the individual country chapters.

number of subnational governments, a couple of criteria are necessary. First, the governments in question must be of the state, provincial, cantonal or länder "order". As federations develop and local government takes on a more prominent position, these administrations may take a more active role in intergovernmental relations; however this study is concerned only with the provincial/state level.[100] Second, the only governments that are counted are those which possess the full powers of states and provinces. This is to exclude territories and possessions such as the Northern Territory in Australia, Nunavut in Canada or Guam in the United States. While the governments of these territories have taken an increasing role in intergovernmental relations - and even agreements - their unequal status and sometimes heavy reliance upon their respective national governments make it difficult to evaluate the nature of their involvement in any accord. With these parameters, determining the number of eligible subnational governments in each federation was a simple task. Further information from secondary sources provided context in each federation, where necessary.

7. The Existence of Intrastate Federalism

The key to considering intrastate federalism and its relationship with intergovernmental agreements is evaluating to what degree it exists in a particular federation. As the previous chapter explained, there are three potential states of intrastate federalism: none, partial and full, each of which could have a different effect on agreement formation. Because this was a novel distinction, building upon the existing

[100] The exclusion of local governments is not merely for clarity's sake but also due to the vast difference in local government regimes amongst federations. For example, while South Africa possesses a fairly developed system of municipal involvement in intergovernmental relations, as well as in constitutional provisions, municipal governments, in Canada, local governments are, constitutionally speaking, creatures of the provinces.

concept of intrastate federalism, there was no source for this information akin to Watts' comparison of constitutions.[101] Thus, information on federal second chambers was gathered from existing secondary sources, constitutions, and data available through the websites of these legislative bodies in order to classify each federal second chamber in the appropriate category.

Case Selection

In addition to the basic requirement that each case must have an accessible record of national intergovernmental agreements, there are several other criteria that were considered in the selection of the federations for this comparison. An optimal collection of cases would provide a diverse range of values for each of the seven variables, which would allow for the full consideration of the hypotheses. For instance, such a sample would include federations with a large number of subnational governments as well as others with only a few provinces or states in order for the sixth hypothesis to be fully explored. Beyond the consideration of these variables, a secondary goal was to include further diversity among the cases to improve the generalizability of the results, incorporating differences in size (in terms of both geography and population), location, language, level of economic development and age (how old the federal system is, not necessarily the country itself).

Using these criteria, the goal of case selection in this study was to assemble a large body of data from the greatest number of federations possible. This effort was balanced against three primary impediments. First, the upper limit in any study of

[101] Existing scholarship on intrastate federalism was generally framed in a binary fashion - it either was present or it wasn't. Allowing for the effects of elected representatives on intergovernmental agreements is not predicted by existing works, such as Smiley, "Federal-Provincial Conflict in Canada,"1974.

comparative federalism is relatively low; Watts, in the latest edition of *Comparing Federal Systems*, counts only twenty-five federations world-wide, while also acknowledging a number of other confederations, federacies and unitary states with some federal features.[102] The Forum of Federations, in its 2005 *Handbook of Federal Systems* also lists twenty-five.[103] This sets an absolute maximum to the number of cases even before other considerations are accounted for.[104]

The second restriction was one of resources. Extensive travel to many of these countries would have proven cost-prohibitive. This is especially true as such travel would have come without any guarantee of success. This limitation meant that data on intergovernmental agreements would have to come in one of the following formats: an online database, an easily accessible public record (held by a library or similar body), a previous scholarly study or a successful request for information to a government agency or official.[105] Language considerations were also governed by the limits of scarce resources. Although eleven of the twenty-five identified federations use English as an official or primary language, language barriers made accessing data in certain countries much more difficult. Once Germany was identified as an important case (see below), funds were used to hire a German-speaking student, Anja Cebotareva, to assist with this

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[102] Watts' list of twenty-five federations might be pared down even further by excluding such dubious entries as Pakistan and Russia, if one desired to insist on a stricter definition, such as that of K.C. Wheare. The complete list includes: Argentina, Australia, Austria, Belau, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St. Kitts and Nevis, South Africa, Spain, Switzerland, United Arab Emirates and the United States of America.

[103] The list found in the *Handbook of Federal Countries, 2005* is nearly identical to Watts' list, though it includes Serbia and Montenegro and forgoes Belau Serbia and Montenegro have since split apart into separate, unitary countries. See: Griffiths and Nerenberg.

[104] As mentioned previously, the actual limit could be considered even lower. In order to avoid overwhelming the sample with very centralized federations or even mostly unitary structures, countries like Pakistan, Russia and Venezuela were excluded.

[105] Fortunately, there did not seem to be any situation in which it was clear that investing in a research trip to a particular country would be likely to produce data when other methods were unsuccessful. While India and Malaysia might have physical records held by their central governments and/or parliaments, this could not be confirmed, making such a trip an expensive risk that was unlikely to pay off.

research and translate any records.[106] This proved to be very helpful with research on Austria, Germany and Switzerland.

Finally, time itself was an important consideration. This research needed to be completed in a relatively timely fashion (between two to three years from conception to completion). The consequence of this was that there was not an unlimited period of time to gather data for every potential federation.

Despite these restrictions, the sample of cases for this study is more than sufficient for this analysis and compares favourably with other works of comparative federalism. As the country analyses will demonstrate, these seven federations provide more than enough breadth in the independent variables to fully consider their effects on the formation of intergovernmental agreements. With seven cases, approximately 25% of all federal systems are represented by this study - a sizeable sample. This makes this study the largest comparative study of intergovernmental agreements in federal systems.[107] It is also in keeping with comparative works on federalism outside the topic of intergovernmental agreements such as Watts' *New Federations*(six cases), Taylor's *Characterisation in Federations* (six cases), Hueglin and Fenna's *Comparative Federalism* (four cases) and Riker's *Federalism: Origin, Operation, Significance*, (8 cases).

Thus, with these aspirations and constraints in mind, the comparative logic behind the case selection for this study is straightforward. The objective was to gather together a group of countries which would provide a representative sample of federal systems as a whole. This is in contrast to other common selection criteria such as a most-similar or

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[106] Funds were made available by the Canada Research Chair in Multilevel Governance.
[107] The only other serious comparison is Bolleyer's study, *Intergovernmental Cooperation*, which includes three cases.

most-different systems case design.[108] Using a most-similar systems design could not produce results generalizable to all federations as the cases would have to be restricted to only certain types of federations, such as established, economically-developed ones. Likewise, a strict most-different systems approach would be problematic given the significant differences in the number of intergovernmental agreements formed by federation (the dependent variable).

Because this investigation tests a set of institutional variables for their effects on the formation of intergovernmental agreements, the cases must adequately reflect the diversity of institutional characteristics in federations in order to be representative. A brief examination of the seven cases indicates that they fulfill the goal of providing a varied sample representative of the diversity of federal systems. As *Appendix H* indicates, these seven cases provide a range of examples of federal divisions of powers, whether decentralized (as in the United States), highly centralized (the United Kingdom) or exhibiting a high degree of concurrency and overlap (Germany). Moreover, this sample manages to include examples of all forms of intrastate federalism (full, partial and none) even though partial intrastate federalism is by far the most common.[109]

The representative quality of this sample of federal systems is even more apparent when the more quantifiable variables are considered. The seven cases include examples of economically developing federal countries (South Africa), industrialized countries with smaller welfare states (such as the United States, which ranks in the bottom five of the

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[108] A most-similar systems design selects cases with many similarities in order to highlight and study their select differences. A most different-systems approach seeks a heterogeneous case selection in order to identify common variables. See: Donatella della Porta, "Comparative analysis: case-oriented versus variable-oriented research," in *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, ed. Donatella della Porta and Michael Keating, (Cambridge: Cambridge University Press, 2008), 214-217, for a more complete summary of these approaches.

[109] Watts, *Comparing Federal Systems*, 3rd ed.,, 149-150.

OECD's Social Expenditure Database) and highly developed welfare regimes (such as Germany, which ranks in the top five in spending according to the OECD).[110] This diversity is further corroborated by Watts' findings on the spending power. Measured by state/provincial dependence on federal transfers, this study includes the federal system with the highest dependency (South Africa), with further variation included among the other five cases.[111] Finally, this group of countries manages to fully represent small, medium and large federations, both geographically and in terms of the number of subnational governments.[112] Overall, these seven federal systems not only provide a diverse set of cases to analyze and test the hypotheses on but also a sample that can claim to be representative of federal systems as a whole.

What follows here are two sets of countries: the first includes the seven cases for which useful data were found and the second includes the federations that were investigated, but which could not be included because a record of national intergovernmental agreements could not be obtained. Both lists include descriptions of the steps taken to find data, the individuals and agencies contacted and, when successful, the sources for the agreements used for the rest of this investigation. As a final general comment, acquiring this information proved to be much more difficult than expected: it is only with the generous assistance of many other scholars from around the world that such a project could be successfully undertaken.

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[110] Organization for Economic Co-Operation and Development. "Social Expenditure Database." http://stats.oecd.org/Index.aspx?datasetcode=SOCX_AGG (accessed September 20, 2011).

[111] Watts, *Comparing Federal Systems*, 3rd ed.,, 105. These seven countries also adequately represent the diversity of systems of fiscal federalism in other respects. See Watts, , *Comparing Federal Systems*, 3rd ed., 100-112 for more examples.

[112] Excluding Russia, America's fifty states represent the most subnational governments in a federation. The United Kingdom's three devolved administrations are only one greater than the smallest number of states/provinces in any federation (two being the smallest in both Bosnia-Herzegovina and St Kitts-Nevis).

Federations Included in this Study

These seven federations are the focus of this comparative investigation into intergovernmental agreements. While the goal was to obtain a record of all national intergovernmental agreements between 1945 (or the earliest possible date for younger federations) and 2008, in most cases, complete and unified records were not available.[113] What follows is a description of the various data sources used to create the agreement records found in the appendices.

Australia

While Australia does not have a readily accessible database for all intergovernmental agreements between 1945 and 2009, it does have a number of other reliable sources that, when combined, can produce a complete record. The lack of a single database was confirmed by Professor Cheryl Saunders of the University of Melbourne who also noted that each state may have its own tracking systems.[114] Fortunately, a combination of three sources has served as a reasonable replacement for the lack of a single government source.

The first source of agreement data came from the Council of Australian Governments (COAG). As the peak intergovernmental institution since 1992, the COAG keeps a listing of some of the national agreements formed since 1995 in a section of its website entitled "Intergovernmental Agreements"[115] This does not seem to be a complete

[113] The one exception to this time period was the United Kingdom. Given the availability of data, short record of its existence as a nascent federal system and its lack of a clear trend in agreement formation (see Chapter Nine), the data for the UK was extended to 2010 to achieve a larger sample in order to create better conclusions.
[114] Cheryl Saunders, email message to author, July 15, 2008.
[115] See Council of Australian Governments, "Guide to Intergovernmental Agreements,"

list of national agreements during this period because further searching revealed that combing the meeting outcomes, minutes and other records produced more agreements than found in the basic listing.[116] This provided a more complete record of agreements concluded at the national level since 1992.

Alone, this source would provide only a portion of the total sample sought for Australia. Further research, specifically internet and inter-library catalogue searches, revealed the existence of a publication entitled *The Compendium of intergovernmental Agreements*. Published in 1986 by the Advisory Council for Inter-governmental Relations, this book collected national, multilateral and bilateral agreements formed in Australia between the 1920s and 1986, after which the project was discontinued. This comprehensive listing of agreements is the source for Australian agreements between 1945 and 1986 in the appendix.

In a final attempt to fill in the remaining gap between 1986 and 1992, I sent an email request for data to Ron Perry, an advisor in the Department of the Prime Minister and Cabinet specializing in intergovernmental relations and the COAG. A colleague of his, Leah Bach, was kind enough to send me a record of all the agreements signed between 1990 and 2006.[117] This listing filled half of the 1986-92 gap in the data, while providing additional agreements that were not listed in the COAG records. Together, these three sources were combined to create a near-complete record of national

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Canberra: Council of Australian Governments. http://www.coag.gov.au/intergov_agreements/index.cfm (accessed May 10, 2010).

[116] This data is also available from the COAG website: Council of Australian Governments, "COAG Meeting Outcomes," Canberra: Council of Australian Governments, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm (accessed May 3, 2010).

[117] Leah Bach, email message to author, January 27, 2010.

intergovernmental agreements in Australia between 1945 and 2009, with the exception of the period between 1986 and 1989. [118]

Canada

Canada proved to be one of the more difficult federations to find data concerning intergovernmental agreements. The initial literature review suggested that a complete record of agreements might be easily accessible: a 2004 chapter by Johanne Poirier of the Université Libre de Bruxelles indicated that the Privy Council Office (PCO) in Ottawa had a complete repository of agreements that she was able to review.[119] A general inquiry in June 2008 to the PCO yielded no results, nor did further inquiries in the fall of 2008 to officials in the Office by myself or Professor Young. In spite of the fact that Professor Poirier was able to access this database only a few years earlier, we were told that the federal government no longer keeps any kind of central record of agreements and that the records Poirier accessed were merely an "aborted project" from years past.[120]

Without a single, centralized depository of agreements, Canada's record of national intergovernmental agreements had to be assembled from a variety of sources. While the federal government proved unable or unwilling to assist with this research, a number of other sources and individuals were much more accommodating. During my difficulties with the PCO, I contacted Johanne Poirier to see if she could provide me with more information as to how she had been able to access their information. She was very helpful in providing me with advice and ultimately, a copy of her dissertation, which

[118] The listing provided by the Department of the Prime Minister and Cabinet also provided some agreements in the period between 1986-89, however, there were only a couple entries which is well below the rate of agreement formation before and after this period. Thus, given the questionable completeness of the data, this period was excluded.
[119] Johanne Poirier, "Intergovernmental Agreements in Canada:," 427-428.
[120] Email correspondence, Ralph Coleman, a senior official in the PCO, February 2009.

included an appendix with several Canadian intergovernmental agreements. While not the complete listing, this was a useful start in the search for more data.[121] This source was supplemented by a Canadian government study, *Fiscal Federalism in Canada*.[122] This report by the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements was published in 1981 and contains a listing of all federal-provincial agreements prior to that year. Unfortunately, the report did not include the dates of the agreements or the participants and thus, could only be used to cross-reference with data from other sources.

In a final effort to find data from a central agency, I contacted the Canadian Intergovernmental Conference Secretariat (CICS) in early 2009. The CICS is responsible for providing institutional support to the conduct of intergovernmental relations in Canada.[123] Although Poirier's work had found that the CICS did not maintain a central registry of agreements, they did provide annual reports and other resources that sometimes made mention of intergovernmental agreements. Although a visit in March 2009 yielded no registry of agreements, the Secretary, André McArdle, was kind enough to meet with me to provide further information regarding Canadian intergovernmental relations as well as advice for my search. One of the staff members, Jane Dubé, was also able to provide me with additional resources on intergovernmental conferences helped contribute to the chapter on Canada.

While the federal government provided limited resources in the search for Canadian intergovernmental agreements, the provinces were much more helpful. The province of Quebec maintains an online listing of every agreement signed by the province

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[121] Johanne Poirier, "Keeping Promises in Federal Systems: The Legal Status of Intergovernmental Agreements with Special Reference to Belgium and Canada," Ph.D. diss., University of Cambridge, 2003.
[122] Canada, Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, *Fiscal Federalism in Canada,* (Ottawa: House of Commons, 1981),81-86.
[123] For more information, consult the website of the CICS: http://www.scics.gc.ca/

from 1922 until the present.[124] While no participants are recorded in this database (aside from Quebec and any others indicated in the title), they are recorded by date, allowing for easier cross-referencing. While all provincial websites were searched for a similar online database during the summer and fall of 2008, Quebec was the only province that seemed to have invested in this particular, public format.[125] Fortunately, this was not the end of the publically available provincial data on intergovernmental agreements. While they possessed no central registry - at least no public one - Alberta did keep track of every accord the province entered into and listed these in the annual reports of the Ministry of Intergovernmental Affairs.[126] Although each year's registry was formatted differently, all entries included the title and year, often the department involved (or policy area) and sometimes (especially in recent reports) a listing of all signatories. Reports from the last twelve years were available from the Ministry's website, while hard copies of earlier entries were held by the D.B. Weldon Library at the University of Western Ontario.[127] Finally, an email inquiry to Newfoundland's Intergovernmental Affairs Secretariat also yielded results. Sean Dutton, the Deputy Minister, was gracious enough to reply to my emails and speak with me via telephone in April 2009. According to Mr. Dutton, Newfoundland had begun to maintain a central repository of agreements, but this had just

[124] Some of this database was in English, though most of it was in French. Agreements were translated using my own knowledge of French, French-English dictionaries, Google Translate and by cross-referencing these agreements against English sources from other provinces/agencies. Any errors are the author's.
[125] Other provinces had varying degrees of online resources but none had a complete database or listing asides from Alberta and Quebec.
[126] The first of these reports was issued for the years 1972-73, but it also included a listing of all agreements made previously.
[127] See Alberta, Ministry of Intergovernmental, International and Aboriginal Relations, "Ministry Business Plans and Annual Reports," http://www.international.alberta.ca/651.cfm for the available reports (accessed October 14, 2011).

begun and records only went back to 2006; he kindly sent me these records for use in my study.

Without a single, definitive source for intergovernmental agreements, the final record of national agreements had to be assembled from the various elements. The different data sources were referenced against each other in order to determine which agreements were national and which merely bilateral. While this method ensures that this list can only be a very close approximation of the true number of agreements, the wealth of data from these disparate sources provides a reasonably comprehensive basis for identifying national agreements in Canada.

Germany

Initially, Germany was not one of the proposed cases, given the language barrier that needed to be overcome. However, at the proposal stage, it was suggested that Germany represented a crucial case in such a comparative work because of its unique system of cooperative federalism.[128] The assistance of Anja Cebotareva, the German-speaking student who was hired, made it possible to directly search German government and political science material. This work, combined with the assistance of several experts on German federalism, made it possible to identify the types of intergovernmental agreements in Germany and to locate a database of at least some of them.

The first and most important step was to determine the German name for intergovernmental agreements in order to be able to search for them. Through her web searches of German government websites, Ms. Cebotareva was able to identify the two main types of formal agreements: *intraföderale staatsverträge*, which are effectively legal

[128] Thank you to Professor Cameron Anderson for this advice.

treaties between the länder and *verwaltungsabkommen*, which are administrative agreements between governments. These terms were later confirmed to be accurate by Professors Wolfgang Renzsch of the Otto-Von-Guericke University of Magdeburg and Christoph Vedder of Augsburg University (separately).[129] Unfortunately, searching with these terms did not lead to any kind of online database that would have simplified the hunt for German agreements.

Armed with this information, I contacted several experts on German federalism, beginning with a conversation with Professor Jurgen von Hagen who was briefly visiting the University of Western Ontario at the beginning of 2009. He directed me to Professor Jonathan Rodden of Stanford who then sent me onto Professors Renzsch and Uwe Leonardy.[130] While they were not able to direct me to a database for agreements, they were able to confirm that *staatsverträge* and *verwaltungsabkommen* were indeed formal agreements and to provide other sources for the study of German federalism.[131]

Fortunately, Ms. Cebotareva's internet searches using the correct German terminology were able to yield some results. A common result in these searches was a 1996 book by Professor Christoph Vedder, titled *Intraföderale Staatsverträge: Instrumente der Rechtsetzung im Bundesstaat*. I requested the book through the inter-library loan service and asked Anja to review it to see what information could be found. She found that Vedder had included a listing of all *staatsverträge* between 1950 and 1996, including the dates and participants. This allowed us to construct a database (in

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[129] Wolfgang Renzsch, email message to author, March 10th, 2009; Christoph Vedder, email message to author, June 15, 2009.

[130] Jonathan Rodden, email message to author, February 7, 2009; Wolfgang Renzsch, email message to author, February 25 and March 10, 2009; Uwe Leonardy of Bonn University, email message to author, April 4 and May 15, 2009.

[131] Professor Renzsch made mention of a source from at least twenty years ago that contained a listing of some agreements, but could not recall the title.

English) of all available national *staatsverträge* during this period. While this was a significant success given the earlier difficulties, the list was only half of the necessary data (it did not include *verwaltungsabkommen*) and was not up-to-date.

I contacted Professor Vedder seeking further clarification and possibly a new lead in the search for more data concerning German agreements. He was generous enough with his time to discuss the matter with me over several emails between June 2009 and January 2010, elucidating and clarifying several important elements of German federalism and intergovernmental agreements. First, Vedder confirmed that both *staatsverträge* and *verwaltungsabkommen* are formal, written intergovernmental agreements and thus, both types qualify under the definition of agreements in this study. Second, he reported that there was no existing database for either of these types of agreements (beyond his own research) that could update the records of *staatsverträge* or provide a listing of *verwaltungsabkommen*. While *staatsverträge* could be updated by perusing German legal gazettes - these agreements are written into law - this method would not be possible for *verwaltungsabkommen,* making a complete list difficult. Third and perhaps most importantly, Vedder made clear that there were a "very large number" of omnilateral *verwaltungsabkommen*, making them at least as numerous as *staatsverträge*.[132]

The end result of this process is that some information is available for Germany, but not a complete set. Thanks to the work of Ms. Cebotareva and the information provided by Professor Vedder, however, Germany can clearly be categorized as a federation that produces a large number of national intergovernmental agreements. While

[132] Vedder email message to author, September 28, 2009.

the specifics of every agreement cannot be known, this reasonable characterization allows the inclusion of this important federation in this comparison.

South Africa

South Africa was an interesting and important case to include. Although a younger federation, South Africa is a good example of an economically developing and African federal system. This case also presented an interesting reversal of the normal exercise of searching for intergovernmental agreements. Early contacts with scholars of federalism in South Africa and searches of government materials made it clear that agreements were rarely or perhaps never used. Thus, rather than seek the existence of a database with the required information, it became clear that the goal with South Africa would be to demonstrate that few, if any, formal, national agreements exist. This process was easier for South Africa, as opposed to some of the unsuccessful cases which had little evidence of agreements, due to the assistance of a local expert and the reasonably well-developed state of the South African government's online resources.

I was fortunate enough to be able to draw on the expertise of Jaap de Visser, a Professor of Law at the University of Western Cape and an expert on South African federalism and multilevel governance. In a series of emails over the summer of 2008, he informed me that it was not until recently (2005) that South Africa adopted a formal framework for intergovernmental agreements.[133] Known as "implementation protocols", Professor de Visser mentioned that these agreements were, in large part, a reaction to the growing role of local governments since the federal and provincial governments already

[133] Jaap de Visser, email message to author, June 24, 2008.

interact closely within executive intergovernmental relations bodies.[134] He knew of no examples of this process being used at the national level.

Building upon this foundation, I searched secondary sources as well as the South African government's online resources. The Department of Provincial and Local Government's (DPLG) website provides a wealth of documents concerning South African federalism and intergovernmental relations and was a valuable asset in this search.[135] While copies of the Intergovernmental Relations Framework Act (2005) and numerous reports and guides for intergovernmental relations were found - including a blank template for forming new implementation protocols - there was no information indicating that these had been used between governments. Although this was not confirmed by the Department - emailed requests for information were not answered - no evidence could be found in their resources, or in general web searches, that South Africa had ever formed a formal, national intergovernmental agreement. For every other federation included in this study, as well as several others for which a complete record of agreements could not be found, there was some evidence of agreements that had been concluded between at least two states or provinces. This evidence was not present in South Africa, despite the relatively well developed system of intergovernmental relations that clearly exists in the country. This extensive search, combined by the information provided by Professor de Visser, provided sufficient evidence to include South Africa in this comparative study as an important example of an economically developing federation as well as one that has formed no national agreements.

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[134] Jaap de Visser, email message to author, September 25, 2008.
[135] South Africa., Department of Provincial and Local Government, www.dplg.gov.za.

Switzerland

Acquiring a record of intergovernmental agreements for Switzerland proved to be the easiest amongst the seven successful cases thanks to the assistance of Professor Thomas Fleiner and the substantial online resources at the University of Fribourg's Institute for Federalism. On the advice of Professor Young, I contacted Professor Fleiner for suggestions regarding where to begin a search for Swiss intergovernmental agreements. In a novel development (compared to similar attempts made with other federations), he was able to direct me to a pre-existing online database assembled by the University of Fribourg.[136]

A general search of this database produced a list of more than one thousand entries for agreements, ranging from bilateral accords to national concordats. For each entry, the date was provided and also often the cantons which participated in the agreement.[137] The large number of agreements was, in part, due to repetition: a single agreement usually had multiple entries, often one for each signatory.[138] In order to determine which concordats qualified as national agreements, the number of entries for a single agreement were totalled up. While this was time-consuming process, it did allow for a listing of national agreements between 1945 and 2005 to be assembled.[139] The agreements were translated into English from French and German by myself (aided by Google Translate) as well as Anja Cebotareva for select German-language agreements.[140]

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[136] This database is available online from the University of Fribourg's Institute of Federalism: http://www.lexfind.ch/

[137] There was often a link to the full text of the agreement on another webpage, usually run by a cantonal government. Unfortunately, most of these links were inoperable when checked.

[138] In some cases, an agreement would list more participants than there would be separate entries for, though this was not overly common.

[139] 2005 is listed as the end date because the database is, regrettably, no longer being updated.

[140] The registry could be accessed in either French or German, but while I attempted to access the French records, some entries were only available in German and thus both had to be utilized.

United Kingdom

The United Kingdom is an interesting case to include in this comparison as it is not formally a federation.[141] However, the process of devolution has transformed the formally unitary UK into a nascent federation, complete with autonomous subnational governments, a quasi-constitution and division of powers, and a developing system of intergovernmental relations. Despite the evolving nature of devolution, the UK already meets four of Watts' six characteristics of federations[142] and the devolution has been described as a federal system, if not a federation.[143] Including the United Kingdom as a case in this investigation provided the opportunity to study an emerging federal system and the role that intergovernmental agreements might play in this development. The UK turned out to be an interesting and useful addition, as a number of resources on intergovernmental agreements were available.

I began the search for agreements by contacting Professor Robert Hazell of University College London and Alan Trench of the University of Edinburgh, scholars who have written on devolution in the UK. They provided suggestions for a number of resources on devolution and intergovernmental relations, including Alan Trench's edited

[141] Technically, South Africa is not termed a federation either, at least according to its constitutional documents. However, given that it possesses virtually all the features of a federal system, this distinction is semantic at best.

[142] The UK meets, in whole or in part, the following four criteria: (1) the existence of at least two orders of government; (2) a formal constitutional distribution of legislative and executive authority; (5) an umpire (such as the courts); (6) processes and institutions to facilitate intergovernmental collaboration. The UK only fails the test in two ways: (3) the lack of any designated representation of distinct regional views within federal policy-making institutions (the House of Lords has regional lords, but this is certainly limited) and (4) the absence of a supreme written constitution which is not unilaterally amendable. It is questionable whether the UK fails on this latter count however, as the Acts of Devolution were ratified by referendum and by the devolved administrations, giving them constitutional status in the UK, which lacks a single, written constitution. See: Watts, *Comparing Federal Systems*, 3rd ed.,, 9.

[143] Ronald L. Watts, "The UK as a Federalised or Regionalised Union," in *Devolution and Power in the United Kingdom*, ed. Alan Trench, (Manchester and New York: Manchester University Press, 2007), 240-241.

volume *Devolution and Power in the United Kingdom*, a book which directly addresses agreements, known as concordats. They were also able to provide links to government websites which included information on existing agreements at the Ministry of Justice, in their Constitution Unit.[144]

Although these were good resources, the information with the UK government seemed to focus only on the original framework agreements for devolution. While it was possible that this was the extent of all agreements in the UK, I explored other avenues to confirm or refute this possibility. A brief research note by Paul Bowers of the House of Commons Library indicated that the governments of Wales and Scotland also kept online records of the concordats that they had reached with the national government.[145] Thanks to these complete and accessible records, constructing a registry of national agreements in the UK simply required a comparison of these two lists (as well as the Ministry of Justice's records, where possible) and including those concordats that had been formed with both administrations. Due to the intermittent nature of its government, Northern Ireland was not included in this analysis (see Chapter Nine on the United Kingdom for more details).

United States of America

One of the significant advantages to be found in searching for information concerning American federalism is the wealth of secondary sources available.

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[144]See: http://www.justice.gov.uk/guidance/guidancedevolution.htm. Thanks to Kam Samplay Policy Advisor at the Ministry of Justice (Constitutional Settlement Division) for confirming this via email (October 3, 2008).

[145] Paul Bowers, "Concordats and Devolution Guidance Notes," London: House of Commons Library, 2005, http://www.parliament.uk/briefing-papers/SN03767 (accessed November 15, 2010). Scottish concordats are available from http:/www.scotland.gov.uk/concordats ;Welsh concordats can be found at http://www.wales.gov.uk/keypubconcord/content/concordats/index_e.htm .

Intergovernmental agreements in the United States have already been the subject of much scholarly inquiry, notably in the works of Joseph Zimmerman.[146] This existing research provided the basis for most of the findings on the United States, in three important ways. First, like Germany, the US has two different types of agreements: interstate compacts and administrative (or sometimes, executive) agreements.[147] Interstate compacts are formal, legal treaties between states, as set out in Article I, Section 10 of the Constitution. Administrative agreements, in contrast, are a more ambiguous category, including everything from informal contacts between officials to signed accords between governors. For the purposes of this study, all national compacts as well as any national, written administrative agreements would qualify for inclusion. The second contribution found in the literature was that data and scholarly work on interstate compacts was readily available. The Council of State Governments, an American lobbying and research group devoted to state issues and intergovernmental relations, runs a small institute for compacts known as the National Center for Interstate Compacts (NCIC).[148] The NCIC possesses numerous resources, including a complete database of all compacts that have been formed, and data for this type of agreement comes from this source. The third and final revelation found in existing research was that information regarding administrative agreements is much harder to find. In *Interstate Cooperation: Compacts and*

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[146] For a more complete discussion of academic literature on intergovernmental agreements, please see the literature review section of the theory chapter and the chapter of the United States.

[147] Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements.* There is also a third instrument that might be deemed as a type of intergovernmental agreement: uniform law. This is a process by which all states adopt the same version of a particular bill (or one with minimal amendments). As these do not necessarily require coordination and negotiation between the states - an NGO may lead the charge by proposing an environmental law, for example - they have not been included in the set of intergovernmental agreements. Please refer to the chapter on the United States for a more complete reasoning as to why uniform laws were not included.

[148] See: Council of State Governments, National Center for Interstate Compacts, http://www.csg.org/programs/policyprograms/NCIC/default.aspx .

Administrative Agreements, Zimmerman concludes that there are "thousands" of administrative agreements, though most of these are informal and unwritten. He also noted that there is no database of these agreements, a fact that he confirmed to me via email in October, 2008.[149] However, in this work he was able to list several of the written agreements that involve a large number of states and these were included in this study. While this was by no means a complete registry, it provided further data for the construction of a database of national agreements.

The remainder of my search for information on American intergovernmental agreements was to supplement these findings and specifically, discover any written, national administrative agreements. Aside from general internet searching, I reviewed the records of several of the major intergovernmental bodies, including the Council of State Governments, the National Conference of State Legislators, the National Governors' Association and the National Association of Attorneys General. I also submitted a question via email to the reference librarians at the Library of Congress in the hopes that their research staff might have better information. While Shameema Rahman was kind enough to reply to my request in April 2008, the response suggested sources that were already known or legal sources that were helpful for compacts, but not administrative agreements. While these avenues provided very limited results in the search for national accords, they did strengthen the conclusion that formal and national administrative agreements are probably as rare as national interstate compacts. This means that the final number of American national agreements may be slightly underestimated, but this does not greatly affect its final ranking relative to the other federations.

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[149] Joseph Zimmerman, email message to author, October 28, 2008.

Unsuccessful Cases

The following is a list of federations for which a usable record of intergovernmental agreements could not be obtained. Inclusion here should not be taken as confirmation that no data on intergovernmental agreements exists for these federations - though in some cases that is surely true - but rather that the required information could not be obtained for this project. A greater focus on some of these cases may produce useful information in the future. These cases are discussed here to serve as an explanation for why certain cases were not included and so they might be of use to other scholars.

Austria

As most of the resources on Austria were in German, the primary research had to be left in the capable hands of Anja Cebotareva, though acquiring data on Germany was prioritized. Austria's Constitution allows for the possibility of agreements between the federal and länder governments under Section 15(1-3). These agreements are known as "Vereinbarung gemäß Art. 15a B-VG", which roughly translates to an "Agreement pursuant to Article 15a of the Constitution" and at least some of these are included in an online version of Austria's legal registry, the *Bundegesetzblatt*.[150] Included within this database was at least a few national agreements, such as an accord on healthcare and another on the environment.[151] While this conclusively demonstrated the existence of formal, written and national intergovernmental agreements, what could not be ascertained

[150] See: Austria, Chancellor's Office Legal Information System, "Federal Law Gazette 1945-2003 (Bundesgesetzblatt von 1945-2003)," http://www.ris.bka.gv.at/Bgbl-Pdf/ (accessed August 15, 2011).
[151] Searching yielded 88 results, many of which were clearly not intergovernmental agreements but merely entries with "agreement" in their texts.

is whether or not all agreements included "Vereinbarung gemäß Art. 15a B-VG" in their title and whether the law gazette recorded all agreements made. Unfortunately, requests for information from the Austrian government and a couple of Austrian academics received no response.

Given this information, it might be possible for a future study to incorporate results from Austria, (especially for an author fluent in German). What is needed is a confirmation of the search terminology as well as a database of those agreements. If it could be ascertained that all agreements are published in the law gazette, careful searching of this registry could serve the same purpose. Unfortunately, this information could not be determined by this study.

Brazil

Along with Mexico, Brazil was a late potential addition to this study; it was only considered after the search for Indian intergovernmental agreements proved to be a dead end in the hopes of securing another example of a newer, economically developing federation While Mexico offered some potential of producing useful data, Brazil presented a number of difficulties. First, while Brazil has existed as an independent country for the entire period that is being studied (1945-2008), there was a long period of military rule, only ending in 1985, with a new democratic constitution ratified in 1988. Assuming useful data could be found, this would add Brazil to the growing category of "new" federations for which the record of agreements would be much smaller than in more established federal systems. Second, as a Portuguese-speaking country, the term or terms used for "intergovernmental agreement" had to be determined. Unfortunately, no sources for this information were identified. Third, online searches for information on

Brazilian intergovernmental relations and specifically agreements of any kind uncovered only limited results. While some evidence was found that intergovernmental agreements are formed in Brazil - a mention of federal-state agreements for transfer payments appeared in an online document - this proved to be the high point of relevant information.[152] Without the appropriate terminology and lacking sufficient sources for information, there was not enough evidence available to secure a record of agreements for Brazil.

India

India was an ideal case for this comparative study. As a large federation, both in terms of geography and population, India would be a good contrast to the United States. As a country with an emerging economy, it would provide another example of a developing federation to go along with South Africa. Finally, despite including a hugely diverse mixture of languages, cultures and religions, India has also maintained English as a national language, enabling me to study the country without the need for translation assistance. With so many potential advantages to including India as a case, a great deal of effort was put into the attempt to find a record of intergovernmental agreements before ultimately concluding that such a feat could not be accomplished.

Early results for India were promising as Professor Young put me in contact with Professor K.C. Sivaramakrishnan, an expert on Indian government and federalism. While he could not confirm the existence of a database of agreements, he did confirm that they

[152] José Cezar Castanhar, "Fiscal Federalism in Brazil: historical trends, present controversies and future challenges," VII Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Panama, October 31, 2003, http://unpan1.un.org/intradoc/groups/public/documents/CLAD/clad0047826.pdf (accessed August 20, 2011).

existed and there was material on the subject.[153] He directed me to the Inter-State Council as well as to review information on the Commission on Centre-State Relations and the Sarkaria Commission, an earlier attempt to reform Indian federalism. Both of the Commissions provided useful information on Indian federalism, but offered no evidence of a record of intergovernmental agreements. The Inter-State Council had greater potential however. The Council was set up as a means to coordinate "inter-state matters" and has a permanent Secretariat which maintains a website.[154] While the documentation available online was minimal, if any organization in India was likely to possess a registry of intergovernmental agreements - or at least, know whether one exists - then the Inter-State Council Secretariat would have such information. Thus, beginning in June of 2008, I attempted to contact the staff of the Secretariat by emailing one of their officers. When I received no response, I emailed several other members of the staff, both junior and senior, including the Secretary. After every email was returned due to a delivery error or left unanswered, I attempted to call the staff at the Secretariat, but the phone was never answered (I did account for the time difference and attempted to contact them at several times throughout the Indian workday).

After spending the fall of 2008 attempting, unsuccessfully, to contact members of the Inter-State Council Secretariat, I contacted Professor Sivaramakrishnan once more seeking guidance. He kindly offered to look into the matter of intergovernmental agreements in India further on my behalf.[155] A few weeks later, he emailed me with information he had gathered from the Central Water Commission, a body which had an

[153] K.C. Sivaramakrishnan, email message to author, June 24, 2008.
[154] See: India, Interstate Council Secretariat, http://interstatecouncil.nic.in/
[155] Sivaramakrishnan, email message to author, December 17, 2008.

Interstate Matters Directorate.[156] While this body did have several written agreements, these were specific to this policy area and did not seem to be national in scope. He also confirmed the difficulty in obtaining any information from the government, even for an established and well-connected Indian professor like himself!

Following this setback, the search for an agreement database for India was put on the backburner for a couple months. In April 2009, Professor Ronald Watts suggested that I attempt to contact two other researchers with knowledge of Indian intergovernmental relations: Professors Mahendra Singh of the West Bengal National University of Juridical Sciences and Rekha Saxena of the University of Delhi. Professor Singh graciously offered to use his contacts within the national government, which I gratefully accepted. While he was able to uncover a number of sources for agreements, including a group of Memorandums of Understanding that the Health Ministry had formed, he was not able to locate a single database.[157] Likewise, Professor Saxena provided me with a great deal of information on Indian intergovernmental relations - helpfully juxtaposed with Canada, which she had studied previously - but did not have knowledge of any means of securing a complete list of Indian agreements.[158]

Despite the generous assistance of several leading Indian academics and their contacts in government, no database of Indian agreements could be found. Again, the search for Indian agreements was put on hiatus for the summer of 2009 only to be revived one final time in September 2009 when a final decision had to be made regarding the inclusion of India as a case. I attempted one last time to contact the Inter-State Council Secretariat and once again, received no response. Thanks to the many sources suggested

[156] Sivaramakrishnan, email message to author, January 4, 2009.
[157] Mahendra Singh, email messages to author, April 29, May 10 and May 12, 2009.
[158] Rekha Saxena, email message to author, May 15, 2009.

by Sivaramakrishnan, Singh and Saxena however, I broadened my search to other central agencies, including the National Planning Council. Naseem Ahmad, an officer of the NPC, was kind enough to reply to my inquiry - the first such reply from an Indian official that I had contacted directly.[159] He confirmed my existing suspicion that agreements between the national government and the states are held by the relevant ministry, meaning no central repository exists. Based on my experience with seeking information from the Indian government, as well as that of my contacts, assembling a database of agreements from each of the ministries would be a Herculean task for a well-connected Indian scholar and an impossible task for a Ph.D. candidate from Canada. This provided a definitive conclusion to my search for Indian intergovernmental agreements and the unfortunate removal of India as a case study in this comparative investigation.

Malaysia

Malaysia was originally considered as a possible case: a centralized and developing Asian federation would have made an interesting contrast to a group of countries that included a number of European and North American examples. Initial searches of Malaysian government websites made it abundantly clear that there was not a large amount of information that could be accessed electronically. Only one potential lead indicated that information on federalism might be found in the Parliament of Malaysia's Resource Centre, but this would have required a trip to Kuala Lumpur, with little hope of success. After failing to locate any evidence of intergovernmental agreements, let alone a database or registry of these, Malaysia was excluded as a case for this investigation.

[159] Naseem Ahmad, email message to author, September 22, 2009.

Mexico

As previously mentioned, Mexico was a late addition to the list of potential cases and like Brazil, it was intended to be a possible substitute for India. A closer look at the federation proved that a search for information on intergovernmental relations and agreements could return significant results. Initial internet and secondary source searches yielded promising results. An OECD policy paper indicated that Mexican states did form formal agreements with federal agencies, suggesting that there was at least the potential for data to be found.[160] Through these preliminary searches, I also found two important intergovernmental bodies: the National Conference of Governors (*Conferencia Nacional de Gobernadores*) and the Executive Commission for the Negotiation and Establishment of Agreements (la *Comisión Ejecutiva para la Neociación de Acuerdos* or CENCA).[161] While neither of these bodies seemed to maintain an online registry of agreements, they did clarify the Spanish terms for agreements in Mexico; reference was made either to "convenio" or "acuerdo" for the most part.

Unfortunately, this proved to be the upper limit to the research on Mexico. Even using these terms in searches of applicable websites, nothing resembling a database of agreements was found (though there was further confirmation of the existence of agreements in Mexico). Attempts to contact government officials and relevant academics

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[160] Organization for Economic Co-Operation and Development., "Regional Innovation in 15 Mexican States," *Policy Brief*, April 2009, http://www.oecd.org/dataoecd/45/1/42644342.pdf . (accessed September 18, 2011). The existence of agreements was confirmed by other sources, including a report by the Financial Action Task Force into Anti-Money Laundering tactics. See: Financial Action Task Force, *Mexico Mutual Evaluation Report - Anti-Money Laundering and Combating the Financing of Terrorism*, Mexico City: Financial Action Task Force, 2008. http://www.fatf-gafi.org/dataoecd/31/45/41970081.pdf (accessed July 3, 2011).

[161] See: Mexico, Conferencia Nacional De Gobernadores, http://www.conago.org.mx (accessed August 10, 2011) and Mexico, Comisión Ejecutiva para la Neociación de Acuerdos, http://www.leyparalareformadelestado.gob.mx (accessed August 10, 2011) respectively.

proved to be unsuccessful and so no further guidance could be obtained. Moreover, while the ever-improving Google Translate function allowed for some surprisingly successful navigation through Mexican websites, this is not yet a perfect substitute for having actual knowledge of another language. Thus, while Mexico returned some promising results, further research was not able to advance beyond these additional gains. As no evidence of a single listing or central repository of agreements could be found and no guidance was forthcoming from officials, Mexico had to be excluded as a potential case for this study.

Nigeria

As another developing, English-speaking and African federation, Nigeria was briefly considered for inclusion within this comparison. This dalliance was short, however, as Nigeria had a couple of significant issues which limited its utility as an appropriate case. Most significantly, initial searches of online resources and secondary sources produced no results. Unlike South Africa, this was not simply a matter of finding no evidence of agreements among a significant body of information on federalism and intergovernmental relations; rather, Nigeria seemed to possess very few avenues of information that might conceivably provide evidence of agreements. Exacerbating this difficulty was the unstable history of the Nigerian federation: Nigeria was under military rule from 1966 until 1979 and again from 1983 to 1999. As Nigeria gained its independence in 1960, this leaves a very small period that would be eligible to study. Given these obstacles, Nigeria was deemed to be a poor case to pursue for this research.

Spain

Spain was initially considered as a potential case for this investigation. Early reviews of secondary sources made it clear that intergovernmental agreements do exist within Spanish federalism, making it a potential candidate for this research.[162] Attempts to search for more information from Spanish web sources were made difficult by the language barrier. Ultimately, emphasis was placed on securing data for the United Kingdom (another example of a newer federal system where power has been devolved from the centre) and with an additional two examples of European federations (Germany and Switzerland), this continent was already strongly represented in the case selection.

St. Kitts-Nevis

The federation of St. Kitts and Nevis was briefly considered for inclusion in this study as an example of a small country with the minimum number of subnational governments. With only two constituent units however, federal law could effectively serve as a means of formal coordination between the two governments, and thus, significant results were not expected. A brief search of secondary sources and online resources during the fall of 2008 uncovered no examples of intergovernmental agreements let alone any evidence of some kind of agreement database. With no results to speak of, St. Kitts and Nevis was dropped as a possible case in favour of devoting more time towards other, more promising possibilities.

Conclusion

This chapter has built upon the theoretical discussion of Chapter Two to define intergovernmental agreements in specific, observable terms. It also explained the

[162] Borzel, "From Competitive Regionalism to Cooperative Federalism," 17-18, 38-40.

operational definitions for the seven independent variables as well as sources of data for these institutional features. Finally, the bulk of this chapter was devoted to describing the process of gathering data for the records of intergovernmental agreements that are used in this analysis. While there were several federations for which data could not be found, the seven cases that are included provide the basis for an interesting comparison.

The next chapters (Four through Ten) will present the individual country case studies for each of the seven federal systems. *Table 3.1* (below) previews the data on intergovernmental agreements found for each country as well as its ranking, relative to the other cases in this study. More information about the data and the frequency of agreements will be available in each of the country chapters, while the relative rankings will be discussed in greater detail in the comparative analysis of Chapter Eleven.

Table 3.1:Summary of Intergovernmental Agreements in Federal Systems

	Time Period	No. of IGAs	Average	Ranking
Australia	1945 - 1987; 1990 - 2008	76	1.27	3rd
Canada	1945 - 2008	92	1.46	2nd
Germany	1950 - 1995	40 (80)	0.89 (1.78)	1st
South Africa	1996 - 2008	0	0	7th
Switzerland	1945 - 2005	15	0.25	5th
United Kingdom	1999 - 2010	11	0.92	4th
United States	1945 - 2008	8	0.13	6th

Chapter Four: Australia

Source: CIA World Factbook

Formal Name: Commonwealth of Australia

Capital: Canberra, Australian Capital Territory

Subnational Governments: There are six states, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, joined by two territories, the Australian Capital Territory and the Northern Territory.

Introduction:

As "the continent that is a country", Australia is one of several large federations to emerge from the British Empire, along with Canada, India and the United States. The world's sixth largest country, spanning over 7.7 million square kilometres, Australia's federal system was a compromise between the goals of autonomy and unity of the six existing British colonies. Drawing inspiration from Canada and the United States, Australia fused American-style federalism with its familiar traditions of British parliamentary government in one of the longest enduring federations.

Australia is an interesting case to include in this comparative study given its relatively long experience with federalism and the fact that it is smaller - in terms of population - than the United States and more homogenous - at least in terms of its political history - than Canada or Switzerland, its nearest contemporaries. As such, Australia serves as a good example of an archetypal modern, industrial federation.

History

Australia has been inhabited by a significant aboriginal population for more than 50,000 years, a length of time that makes the recent, European-dominated history seem insignificant. Despite this legacy, the political history of the modern Australian state truly begins in earnest with the British colonization of Australia in the latter half of the 18th century. Following Captain James Cook's famous voyage to discover and map Australia's eastern coast in 1770, the first permanent British settlers arrived on January

26, 1788.[163] Captain Arthur Phillip led a fleet of eleven convict ships which founded the New South Wales penal colony at what would become Sydney cove. Between 1788 and 1829, Australia continued to be settled by the British, beginning with the addition of further penal colonies, but also with the development of "free" colonies. By 1850, distinct, self-governing colonies were emerging, seeking to move beyond their status as prison colonies for the British Empire.[164]

From 1851 to 1891, the British settlements organized into "six separate self-governing colonies... each with a constitution and institutions of government of its own."[165] Though they were individual colonies, they shared many common features. The vast majority of the colonists were of British origin, keeping the same cultural traditions and political institutions.[166] The one significant cultural or religious minority, Irish Roman Catholics, were dispersed among the colonies in a way that did not form any large concentrations in any one colony, as compared to the situation in Britain's Canadian colonies.[167] Finally, as colonists, the people of the six colonies and their governments shared common concerns vis a vis the Imperial government in London.[168]

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[163] Elizabeth Kwan, "Celebrating Australia: A History of Australia Day," Canberra: National Australia Day Council, 2007. http://www.australiaday.org.au/experience/page76.asp (accessed August 15, 2011).
[164] Sending convicts to New South Wales ceased in 1840, following a campaign by colonists to halt the use of Australia as a prison colony and concerns within the British government. However, the shipment of convicts continued to Tasmania until 1853 and Western Australia until 1868. See: Graeme Davison, John Hirst and Stuart MacIntrye, ed., "Convicts," in *The Oxford Companion to Australian History*, (Oxford: Oxford University Press, 1998), 156-157, and Australian Bureau of Statistics, "1998 Special Article - The State of New South Wales - Timeline of History," *New South Wales Year Book 1998*. http://www.abs.gov.au/Ausstats/abs%40.nsf/0/A890E87A9AB97424CA2569DE0025C18B?Open (accessed July 15, 2011).
[165] Cheryl Saunders, "Australia," in *Handbook of Federal Countries, 2005*, ed. Ann L. Griffiths and Karl Nerenberg. (Montreal & Kingston: McGill-Queen's University Press, 2005), 32.
[166] Watts, *Comparing Federal Systems*, 3rd ed., 33.
[167]Davison, Hirst, and MacIntyre, ed. "Irish in Australia," in *The Oxford Companion to Australian History*, 350-351.
[168] Ronald Norris, "Towards a Federal Union," in *Federalism in Canada and Australia: The Early Years*, ed. Bruce W. Hodgins, Don Wright and W.H. Heck, (Peterborough: Frost Centre for Canadian Heritage and Development Studies, 1989), 178.

Despite these common characteristics that might have served to encourage unity, geography and economics helped to keep them apart. The economic factors were particularly divisive, as Norris explains:

> In this way political and economic rivalry and jealousy developed. Colonial politicians paid regard to their own colonies in the interests of themselves and their electors, to whom they were required to make periodic appeals for support. They therefore enacted legislation to foster their primary and secondary industries. These measures, which directly or indirectly hit at neighbouring colonies, increased suspicion and hostility. The colonies fought and feuded over such things as the awarding of the P. and O. mail contract, and the capture of British capital and honours. Rivalry exceeded the bounds of healthy competition.[169]

This economic competition helped to enforce an independent identity among each of the colonies for several decades, rather than promoting a pan-Australian cause.

By the late 1880s however, the common ties of the Australian colonies were increasingly more powerful than the divisions, especially as economic concerns became widespread.[170] The difficulties of unrestrained economic competition were making the status quo untenable. As the nationalist movement gained momentum, Australians focused on balancing unity and autonomy, both externally and internally. Externally, the new Australian nation would maintain a close relationship within the British Empire as a Commonwealth.[171] Internally, a federal system was deemed necessary to bridge the divisions between the colonies while still allowing them to reap the benefits of a common economy and polity. Indeed, the assertiveness of the individual colonies led them to be

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[169] Ibid., 174.
[170] Daniel J. Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements*,2nd ed. (Essex: Longman Group Limited, 1994), 18.
[171] Some Australian advocates of increased autonomy and independence felt that the British Empire itself could emerge as something of a global federation, in which separate former colonies would maintain a significant degree of independence while still remaining under the sovereignty of the British Crown. See: Norris, "Towards a Federal Union," 174-178.

inspired by American, as opposed to Canadian, federalism as it was thought that it would provide a more decentralized federation.[172]

Government and Political Structure

Australian political institutions for the new state and Commonwealth governments grew out of the constitutional and federation debates of the 1890s, which in turn were directly inspired by the development of colonial self-government in the 1850s.[173] This meant a tradition of responsible government in the British parliamentary tradition, with a few specific Australian alterations, including: the use of a written constitution with judicial review, some experimentation with referendums and direct democracy, and a strong tradition of bicameralism, with powerful upper chambers.[174]

The Commonwealth government incorporated these elements in a national parliament with two chambers: the lower chamber, the House of Representatives, would be the body for popular representation, while the upper chamber, the Senate, would have its seats allocated equally amongst the six states. The House of Representatives evolved directly from the British tradition of responsible government. The House has 150 representatives, elected in single member constituencies, and is the seat of the Government, which is led by the Prime Minister and must maintain support from a majority of the members. The constituencies are allocated, at least nominally, by state and territory, with the largest receiving the greatest representation; New South Wales

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[172] Watts, *Comparing Federal Systems*, 3rd ed., 33.
[173] Campbell Sharman and Jeremy Moon, "Introduction," in *Australian Politics and Government - The Commonwealth, the States and the Territories*, ed. Jeremy Moon and Campbell Sharman, (Cambridge: Cambridge University Press, 2003), 2.
[174] Much like the American experience, Australia's colonies already had experience with bicameral institutions and the creation of their own constitutional documents Ibid., 2-4.

currently has 48 seats in the House while Tasmania, only 5.[175] These members are elected via a preferential ballot (a.k.a. the alternative vote), as opposed to the more historic "first-past-the-post", plurality system.

The Senate was created to serve a dual purpose: the representation of state interests, especially for the benefit of the smaller colonies, and to serve as a check on potential excesses of the House of Representatives, a common responsibility for colonial upper chambers.[176] The Senate possesses the same powers as the House of Representatives, with two primary exceptions: it does not have authority to introduce supply (money) bills and the Cabinet is not dependent upon the Senate for confidence votes. While there was debate between the larger and smaller colonies as to the allocation of seats, state equality in the Senate was adopted in Section 7 of the Constitution.[177] The other contentious issue concerned the selection method of Senators, but it was eventually decided that they should be directly elected.

The political institutions in the states are very similar to those of the Commonwealth and are defined in state constitutions. With the exception of Queensland, all state legislatures are bicameral, retaining the legislative councils of their colonial past.[178] No longer an elitist check on popular representation, all state upper chambers are now elected and some now have no authority over money bills.[179] The lower houses of

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[175] Both the Australian Capital Territory and the Northern Territory are each represented by 2 members. Section 26 of the Constitution spelled out the initial distribution of seats for the House of Representatives, with 5 being the state minimum. Only Tasmania has not increased from this amount in the last century.
[176] Sharman and Moon, "Introduction," in *Australian Politics and Government*, 3.
[177] In 1901, each state was granted 6 Senators, this was then increased to 10 in 1948 and 12 in 1984. The two territories were also granted 2 each in 1975, bringing the current total to 76.
[178] Cheryl Saunders and Katy Le Roy, "Commonwealth of Australia," in *Legislative, Executive, and Judicial Governance in Federal Countries,* ed. Katy, Le Roy, Cheryl Saunders and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 54.
[179] Ibid. In four of the five states which still maintain a second chamber, some form of proportional representation is used to select members.

the state legislatures keep close to the Westminster parliamentary model, with the exception of their electoral systems, which use a preferential ballot. Just as with the Commonwealth government, the executive of each state, led by the Premier, is responsible to the Assembly (lower chamber) and must maintain the confidence of a majority of members.[180]

One final, important element in the development of Australian government at both the national and state level was the use of direct democracy. Referenda were held in the colonies to determine whether the new constitution had popular support and to encourage colonist participation. According to Sharman and Moon, this was an innovative inclusion:

> While used in the Swiss federation, such a measure was alien to the British parliamentary tradition and had not been used to provide popular legitimacy or an amendment procedure for either the United States or the Canadian federations. [181]

Combined with the election of delegates for the constitutional conventions, the development of the Australian federation had a greater degree of public participation than the federal states that preceded it.[182] In this way, Australia combined the age-old institutions of parliamentary government with American-style federalism and constitutionalism, along with their own domestic political developments, notably an increased use of direct democracy and elections of all representatives.[183]

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[180] This is generally assured as state elections usually lead to majorities for the governing party in the lower house of the legislature.
[181] Sharman and Moon, "Introduction," in *Australian Politics and Government*, 6.
[182] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution,* (Cambridge: Cambridge University Press, 2009), 340.
[183] Wilfried Swenden, *Federalism and Second Chambers - Regional Representation in Parliamentary Federations: the Australian Senate and German Bundesrat Compared,* (Brussells: P.I.E. - Peter Lang, 2004), 108-109. Australia's use of direct democracy and elections for both legislative houses marked perhaps the biggest departure from the existing American and Canadian models of federalism. The Australian Senate was the first elected upper chamber in the world, preceding the democratization of the American chamber by ten years.

Intergovernmental Agreements in Australia

Australian intergovernmental agreements are generally known by that name, both to practitioners and scholars, though individual documents may be entitled accords, concordats, memoranda of understanding, and (joint) "schemes". There are limited provisions in the Constitution for general intergovernmental agreements, as they have evolved out of Australian intergovernmental relations.[184] The small exception to this is that Section 105A of the Constitution authorizes the Commonwealth and state governments to enter into agreements concerning state debt.[185] Although this type of agreement is legally binding, this section of the constitution does not seem to apply to agreements on other topics. The High Court ruled in 1962 that agreements were instruments of politics, rather than law, and therefore, are not enforceable by the courts.[186] The exception to this is when agreements are incorporated into law via a statute, but this is a rare and infrequent occurrence.[187]

The data for Australian intergovernmental agreements were collected from three sources. First, a volume known as *The Compendium of Intergovernmental Agreements*, compiled by the Advisory Council for Inter-government Relations, collected national, multilateral and bilateral agreements in Australia from the 1920s until 1986, when the project was discontinued. Second, The Department of the Prime Minister and Cabinet in the Commonwealth Government was able to provide a listing of recent agreements (since 1990) after a request was made to Ron Perry, an official responsible for intergovernmental relations. Third, the Council of Australian Governments, the peak

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[184] Cheryl Saunders, "Intergovernmental agreements and the executive power," *Public Law Review* 16, (2005): 298.
[185] Cheryl Saunders, "Collaborative Federalism," *Australian Journal of Public Administration*. 61 (2002): 71.
[186] Painter, *Collaborative Federalism*, 102.
[187] Saunders, "Intergovernmental agreements and the executive power," 299.

intergovernmental institution for Australia, maintains a website that includes the majority of national intergovernmental agreements concluded in the last twenty years. Together, these sources have provided a reliable record of national intergovernmental agreements between 1945 and 2008, with the exception of 1987-1989.[188]

The consistent trend among all three of these sources is that Australia produces a large number of national intergovernmental agreements. Between 1945 and 2008, a total of 76 agreements have been created, a rate of 1.27 per year.[189] This places Australia as the third-most prolific in the formation of agreements, behind Canada and Germany and ahead of the United Kingdom. As part of a group that creates an average of more than one national agreement per year, it is expected that Australia's institutional features are highly conducive to the formation of agreements. The remainder of this chapter will analyze these features and seek to determine which, if any, seem to be influencing the creation of agreements in Australia.

1. The Degree of Overlap that Exists in the Constitution

It is somewhat surprising that a federation that was modelled after American-style "dual federalism" would now be known for a significant degree of overlap and interdependence. Yet, that is exactly the situation found in Australia, as a large number of policy areas include a role for both the Commonwealth and state governments.[190] The evolution of the Australian federation towards a model of overlapping and coordinate, as

[188] The data for this period was deemed to be not completely reliable as the COAG data does not cover this period and the records of the Commonwealth government appear to lack activity.
[189] This rate of agreements takes into account that no data could be collected for the years 1987, 1988 and 1989. Thus, the total number of agreements is divided by 60 years instead of 63.
[190] Kenneth Wiltshire, "Australia's New Federalism: Recipes for Marble Cakes," *Publius* 22, no. 3 (1992): 175-176.

opposed to watertight, jurisdictions, may help explain the large number of intergovernmental agreements that have been created.

As they attempted to determine the nature of the Australian federation, the framers of the Australian constitution had three existing models to draw inspiration from: the United States, Switzerland and Canada. American and Canadian experiences with federalism were particularly influential, given the common British cultural legacy shared by the three countries.[191] While the Canadian model was important for demonstrating that parliamentary government could function in a system of divided sovereignty (as opposed to the American republic), the American model of federalism would be more clearly reflected in the final constitution. Many delegates to the constitutional conference found the Canadian model too centralized, as Aroney records:

> In the minds of these delegates, Canada was not an appropriate model of federation because the Canadian provinces had not federated as 'sovereign' bodies politic on the basis of absolute equality. As a consequence, the Canadian Senate inadequately represented the provinces; the Dominion was given 'general' power to legislate, subject to an elaborate 'division' of responsibilities between the Dominion and the provinces (i.e. legislative power was not 'delegated' by the provinces to the Dominion); provincial legislation could be disallowed; and the provincial governments were apparently subordinated through centralized powers of vice-regal appointment.[192]

This perspective on the Canadian experience with federalism clearly influenced the construction of the Australian federation and the degree of centralization found in the division of powers (this will be discussed in the following section). Beyond centralization, it also had a substantial impact on the issue of constitutional overlap. As

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[191] Aroney, *The Constitution of a Federal Commonwealth*, 70. This is not to say that the Swiss model was not recognized – indeed, the Australian use of direct democracy, especially for constitutional ratification, was more akin to the Swiss than either the American or Canadian experience – merely that the cultural ties Australia shared with Canada and the United States increased their prominence in debates.

[192] Aroney, *The Constitution of a Federal Commonwealth*, 151-152.

the framers of the Australian constitution were influenced by the American model for federalism, they sought to carve out jurisdictions by enumerating federal powers, while reserving all other powers to the states.[193] This created a system in which the states were seen to have broad powers over everything that was not reserved to the Commonwealth, granting them significant autonomy.[194] In practice however, this distribution of competencies allowed for development of significant overlap between the Commonwealth and the states. This overlap has two primary sources.

The first way in which this overlap has developed is through the enumerated powers of the Commonwealth. Section 51 and 52 list the powers over which the Commonwealth has jurisdiction. While Section 51 includes a large number of competencies, including power over taxation, economic regulation, criminal and civil law and foreign relations, it is only the limited responsibilities of Section 52 which are exclusively reserved to the national government. These powers are much more limited, including authority concerning the seat of government, the public service and any other matters that might be included by other sections (such as the organization and functioning of Parliament).[195] Moreover, Section 107 vests the States with any powers the Constitution has not explicitly reserved from them, granting them broad and overlapping powers.. This essentially opened up the scope of Commonwealth powers to some level of concurrency, something acknowledged specifically in some of the enumerated powers

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[193] Specific Commonwealth powers are set out by Sections 51 and 52 of the Constitution. See: Saunders, "Collaborative Federalism," 31.
[194] Riker, *Federalism*, 119.
[195] Section 51 states that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to..." before listing the enumerated powers. In contrast, Section 52 begins "The Parliament shall, subject to this Constitution, have *exclusive power* to make laws for the peace, order, and good government of the Commonwealth with respect to..." (emphasis added).

such as banking (S. 51, xiii), insurance (S. 51, xix) and railways (S. 51, xxxiii).[196] Although Section 109 gives the Commonwealth primacy in the case of conflicting legislation and the courts have attempted to clarify the powers of both orders of government, this has not diminished the "operative concurrency of Australian federalism".[197]

The second source of overlap in Australia has come from the evolution of these same enumerated Commonwealth powers. Although the initial intentions of the framers seem to have been to limit the reach of the federal government, the evolution of the Constitution since 1901 complicated, if not entirely impeded, this goal. The initial restraint used by the courts and the federal government in interpreting the breadth of enumerated powers lasted only a couple of decades and Commonwealth powers increasingly expanded beyond their original scope.[198] Saunders identifies Commonwealth powers over "taxation, corporations and external affairs" as granting much of the increased authority.[199] For example, the Commonwealth has been able to use its power to enter international treaties as a means to influence environmental and industrial policies in the states, as was the case in 1983 when the federal government prevented the construction of a dam in Tasmania.[200] As these Commonwealth competencies were interpreted more broadly, this avenue of overlap was enabled and exacerbated by the financial powers of the Commonwealth government, which proved to

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[196] Painter, *Collaborative Federalism*, 13.
[197] John M. Williams and Clement MacIntyre, "Commonwealth of Australia," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 13-14.
[198] The 1920 case *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* is specifically cited as a turning point from a more restricted to a more expansive view of Commonwealth powers. In this case, the High Court rejected the argument that reserved state powers should be given a broad reading. See Saunders, "Intergovernmental Agreements and the Executive Power."
[199] Saunders, "Australia," 33.
[200] Williams and MacIntyre, "Commonwealth of Australia," 19.

be much greater than the states'.[201] Thus, while the scope of state authority remained significant, the growth in federal authority has increased the number of areas in which both orders of government are active, beyond the existing overlap found in the division of powers.

These two means of overlap have created an increasingly concurrent constitutional environment in Australia. Watts' comparison of powers and functions across federations gives a good indication of just how substantial this degree of overlap is (see *Appendix H*). Australia has the second highest percentage of overlapping jurisdictions – areas where either both governments are competent or explicitly concurrent – with both governments operating in 70% of enumerated areas; only Germany's 75% overlap is higher. Australia's constitutional environment is one in which both spheres of government have some stake in the vast majority of government activities, creating a need for some form of coordination, such as intergovernmental agreements.

The record of intergovernmental agreement formation is consistent with the contention that a high degree of constitutional overlap provides fertile ground for such accords. With a relatively large number of national intergovernmental agreements, Australian governments clearly make frequent use of this device in order to coordinate their activities. Beyond the raw number of agreements, looking more closely at the record of agreement formation indicates the further impact of the wide degree of overlap (*Appendix A* includes the list of agreements and their policy areas). National intergovernmental agreements in Australia are widely distributed across a number of policy fields; they exist in areas allocated to the Commonwealth in the enumerated powers - such as National Security - as well as those that fall under reserved state

[201] This will be discussed in greater detail in the section on the federal spending power.

authority, such as health and education[202]. Had these agreements been specifically concentrated in one or two areas, it might be easier to conclude that the breadth of overlap is not significant to the formation of agreements.

The overlapping areas of jurisdiction create the need for coordination in order to allow for coherent policy to be developed across both orders governments. Australian governments seem to have chosen to address this need for coordination, at least in part, through the formation of numerous national intergovernmental agreements.

2. The Degree of Centralization in the Constitutional Division of Powers

The question of how centralized Australia is in its constitutional division of powers does not have a simple answer. Williams and Macintyre see that the Commonwealth "has come to dominate the federal landscape", especially as it has added new responsibilities for economic regulation and the welfare state.[203] Watts seems to agree with this assessment, finding Australia to be "relatively centralized", more so than Canada, Germany, Switzerland and the United States, though much of this categorization stems from Australia's high degree of financial centralization.[204] In contrast, Saunders argues that "it is difficult to characterize the Australian federation as either centralized or decentralized" as it is not intrinsically "inclined toward either unity or diversity."[205]

What is less controversial are the intentions of the framers of the Australian Constitution and their desire to build a federation that left a great deal of autonomy to the states. While the six colonies saw advantages in closer ties, notably a common market

[202] Elazar, *Federal Systems of the World*, 21-22.
[203] Williams and MacIntyre, "Commonwealth of Australia," 13-14.
[204] Watts, *Comparing Federal Systems*, 177.
[205] Cheryl Saunders, "Commonwealth of Australia," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, (Montreal & Kingston: McGill-Queen's University Press, 2005), 21.

and defence policy, all were used to a significant degree of autonomy as self-governing parliamentary democracies.[206] Moreover, as was discussed in the last section, the Australians were keenly aware of the experience of other federations, Canada, Switzerland and the United States. The American idea that a federation was formed by independent states coming together for common purposes and delegating powers to a central government proved to be persuasive to early Australian politicians. This was in direct contrast to what Australians perceived as the Canadian model of federalism - a powerful central government with weak provinces.[207] These sentiments led Australia to adopt an American model of the division of powers: only the federal powers are enumerated, with the remainder reserved to the states. The logic behind this constitutional division of powers was that it would confine the federal government to narrow areas of responsibility, while leaving much broader and flexible authority to the governments of the constituent units.

A constitution, however, tends to be a dynamic document in both its environment and how it is interpreted. A number of developments have taken place since 1901 which have moved Australia from its original, decentralized vision to a federation with a stronger central government. The first, and potentially most centralizing factor, has been the financial power of the Commonwealth government. While the growth of the Commonwealth's spending power will be discussed in detail later in this chapter, the centralizing effect of federal financial resources must be acknowledged here. World War II was a turning point, as the Commonwealth gained full control over income tax and

[206] Elazar, *Federal Systems of the World*, 19.
[207] Aroney, *The Constitution of a Federal Commonwealth*, 70.

thus, the bulk of government revenues.[208] Even before this watershed event, the national government exercised substantial financial power through significant tariff revenue.[209] Constitutionally, much of this centralizing authority can be traced to the enumerated powers over trade and commerce (S. 51, i), taxation (ii), borrowing (iv) and the ability of the federal Parliament to provide grants to states in any ways it sees fit (S. 96), the relevance of which has increased over time.[210] Occupying a hegemonic position in Australian public finances, the Commonwealth government was able to expand the scope of its jurisdiction.

Moving beyond the financial pressures contributing to centralization, a shift in judicial interpretation had an important role to play. For the first twenty years following the creation of the federation, the state governments, supported by the courts, took a restrictive view of Commonwealth powers akin to the views held during the constitutional debates of the 1890s.[211] That is, they felt that federal powers should be restrained within only their explicitly enumerated jurisdictions while state powers should be interpreted broadly. This was not to last as the High Court began to shift its interpretation towards a broader reading of federal powers notably in the 1920 case of *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* This change in the jurisprudence established the High Court's opinion that Commonwealth's powers could be read more broadly, "unconstrained by assumptions about the nature of the federation."[212] In addition to the oft-discussed financial powers, this interpretation also enhanced the centralizing ability of

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[208] Alan Morris, "Commonwealth of Australia," in *The Practice of Fiscal Federalism: Comparative Perspectives,* ed. Anwar Shah and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2007), 48-49.
[209] Elazar, *Federal Systems of the World*, 19.
[210] Williams and MacIntyre, "Commonwealth of Australia," 13-14.
[211] Aroney, *The Constitution of a Federal Commonwealth,* 274-277.
[212] Saunders, "Australia," 33.

the Commonwealth's authority over corporations and external affairs. Specifically, the case of *Commonwealth v. Tasmania* found that the national government's power over corporations (S.51, xx) and foreign affairs (S. 51, xxix) may allow it to make laws beyond its explicit jurisdiction, in order to implement treaties or international policies.[213] This also invoked Section 109 - which declares that when laws of the states and the Commonwealth are inconsistent, the Commonwealth law is valid - a potent and centralizing, if seldom invoked, clause in the Constitution. While the degree to which Commonwealth competencies can extend has waxed and waned (and continues to be debated), the interpretation that the Commonwealth is restricted to narrow policy areas has not recovered.[214]

Given this, it is clear that Australia has not maintained the decentralized model on which it was founded as the Commonwealth has increased the scope of their powers. However, this does not demonstrate that the Australian division of powers is particularly centralized compared to other federations, especially if we postpone questions of financial centralization. Turning back to Watts' comparison of competencies in federations (*Appendix H*), the federal government possesses exclusive jurisdiction in only 6 policy areas (13%) while the states have sole jurisdiction in 8 (17%). Out of seven federations in this study, Australia has the fewest areas of exclusive federal jurisdiction, as overlapping authority is the norm for most policy fields. This reading of the Australian division of powers is consistent with the record of agreement formation. With an overlapping, and even "cooperative" system of federalism, the Commonwealth is not in the position to provide an overriding central authority that might stymie agreement

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[213] *Commonwealth v. Tasmania*, (1983), HCA 21.
[214] James A. Gillespie, "New Federalisms," in *Developments in Australian Politics*, ed. Judith Brett, James Gillespie and Murray Goot, (Melbourne: MacMillan Ltd., 1994), 62-64.

formation.[215] If the Commonwealth's powers had become predominant, we would expect to see fewer agreements in lieu of broad, federal legislation that could pre-empt state jurisdiction utilizing the legislative supremacy clause of Section 109. Instead, Commonwealth authority has broadened to exist concurrently with the already expansive state authority. Thus, while Commonwealth powers have surely increased, they are still subject to clear limitations, as Painter argues:

> It must be pointed out, however, that this growth in Commonwealth jurisdiction and powers has not resulted in as dramatic a degree of centralisation as a literal reading might suggest. The political and administrative restraints on Commonwealth power consequent upon the existence of effective, active, democratically elected state governments remain significant.[216]

As these two sections have indicated, the Constitution of Australia has promoted a system of overlapping jurisdiction, where governments must coordinate in order to make effective policy – an environment that has suitably produced a large number of national, intergovernmental agreements.

3. The Size and Status of the Federal Spending Power

Throughout the discussion of constitutional overlap and the division of powers, reference was made to the fact that while Australia is constitutionally a system of cooperative and overlapping federalism, financially, it is very centralized. Examined on the basis of financial criteria, Ronald Watts finds Australia to be the fourth-most centralized in his study (out of fifteen federations), behind only Malaysia, Brazil and

[215] Williams and MacIntyre, "Commonwealth of Australia," 24-25.
[216] Painter, *Collaborative Federalism*, 17.

Nigeria, while ranking ahead of countries such as South Africa and Russia, regimes that are widely regarded as highly centralized.[217]

Before examining the extent of the federal spending power in Australia, it is worthwhile to identify the constitutional basis for it. Unlike federations such as Canada or Switzerland, in which the question of spending power is not specifically addressed by the constitution, Section 96 of the Australia Constitution provides a legal foundation:

> During a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

This Section was included in the Constitution to provide financial compensation to the states for the lost tariff revenue after federation because this form of taxation had been transferred to the Commonwealth.[218] This clause is notable in establishing the Commonwealth's spending power since it not only establishes the federal government's prerogative in transferring funds as it sees fit, but it also enables them to utilize conditional transfers, which can be more controversial and divisive.[219]

If the spending power can be said to have at least some legal foundation, the financial basis is certainly as strong. The strength of the federal spending power begins with the Commonwealth's control of the majority of government revenue. As was the case with many federations, the Commonwealth government took full control of income tax during the Second World War; however, Australia diverged from other countries when the Labor government managed to establish a federal monopoly over this important

[217] Watts, *Comparing Federal Systems*, 3rd ed., 177.
[218] Morris, "Commonwealth of Australia," 48-49.
[219] Ibid, 49-50.

revenue source in the post-war years.[220] In addition to the income tax, the federal government is responsible for the collection and administration of international taxes and tariffs, sales tax, the Goods and Services Tax (GST) and the enterprise (corporate) tax.[221] In terms of revenue, Thorlakson's comparison of six federations found that Australia's federal government held 79% of total government revenues in 1974, 74% in 1984% and 68% in 1994.[222] This was the highest percentage, among the federations studied, in 1974 and 1984, while being surpassed only by Austria (at 73%) in 1994. Watts found similar results for Australia as the federal government's revenues made up 74.4% of the total in 1986, 69.1% in 1996 and 74.8% between 2000 and 2004.[223] This percentage was greater than most of the federations in his study, including Canada, Germany, Switzerland and the United States.[224] By controlling the collection and allocation of a majority of government revenues, the Commonwealth government has a strong financial basis for providing grants and transfers to the states. These revenues often outpace the needs of the federal government spending on their own priorities.[225]

Table 4.1: Percentage of Subnational Revenue from Federal Grants (Australia)[226]

	1972	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Australia	52.90	57.27	57.02	56.19	44.66	40.94	37.23	46.62	45.16	48.67	3

[220] Painter, *Collaborative Federalism*, 16-17. It is worth noting that until the 1960s, the Labor Party of Australia sought to undermine and even abolish federalism in favour of a unitary state that might better realize their economic and social goals.
[221] Morris, , "Commonwealth of Australia," 54. The 1999 Intergovernmental Agreement on the Reform of Commonwealth-State Fiscal Relations established that the Commonwealth government would collect the GST, but the revenues would entirely be transferred to the states as part of equalization.
[222] Lori Thorlakson, "Comparing federal institutions: power and representation in six federations," *West European Politics* 26, no. 2 (2003): 13.
[223] See Watts, *The Spending Power in Federal Systems*, 52 for 1986 and 1996 data and Watts, *Comparing Federal Systems*, 3rd ed., 102 for 2000-2004 data.
[224] Of the cases which are included in both Watts' study and this one, only South Africa had a higher percentage of government revenues allocated to the federal government.
[225] Morris, "Commonwealth of Australia." 56-58.
[226] Results were collected from the IMF's World Financial Yearbook series.

As much of government revenues are placed, at least initially, under the purview of the Commonwealth government, it should not be surprising that Australia's state governments are more reliant on federal transfers than many other countries in this study (see *Table 4.1*). Ranking third among the seven cases might not seem particularly notable, until one examines the numbers more closely. Australia ranks behind only highly centralized South Africa and the nascent federation that is the United Kingdom which is still in the process of devolving its historically unitary financial powers. Moreover, Australia ranks well ahead of the fourth place federation in this comparison, as Switzerland's cantons are only dependent upon federal transfers for 28.83% of their budgets, on average.

Combined with the overlapping constitutional environment, the financial status of Australia's governments creates a situation that has stimulated the growth of intergovernmental agreements. The overlapping nature of the Constitution means that the Commonwealth government is already active within most policy areas in some form, but cannot simply administer its agenda independently. The significant financial powers of the federal government allow for the transfer of a great deal of money to state governments, while not being completely dominant and coercive, as in the South African case. Agreements are often joined with federal spending as a means of ensuring state input and control, while giving the federal government a means of directing funds to specific purposes.[227] As Watts observes, Australia resorts to executive federalism and intergovernmental institutions and forums in order to coordinate between governments (including matters of the spending power).[228] The large record of agreements, covering

[227] Painter, *Collaborative Federalism*, 102-103.
[228] Watts, *The Spending Power in Federal System*, 55.

numerous policy areas, including health, education and government financial arrangements (such as the Intergovernmental Agreement on the Reform of Commonwealth-State Fiscal Relations in 1999 and the 2008 Intergovernmental Agreement on Federal Financial Relations) confirm that, at least in the case of Australia, the spending power has helped to encourage the formation of national intergovernmental agreements.

4. The Size and Scope of the Welfare State

Over the last sixty years, the growth of the welfare state in OECD countries has been a consistent trend observed by political scientists and Australia has certainly contributed to this pattern. The development and expansion of the Australian state during the Second World War and the post-war reconstruction saw the introduction of many of Australia's modern social policies. Between 1943-1949, Labor governments introduced "child allowances, unemployment benefits, sick pay, and health care benefits for the first time at the federal level" while also taking steps to improve existing programs for pensions and maternity allowances.[229] With the defeat of Labor in 1949, the development of the welfare state was not the primary focus of governments, as managing the post-war economic recovery became the priority for the next couple of decades.[230] Increasing economic challenges, both domestically and internationally, as well as a resurgent Labor party, put welfare policies back on the agenda by the late 1960s. First as a vigorous opposition and then as government following the 1972 election, Labor proposed to

[229] Huber and Stephens, *Development and Crisis of the Welfare State*, 175. The Labor government also attempted to amend the Constitution to grant the federal government broader powers to expand the welfare state. The first and broadest proposal was defeated by referendum in 1944, however, a second proposal focusing primarily on aspects of social policy was accepted.

[230] Deborah Brennan, "Social Policy," in *Developments in Australian Politics*, edited by Judith Brett, James Gillespie and Murray Goot, (Melbourne: MacMillan Ltd., 1994), 283.

strengthen the welfare state, most notably through the introduction of universal medical insurance (Medibank).[231] Though some of these initiatives would be delayed or somewhat rolled back by the Liberal government that emerged from the crisis and deadlock of 1973-75, the welfare state continued to grow, especially following the re-election of Labor in 1983.[232]

Table 4.2: Australian Welfare Spending as a Percentage of GDP[233]

	1980	1985	1990	1995	2000	2005	AVG	Rank
Australia	10.6	12.5	13.6	16.6	17.8	17.1	14.7	5

The political conflict which led to the slow development of the welfare state in Australia is clearly indicated by the figures above. At 10.6% of GDP in 1980, Australia's welfare spending ranked behind all other OECD federations in this study (the exception being non-OECD South Africa). By 2000, Australia's ranking increased to fourth, ahead of both Canada and the United States, a function of "catching up" in the development of the welfare state. Overall, Australia ranks only fifth in terms of welfare spending as a percentage of GDP with an average of 14.7%, well behind leaders Germany (24.6%) and the United Kingdom (19.03%).

Table 4.3: Australian Welfare Spending as a Percentage of Total Federal Spending[234]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Australia	N/A	50.10	48.70	47.61	51.98	51.98	56.88	60.10	65.75	64.68	3

[231] Huber and Stephens, *Development and Crisis of the Welfare State*, 175.
[232] Brennan, Social Policy," 286-288.
[233] Data collected from the OECD Social Expenditure Database.
[234] Data collected from the IMF World Financial Yearbook.

The second table (*Table 4.3*) provides further evidence of the slow start to the Australian welfare state, with major increases in the proportion of federal spending coming as late as 2000. As welfare programs expanded, they began to consume ever-larger portions of the federal budget, especially as overall spending did not increase as quickly as during the 1980s.[235]

This information demonstrating increases in welfare state spending does provide a potential explanation for the increasing frequency of intergovernmental agreements in Australia. There have been almost as many national agreements in the last ten years (36) as were formed between 1945 and 1999 (40). There are many potential explanations for this increase – the rise in executive federalism via permanent forums, increased familiarity with agreements as a tool for intergovernmental relations – however, this rise in agreements does correlate somewhat with a growth in welfare spending. Returning to *Table 4.2*, the largest single increase in welfare spending as a percentage of GDP occurs between 1990 and 1995, before reaching its peak in 2000. While this precedes the most active period of national agreement formation, it is plausible that this increase in spending may have produced new areas in which intergovernmental coordination could be addressed via an agreement. As the size and scope of government institutions increased to sustain a larger welfare state, so too did the number of agreements. Examining welfare spending as a percentage of total federal spending (*Table 4.3*) demonstrates a closer correlation, as significant increases in spending occur first between 1995 and 2000, and then again between 2000 and 2005. The types of agreements being formed during this period also lends some credence to this relationship. Between 2000-2008, seven new agreements were created in either the health or welfare policy areas whereas between

[235] Brennan, Social Policy," 286-288.

1990-1999, none of these types of accords were formed (See *Appendix A* for the agreement listing). Though this alone does not entirely explain the difference between the number of agreements between these periods (17 during 1990-1999 and 36 from 2000-2008), it does account for more than a third of the increase. While it is impossible to determine a threshold at which welfare spending produces an increased number of intergovernmental agreements, the correlation between the highest periods of spending and agreement formation indicates a possible relationship.

5. The Existence of Lasting Forums for Intergovernmental Relations

Australia has had a long history of active intergovernmental relations via formal bodies. The origins of permanent forums for intergovernmental relations date back to 1927 and the first written, national agreement: the Financial Agreement.[236] This established the Australian Loan Council, the first formal and permanent intergovernmental body, and these factors made it a unique institution for some years.[237] It contrasted greatly with the informal and more secretive Premier's Conferences, which acted as the general forum for executive federalism in Australia.[238] Australian policymakers would not confine themselves to only two intergovernmental forums however, and the first ministerial councils began to be established. The first, the Australian Agricultural Council, was formed in 1934, with the Australian Education Council following in 1936.[239] These were the precursors to dozens of bodies for intergovernmental interaction specific to a policy field, as a study in 1993 found that there

[236] ACIR, *Compendium of Intergovernmental Agreements*.
[237] See Painter, *Collaborative Federalism*, 103. The Loan Council was added to the Constitution via an amendment in 1928.
[238] Ibid., 103-104.
[239] Richard H. Leach, *Interstate Relations in Australia*, (Lexington: University of Kentucky Press, 1965),50, 72.

were forty-five such bodies active in Australia.[240] Painter describes these as forums for communication and expertise, while Leach identifies their greatest contribution as facilitating the personal contacts which are formed.[241] While many of these bodies were known for "informality, adhockery and secrecy", they still demonstrate the common practice of Australians conducting intergovernmental relations through an institutionalized setting, even if a weak one.[242]

More recently, Australian governments have moved to institutionalize their intergovernmental relations, especially at the executive level. Seeking to increase cooperation and ensure more effective intergovernmental relations – to reduce duplication and deliver services more efficiently, among other goals – Prime Minister Bob Hawke and the Premiers moved to develop a stronger institution for executive federalism.[243] This led to the formation of the Council of Australian Governments (COAG) in 1992 at a Heads of Government meeting creating a formal institution for "peak intergovernmental relations".[244] A secretariat was formed to run this new permanent body and to provide resources to not only first ministers, but also for other government ministers and bureaucrats. At the First Ministers level, the COAG has met at least once every year since its creation, with meetings becoming even more frequent since 2005 (two meetings each between 2005-07, with four each in the last two years).[245] The COAG also helped to

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[240] Painter, *Collaborative Federalism*, 105.
[241] Painter, *Collaborative Federalism*, 105-106 and Leach, *Interstate Relations in Australia*, 73.
[242] Ibid.
[243] Painter, "The Council of Australian Governments and Intergovernmental Relations," 101-102.
[244] Council of Australian Governments, "About COAG," http://www.coag.gov.au/about_coag/index.cfm (accessed August 9, 2009.
[245] Council of Australian Governments. "Ministerial Councils." Canberra: Council of Australian Governments. http://www.coag.gov.au/ministerial_councils/index.cfm (May 3, 2010).

provide structure to the existing plethora of Australian intergovernmental forums, by building connections with existing ministerial councils.[246]

Painter describes the COAG as an important "framework for negotiation, commitment building, and public affirmation of final settlements" which has "facilitated the signing of agreements".[247] An examination of the COAG's records indicates that this assessment is an accurate one. The COAG website lists 15 agreements (and 3 amendments) since 1997 which have been concluded, in some part, through the COAG.[248] Moreover, a detailed examination of the "Meeting Outcomes" section indicates at least 10 other national agreements which have been concluded through negotiation through the COAG.

With at least 25 distinct national agreements having been formed via intergovernmental relations through the Council of Australian Governments, it is clear that this body has had an impact on the formation of agreements. The rapid increase in the number of agreements in the last fifteen years nicely corresponds with the establishment of the COAG, and the body's record of agreement formation clearly indicates a direct and sizeable effect on the number of national agreements.

6. The Number of Subnational Governments at the State/Provincial Level

Australia has six states, all of which regularly participate in intergovernmental relations in Australia. In addition to the states, Australia also has two territories: Northern

[246] The COAG has aided ministerial councils by supplying a complete listing of them and their basic activities, producing "Best Practices" guides and by providing the institutional support to allow for better communication and reporting. This increases the level of institutionalization and permanence in these classically ad hoc organizations. See: http://www.coag.gov.au/ministerial_councils/index.cfm .
[247] Painter, "The Council of Australian Governments and Intergovernmental Relations," 105, 118.
[248] Council of Australian Governments, "Guide to Intergovernmental Agreements," http://www.coag.gov.au/intergov_agreements/index.cfm .

Territory and the Australian Capital Territory. While they do not possess the same power as the states, both have been increasingly involved in intergovernmental relations and are the signatories to virtually all intergovernmental agreements in the period beginning in 2000.

Given the extensive records of national intergovernmental agreements, the number of subnational governments does not provide an impediment to formation of these institutions. The *Compendium of Intergovernmental Agreements* indicates that national agreements - as opposed to bilateral or multilateral ones - seem to be the norm, as it identifies only six agreements with more than three state participants, but less than five, as compared to twenty-three national ones.[249] Moreover, as the previous section will discussed, Australia possesses a multitude of bodies for intergovernmental relations, virtually all of which encourage relations among all subnational governments, as opposed to smaller regional groups. This includes the Council of Australian Governments which provides a permanent institution that meets frequently for the conduct of national intergovernmental relations. Thus, there is no evidence available which would indicate that six subnational governments is any barrier to the formation of national intergovernmental agreements in Australia.

7. The Existence of a Body for Intrastate Federalism

When evaluating whether a federation possesses a legislative body that can serve as a forum for intrastate federalism, the key consideration is the role of the subnational governments. For intrastate federalism to exist, members or representatives of

[249] Australia. Advisory Council for Inter-governmental Relations. *Compendium of Intergovernmental Agreements*. Battery Point: ACIR, 1986. It is also worth noting that at least two of the six regional agreements are water agreements which, by their nature, are geographically restricted.

subnational governments must be active within the national legislative institutions (almost exclusively through a second or upper chamber).[250] This alone is not enough for a functioning body of intrastate federalism. The chamber must also include equal - or at least disproportionate - representation for the subnational governments, otherwise the largest units will dominate in a situation similar to a lower or popular chamber. It must also have tangible authority within the federal legislature to allow the subnational governments to contribute to the legislative process and divert business away from other processes of intergovernmental relations. While the Australian Senate meets two of these criteria, the fact that it is popularly elected means that it acts as only a *partial* body for intrastate federalism. Thus, according to the theory, the Australian Senate should provide only a limited alternative - at most - to the creation of agreements as a means of intergovernmental coordination.

The Australian Senate found its roots in the bicameralism of the individual colonies. All six colonies possessed Legislative Councils, whose primary purpose was to "check the excesses of (the) popular assembly".[251] This familiarity, combined with the bicameral examples of existing federations, made the inclusion of a federal upper chamber a natural fit for Australia. Drawing inspiration from Switzerland and the United States, the framers decided that the Senate would serve the dual purposes of acting as a check on government power and as a body for federalism and state representation.[252] Although New South Wales and Victoria – the most populous colonies – attempted to propose a system of disproportionate, rather than equal, representation, the smaller

[250] Smiley, "Federal-Provincial Conflict in Canada," 15.
[251] Sharman and Moon, "Introduction." 2.
[252] Aroney, *The Constitution of a Federal Commonwealth*, 48.

colonies held firm on their insistence that the distribution of Senate seats be equal.[253] The original Senate of 1901 held to this principle of equality with six Senators per state, with the number increasing to ten in 1948 and twelve in 1984. The one exception to this system of equal representation is the two territories, which each gained two representatives in 1975.

A second criterion of intrastate federalism, that the body must have tangible authority within the federal Parliament, is also met by the Australian Senate. Again, the Australian experience with bicameralism in their colonial governments directly contributed to the design of the Senate. The Senate has "almost co-equal powers with the House", but they differ in a couple of key respects.[254] First, the Senate is unable to introduce or amend supply bills, as enshrined in Section 53 of the Constitution. However, the Australian Senate is not impotent where supply bills are concerned, as compared to the British House of Lords (at least, post-1911).[255] Drawing on the "Connecticut Compromise" from the United States, the Australian Senate may return a supply bill to the House of Commons with a request for amendments; the Senate may also refuse to pass a supply bill entirely.[256] While these powers have occasionally led to deadlock and conflict with the House of Representatives, most notably during several political crises of the 1970s, the Senate still possesses significant, if somewhat restricted, legislative

[253] The larger colonies attempted to propose a system in which there would be tiered representation similar to the current German Bundesrat. That is, smaller states would still have more seats than in a distribution based solely on representation by population, however, larger colonies would be allowed to possess more. See Aroney, *The Constitution of a Federal Commonwealth*, 217-219.
[254] Saunders, "Commonwealth of Australia," in *Constitutional Origins, Structure, and Change in Federal Countries*, 29.
[255] Swenden, *Federalism and Second Chambers*, 75-76.
[256] Ibid. The Connecticut Compromise stemmed from the belief that only the chamber of popular representation could introduce money bills, otherwise it would violate the principle of "no taxation without correct representation".

powers.[257] The second difference in Senatorial powers stems from the issue of supply bills: that is, the Government is not directly responsible to the Senate. The Prime Minister and Cabinet are only technically responsible for maintaining the confidence of the House of Representatives in order to stay in power. This does not mean the Government can afford to ignore or avoid the Senate however, as the upper chamber can make governing difficult, and in some cases impossible.[258] As with supply bills however, the difference between the two is less than in other parliamentary democracies such as Canada and the United Kingdom. Although it was a unique series of events, the deadlocked Parliament of 1975 demonstrated that a determined opposition majority in the Senate can challenge a sitting government and even cause it to fall.[259]

While the Australian Senate clearly meets the intrastate federalism criteria for representation and power, it clearly fails in the category of representing the interests of state governments. Much of this can be attributed to the fact that Senators are directly elected by the people, the practice of four of the six colonial upper chambers during the federation debates of the 1890s.[260] Some debate did occur as to whether Australia should follow the American and Swiss examples of placing the selection of representatives in the

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[257] The political crises of the Australian Parliament in the 1970s stemmed in great part from a split in party control of the two houses. The House of Representatives, and thus the Government, were controlled by the Australian Labor Party, which had secured its majority based on support in the more populous states. The Senate, however, was controlled by a coalition between the Australian Liberal and National Country Parties. Under their leadership, the Senate refused to pass much of the Government's legislation, including supply bills. While it is impossible to fully describe this fascinating period of Australian political history here, this period did indicate one other inequality between the House of Representatives and the Senate. In cases of true deadlock, the Governor General can call a joint sitting of the House and the Senate to resolve it (this occurred for the first and only time in August of 1974). With approximately double the membership, the House gains an advantage over the Senate in these circumstances.

[258] Saunders and Le Roy, "Commonwealth of Australia," 44-45.

[259] Technically, the Government was not defeated by the Senate, but the insurmountable deadlock led the Governor-General to dissolve both houses of Parliament and call new elections.

[260] Only New South Wales and Queensland did not hold elections for their Legislative Councils, Swenden, *Federalism and Second Chambers*, 72-73.

hands of the state governments.[261] However, Alfred Deakin's argument that the state's interests could not be separated from that of the people eventually was accepted, leading to the popular election of Senators.[262] As the state governments do not directly take part in the selection of these Senators, the Senate cannot function as a body in which these governments can negotiate with each other. Though Senators could, in theory, represent many of the same interests as their state governments, in practice it is party affiliation that seems to be the most powerful influence in the Senate.[263] This has been exacerbated by the use of proportional representation in state-wide constituencies as the means of selecting Senators, meaning that issues in the Australian Senate often break down along party lines, limiting some of the freedom of representatives to speak directly for their state.[264] Where state interests are realized, it is through the advancement of a party's agenda, and not from a state Senator individually advancing their own interests.

The Senate of Australia remains an important and influential body in Australian politics, even when that serves a federal purpose of empowering smaller states. However, with directly elected Senators voting along party lines, it cannot be said to act as a body for full intrastate federalism. As such, the business of the Senate does not seem to take the place of intergovernmental relations via executive federalism, which might impede the formation of national intergovernmental agreements. The large number of agreements in Australia demonstrates that the Senate is not an active limitation to agreements.

Conclusion

[261] Aroney, *The Constitution of a Federal Commonwealth*, 217-18.
[262] Ibid., 195.
[263] Swenden, *Federalism and Second Chambers,* 200-201.
[264] Brian Galligan and John S. F. Wright, "Australian Federalism: A Prospective Assessment," *Publius* 32(2) The Global Review of Federalism (Spring, 2002): 147-166.

Australia is one of the most prolific federations when it comes to creating national agreements, with 76 formed between 1945 and 2009 a rate of 1.27 per year.[265] This places Australia in the group of the most active agreement-forming federations, along with Canada and Germany, all of which average at least one national accord per year. As such, it would be expected that Australia should exhibit strong features conducive to intergovernmental coordination, with limited inhibitors and alternatives - something this chapter has demonstrated.

In many ways, Australia operates as a model federal environment for the formation of intergovernmental agreements. Constitutionally, it is not so centralized as to impede the autonomy of the states to form agreements. Instead, constitutional overlap is the most significant feature, with both the Commonwealth and State governments active in most areas of public policy. This extensive concurrency creates numerous areas where the formation of agreements can coordinate government activity. The use of the federal spending power by the Commonwealth government has only served to increase the number of potential areas for collaboration between governments, encouraging the formation of agreements in order to control the use of these funds. Finally, the small number of subnational governments means that Australia's agreement formation is not impeded or inhibited by basic coordination problems. Moreover, relations between the states and the Commonwealth cannot be conducted through the Senate, as it does not possess a full degree of intrastate federalism.

While Australia has a fairly active record of agreement formation (at least, comparatively), the explosion in the rate of agreement formation in the last fifteen years seems to correspond with two of the variables. First, there has been a significant growth

[265] Reliable data was not available between 1987 and 1989.

in welfare spending since 1990, potentially increasing the number of programs and initiatives which can be coordinated via an agreement. Second, the formation of the Council of Australian Governments in 1992 has provided a permanent and institutionalized body for intergovernmental relations – one that has been important in the negotiation of intergovernmental agreements. These developments provide Australia with one of the most fertile environment for the formation of national intergovernmental agreements, as the factors that encourage agreements are all present, while those that would discourage them are almost entirely absent.

With no significant inhibitors or alternatives, the strong factors conducive to coordination create an environment with a high likelihood of intergovernmental agreements. This can be expressed using the summary formula in the following terms:

CON (*Strong*) – INH (*None*) – ALT (*Weak-none*) = High IGA Formation

With a large number of agreements, the finding that Australia has a high potential for these intergovernmental institutions is fully consistent with the hypothesis. In Australia, at least, the institutional environment provides a sound explanation for the formation of intergovernmental agreements.

Chapter Five: Canada

Source: CIA World Factbook

Formal Name: Canada

Capital: Ottawa, Ontario

Subnational Governments: There are ten provinces, which possess full constitutional authority: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. There

are also three territories that possess more limited authority: Northwest Territories, Nunavut and Yukon Territory.

Introduction:

Canada, the second largest country in the world, has relied on its federal system to help manage the challenges of multiple geographic, economic and social cleavages. Canada's complex geography and history has spurred the development of a diverse economy across its many regions, as different industries – energy, manufacturing, mining, finance and agriculture, to name but a few – have been concentrated in different areas of the country. This has led to the development of regional political cultures. Most notably, Canada's federal arrangements have been marked by conflict and cooperation between the province of Quebec – the homeland of most of the country's Francophone minority – and the rest of Canada, which is primarily English-speaking. Yet, in spite of these potential cleavages (or perhaps because of them), Canada is one of the oldest federations in the world and the largest by geographic size.[266] While Canada continues to face challenges, it provides a fascinating case of a large and dynamic federation.

History:

Much like Australia and the United States, the land that would become Canada was inhabited by Aboriginal groups for thousands of years prior to the arrival of Europeans. European explorers and immigrants began to arrive throughout North

[266] While some scholars (including Ronald Watts) have classified Russia as a federation, the country (particularly the current administration) has shown a relatively weak commitment to federalism and democracy, with replacement of elected officials by ones appointed by the central government, de facto one party rule and very limited powers for the subnational governments.

America during the 16th century, with Great Britain founding a number of settlements, notably the Thirteen Colonies of America, and the French establishing a collection of colonies along the St. Lawrence River known as "New France".[267] This sizeable French colony would distinguish the development of Canadian politics and federalism from the American and Australian experiences by forcing two different linguistic and cultural groups to (eventually) reach an accommodation. A series of global wars between European colonial powers beginning in 1701 would entwine the fates of these British and French colonies.[268] Culminating in the Seven Years' War (1756-1763) and the Battle of the Plains of Abraham, the British defeated the French forces in Canada and annexed all their colonies. From this point forward, British authorities in North America would have to grapple with the challenges of dealing with a large French population under their rule, a people that would be a majority in Canada until the 1850s and a significant minority thereafter. Colonial leadership vacillated between attempts at accommodation – the Quebec Act of 1774 – and assimilation - Lord Durham's Report and the 1840 Act of Union –all while a surge of Loyalist immigrants from the newly independent United States boosted the English population of all the colonies of British North America.[269]

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[267] Known as *Nouvelle-France* to its own colonists.

[268] This began with the War of Spanish Succession – known as Queen Anne's War in the North American theatre – beginning in 1701 and ending in 1714. The British annexed Rupert's Land (an area around Hudson's Bay), Newfoundland and Nova Scotia (minus Cape Breton). Between 1744 and 1748, British and French forces clashed again in King George's War, but this led to minimal territorial transfers. Finally, the French and Indian War, which began in 1754, two years before the major global conflict of the Seven Years' War (of which it is seen to be a part), was the largest conflict of the three wars, with fighting from the Caribbean to Northern Canada. The near-total defeat of the French in North America led to the Treaty of Paris 1763 through which the French forfeited all territory in Canada in exchange for the return of their sugar islands in the Caribbean.

[269] Following the American Revolutionary War, the remaining British colonies in North America included: New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Quebec, which included both the original French colony of New France and what would become the area known as Ontario. This Colony was renamed Canada and divided into Upper Canada (Ontario) and Lower Canada (Quebec) in 1791.

By the mid-19th century, pressures were building towards increased autonomy from Great Britain, if not outright independence. The two rebellions of 1837 in York (modern-day Greater Toronto Area) and Montreal may have been small in terms of participants and casualties, but they emphasized a growing demand for responsible government for the colonists. Yet the first attempt at a parliamentary government for a newly united province of Canada resulted in political deadlock and a lack of effective governance, leaving the desire for self-government unfulfilled.[270] Added to this were the interests of powerful businessmen and politicians from Canada, as well as the Maritime colonies, who saw potential economic gains from closer trade relationships. Meanwhile, the Imperial Government in London was increasingly weary of the cost of supporting and defending their North American possessions, while still wary of American aggression.[271]

Separately, the colony of Canada and the Maritime colonies began to move towards autonomous federations. Individually, these efforts met with some obstacles, notably in Canada where the issue of deadlock remained unresolved. However, a meeting on Maritime union scheduled for 1864 in Charlottetown, Prince Edward Island provided the perfect opportunity to find a joint solution to these challenges, and representatives from the united province of Canada joined their Maritime counterparts in negotiations. Agreeing in principle to some form of federal union, the leaders left the details of this new bargain to be decided in a two week conference in Quebec City in 1865.

The proceedings of the Quebec Conference of 1865 provided the framework for Canada's federal system and the *British North America Act 1867*, Canada's original

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[270] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., (Toronto: University of Toronto Press, 1993), 14-16.

[271] See Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 4th ed. (Montreal & Kingston: McGill-Queen's University Press, 2004), 23-25 for a discussion of these factors leading to Confederation.

constitution. Perhaps the most vigorous debates concerned the power and scope of the new national government. A federal system was seen as a necessity because the French Canadian population of Quebec sought a jurisdiction where they could manage language and cultural affairs as the majority, while the smaller Maritime provinces were wary of being ignored politically if all power was exercised by the centre.[272] However, the American Civil War (1861-65) was only just concluding as the conference began and this gave the delegates a clear view of the potential dark side of federalism and the price of failure. The American experience, combined with the British tradition of unitary government helped to forge a group of delegates opposed to federalism, or at least, opposed to a decentralized federation. After much debate and compromise, delegates eventually agreed on a set of resolutions which would reserve to the provinces power over "local matters" (including education, charitable and religious matters, healthcare, municipal governments, business licensing and public lands) while centralizing power over foreign relations, defence and the economy (via authority over monetary and fiscal policy, as well as broader taxation power) to the federal government.[273] Both English and French were recognized as official languages. In 1867, the Parliament at Westminster in London passed the *British North America Act,* founding the new Dominion of Canada as a new federation of four provinces: Nova Scotia, New Brunswick, Quebec and Ontario.[274] Over the next forty years, Canada experienced rapid territorial expansion, as the four

[272] See Russell, *Constitutional Odyssey*, Chapter 3 or Martin Ged, ed., *The Causes of Canadian Confederation*, (Fredericton: Acadiensis Press, 1990) for a good discussion on the dynamics and debates during the constitutional negotiations.
[273] Canada, *The Constitution Act 1867*. The inclusion of education, healthcare, language and charitable matters within the provincial sphere of Section 92 of the BNA Act 1867 was essential to appease the demands of Quebec delegates.
[274] The provinces of Ontario and Quebec were founded from the division of the old united province of Canada.

original provinces were soon joined by other British colonies as well as new jurisdictions carved out of other British possessions on the Canadian prairies.[275]

Since Confederation, Canada has not only grown geographically, but culturally, economically, demographically and politically. Traditional sources of immigration from the United Kingdom were soon supplemented by new waves of newcomers from central and eastern Europe, as well as east Asia. Since the Second World War, immigration to Canada has diversified further, leading to the enshrinement of multiculturalism both as a policy and a part of the country's identity.[276] Despite this increasing ethno-cultural diversity, the early tensions between the English and French persisted, and were even exacerbated. A decade long process of cultural change in Quebec known as the "Quiet Revolution" saw the rise of a more confident and assertive Francophone political culture in Canada's second-largest province.[277] Sovereigntist movements developed in the province after some of Quebec's demands were not realized, leading to referendums on sovereignty in 1980 and 1995, the latter of which only just failed.[278] The federal and provincial governments of Canada today continue to try to strike a balance between managing this traditional cleavage and coping with the realities of a large, sparsely

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[275] British Columbia (1871), Prince Edward Island (1873), and Newfoundland (1949) were all pre-existing British colonies which joined Canada. The remaining three provinces, Manitoba - which included part of the pre-existing Red River Colony (1870), Alberta (1905) and Saskatchewan (1905) were carved out of Rupert's Land, a gigantic swath of territory across the Canadian Shield, Prairies and North. This was purchased from the Hudson's Bay Company by the Canadian government in 1870 and renamed the Northwest Territories.

[276] Statistics Canada. "Immigrant Status and Period of Immigration and Place of Birth of Respondent for Immigrants and Non-permanent Residents, 2001." http://www12.statcan.ca/english/census01/products/standard/themes/RetrieveProductTable.cfm?Temporal=2001&PID=62124&APATH=3&GID=431515&METH=1&PTYPE=55440&THEME=43&FOCUS=0&AID=0&PLACENAME=0&PROVINCE=0&SEARCH=0&GC=99&GK=NA&VID=0&VNAMEE=&VNAMEF=&FL=0&RL=0&FREE=0 (accessed January 15, 2011).

[277] Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism*, (Toronto: University of Toronto Press, 1990), 176-186.

[278] The final margin in the referendum of 1995 was razor thin, with 50.58% voting "no" to secession.

populated territory, different economic interests and the emerging issues of a multicultural population.

Government and Political Structure:

While Canada's history may be rooted in the struggles and successes of the British and French cultures, its government and political structure draw almost exclusively from the English tradition. Canada's parliamentary government is a near-carbon copy of the Westminster Parliamentary system, even to the point of sharing the same head of state. Moreover, unlike Australia – which has experience with more direct democratic measures and strong upper houses – Canada has kept close to British traditions in the operation of its political institutions.

Canada's federal Parliament is composed of two bodies: the popular (sometimes called "lower") chamber known as the House of Commons and the appointed (or upper) chamber known as the Senate. These chambers are organized along the same lines as their British predecessors with the Commons elected by the people and the Senate appointed by the monarch (or more specifically, the Crown in Canada, represented by the Governor-General), on the advice of the government.[279] Members of the House of Commons, known by the generic title "Member of Parliament" (MP), are elected in single member constituencies by a plurality of the vote. There are currently 308 MPs in the House of Commons, but unlike other countries, there is no upper limit set by the

[279]There are two notable differences between the British House of Lords and the Canadian Senate. The first is that, in the absence of a landed aristocracy, all members of the Senate would be appointed to lifetime terms (recent changes to limit life peerages in the United Kingdom have brought the Lords closer to this model). The second difference is that the Canadian Senate is explicitly appointed along regional lines.

Constitution and the number may be increased via federal legislation.[280] Seats are allocated by province roughly in accordance with their share of the population; however, Canada does not adhere too closely to the principle of "representation by population".[281]

The Canadian Senate is primarily drawn from the British example, with at least a token influence from the American experience. The 105 Senators that sit in the upper chamber are appointed by the Governor-General based upon the recommendations of the Prime Minister, who, in practice, makes the selection. Much like the House of Lords, the Senate was expected by the Fathers of Confederation to serve as a body for "sober second thought" and to curb any potential "excesses" of the House of Commons.[282] The diversity of the country and the needs of the federal system added an additional role to these traditional functions: regional representation. During the Confederation debates, it was decided that seats in the Senate would be allocated equally by regions in order to provide greater representation for small provinces; these regions (Atlantic Canada, Ontario, Quebec and, eventually Western Canada) each received 24 Senators.[283] However, much like representation by population in the House of Commons, Canada's commitment to this principle has not been absolute, as Newfoundland's entry into Confederation in 1949 upset this balance.[284] Along with the undemocratic selection method, the Senate has been the focus of a great deal of criticism for its problems with regional and provincial representation. There is no formal provincial role, either de jure

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[280] The only constitutional limitations on the number of Members of Parliament are various "floors" to the numbers of representatives from each province, which encourages "parliamentary inflation" over time in order to keep some degree of representation by population.
[281] David C. Docherty, *Legislatures*, (Vancouver: University of British Columbia Press, 2005), 74-76.
[282] Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal, (Montreal & Kingston: McGill-Queen's University Press, 2003), 3-8.
[283] Russell, *Constitutional Odyssey*, 25.
[284] Following the example of the four western provinces, Newfoundland was granted 6 seats in the Senate, bringing Atlantic Canada's total to 30.

or de facto, in appointments.[285] Whatever the controversy pertaining to the type and selection of representatives, Canadian Senators are still entrusted with substantial powers. The Senate possesses legislative powers similar to the House of Commons, including the ability to introduce legislation – with the exception of bills concerning financial matters – and the prerogative to unilaterally amend or defeat legislation.[286]

The government of Canada essentially is the federal Cabinet, led by the Prime Minister. As with other parliamentary systems, the government must maintain the confidence of the legislature in order to wield power. In Canada, only the House of Commons is able to defeat the government in a confidence vote and virtually all members of the Cabinet are drawn from the Commons.[287] The prevalence of single-party majority governments in Canadian politics means that such defeats occur only during periods of minority government.[288] This security, along with strong traditions of party discipline, has invested the Cabinet, and specifically the Prime Minister, with a great deal of authority and control.[289] This is particularly interesting given that the Constitution provides very few specifics on Government of Canada, failing to mention the workings of Cabinet and completely omitting the role of the Prime Minister.

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[285] On rare occasions in the past, prime ministers have sought provincial advice, notably when Brian Mulroney appointed Stan Waters in 1990, who had been elected in a special Albertan Senate election.
[286] See David E. Smith, *The Canadian Senate in Bicameral Perspective*, (Toronto: University of Toronto Press, 2003), Chapter 6 for a good overview of the Senate's role in the legislative process.
[287] Aside from the Government Leader in the Senate, it is rare for a Senator to be named to the Cabinet (though this was more frequent during the 19th century). On rare occasions, the Cabinet may include a Senator or two, usually to bolster the representation of regions which are under-represented in the Government's caucus in the House of Commons.
[288] Unlike other parliamentary governments, specifically those in Continental Europe (such as Germany), Canada has virtually no history with coalition governments. Even during periods of minority parliaments (such as the recent Conservative minority, 2004-2011), the largest party in the House of Commons tends to govern without a formal partner.
[289] See: Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics*, (Toronto: University of Toronto Press, 1999).

Canada's provincial governments are structured along the same lines as the national Parliament, with the notable difference that they are now unicameral. Each province is led by a Premier, who draws a cabinet from members of the legislature. Elections to provincial legislatures are the same as in national contests, and there are frequent single-party majorities dominated by the Premier and central party leadership.[290] This creates a system that endows the Premiers with substantial authority, and makes the executive powerful and primordial in intergovernmental relations (as will be explored in greater detail in section seven, concerning forums for intergovernmental relations).

Intergovernmental Agreements in Canada:

Agreements between governments in Canada are generally referred to as "intergovernmental agreements" in academic literature, a term that applies to concords of both a federal-provincial or interprovincial nature. This categorization brings some uniformity to a field that would otherwise be dominated by a chaotic lexicon of terms for formal partnerships, including "memorandum of understanding", "accord", "co-operative action framework", "provincial-territorial protocol", "national program" and many more. As of 2002, there were at least 39 different terms for intergovernmental agreements in English and another 36 in French.[291] This semantic diversity also suggests a lack of consistency in the style, format and effect of intergovernmental agreements in Canada. Unlike South Africa, which has issued an actual template for agreements, the United Kingdom, which has produced guidelines and briefings for concordats, and the United States, which has one type of agreement enshrined in the Constitution, Canada has no

[290] Graham White, *Cabinets and First Ministers*, (Vancouver: University of British Columbia Press, 2005), 74-77.
[291] Poirier, "Intergovernmental Agreements in Canada," 428.

guiding format or law governing the use of agreements. Thus, intergovernmental agreements in Canada can be formal or informal, take a variety of formats and deal with virtually any area of government policy.

This breadth – and in some senses, ambiguity – is reinforced by the lack of a clear legal definition for intergovernmental agreements. Neither the Constitution nor a single framework agreement have established the legality of agreements, a vacuum which finally led to a court challenge in 1991. In the *Reference re: Canada Assistance Plan* case, provincial authorities challenged the federal government's unilateral abrogation of an existing intergovernmental agreement.[292] The Court held, however, that the federal government was not constrained by the agreement and was within its constitutional right to make changes unilaterally. While this ruling did not eliminate the possibility that certain agreements could be justiciable, it did establish that written agreements between governments were not intrinsically legal matters, but rather political ones.[293]

These uncertainties have certainly proved to be no limitation to the formation of intergovernmental agreements in Canada. Agreements between provincial governments or between Ottawa and some of the provinces are common, with Poirier estimating that more than 1000 have been concluded overall.[294] National intergovernmental agreements – the focus of this study – have been numerous as well, with approximately 92 having been concluded between 1945 and 2008, a rate of 1.46 per year (see *Appendix B)*. Unfortunately, this number can only be a very close approximation as there was no central registry to gather data from. Instead, records of agreements were drawn from a

[292] The case concerned the federal government unilaterally capping increases in transfer payments under the Canada Assistance Plan, despite an earlier agreement with the provinces as to the rate of increase. See: Supreme Court of Canada, *Reference re Canada Assistance Plan (B.C.)* (1991) 2 S.C.R. 525.
[293] Poirier, "Intergovernmental Agreements in Canada," 431-433.
[294] Ibid., 428. This estimate surely includes national accords which are formally concluded as separate bilateral agreements between Ottawa and each of the provinces.

number of sources, including complete listings from the provincial governments of Alberta and Quebec, a partial listing from Newfoundland, a listing of federal agreements concluded before 1981 in a report by the Senate entitled *Fiscal Federalism in Canada* and records from Johanne Poirier, who recorded some of the agreements in a central federal registry in 2000 before it was made inaccessible (see the chapter on methodology for more details).

This is one of the highest levels of national agreement formation found in this study, placing Canada second and in a group with Germany and Australia as countries that are very active.[295] The remainder of this chapter will assess this large number of agreements and determine whether it is consistent with the seven variables that may affect agreement formation.

1. The Degree of Overlap that Exists in the Constitution

When designing the Canadian Constitution, the Fathers of Confederation defined what they believed to be clear areas of authority for the federal and provincial governments. Unlike their American predecessors, the Canadian constitutional framers explicitly listed the competencies for both the federal and provincial orders of government, rather than simply defining one and leaving the other the undefined residual power. Furthermore – and contrary to the future tradition of many European federations – Canada's framers limited the areas of explicit concurrency to only two: agriculture and immigration (authority of pensions was added to this group through a constitutional

[295] The ranking of Canada as second is due to the estimated number of German national agreements. While more agreements are listed for Canada than Germany in the appendix, this listing of German agreements is restricted to only one (staatsverträge) of two main types. Thus any rough estimate of German agreements places it ahead of Canada. See the chapter on Germany for more information on these estimates.

amendment in 1951).[296] In theory, this leaves Canada with a Constitution that clearly defines jurisdictions for the federal and provincial governments, with a very small number of areas where both are competent, and thus, a low level of constitutional overlap.

Of course, explicitly concurrent jurisdictions are not the only measure of overlap in a constitution. The other source is de facto overlap that develops from both orders of government having authority in a single policy area based on different exclusive powers; this is the primary type of overlap found in the Canadian Constitution. There are a number of examples of this occurring in Canada, as both the federal and provincial governments have authority in areas such as transportation, law enforcement, environmental policy and language and culture. Combined with existing concurrent jurisdictions of agriculture, immigration and taxation, this represents a not inconsiderable number of areas in which jurisdictions overlap.

Ronald Watts' study of federal constitutions can assist in quantifying the extent of overlap as well as providing a basis for comparison with other federations. According to his analysis of 48 policy areas, only 3 (6%) are explicitly concurrent; however, there are another 19 areas in which both the federal and provincial governments have overlapping jurisdiction, for a total of 22 of 48 or 46% (See *Appendix H* for more information). Compared to other federations, this level of constitutional overlap is in the lower range, though not at the extreme end. Canada ranks 5th, in the same area as 6th-placed Switzerland (43%), but not close to the lowest level of concurrent and shared jurisdictions found in the United Kingdom (22%). This level of overlap is much lower than the leaders, Germany (75%) or Australia (70%).

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[296] Richard Simeon and Martin Papillon, "Canada," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 100.

It is also worth noting that unlike federations such as Germany and Switzerland, there is a unity of legislative and executive authority in the Canadian division of powers. The order of government that is able to legislate in a matter is fully capable of implementing legislation and both the federal and provincial governments possess fully developed and autonomous bureaucracies. This eliminates the possibility of overlap emerging from the division of the legislative and executive processes.

Canada's low level of constitutional overlap creates something of an inconsistency between it and the two other federations that formed a large number of national intergovernmental agreements, Australia and Germany. While the simple explanation for this is simply that other factors have been more important to the formation of agreements in Canada, a closer examination of the agreements themselves does demonstrate that it would be unwise to completely reject overlap in the Canadian case. Approximately 25% of all national agreements in Canada pertain to some element of agriculture or food management, one of the few areas of strict concurrency. Moreover, another 20% fall into categories of clearly overlapping jurisdiction such as environmental regulation, justice and law enforcement, immigration and pensions. Thus, even if Canada does not have a high degree of constitutional overlap, those policy areas that involve both the federal and provincial orders of government have produced a significant number of agreements.

Even with this important caveat, it is probably unwise to try to stretch this explanation for Canada's record of agreement formation too far. Canada's overall levels of constitutional overlap remain on the lower end of this comparison and even though some concurrent and shared areas of jurisdiction have produced a large number of agreements, there are also numerous agreements in areas such as education, which have more "watertight" properties.

2. The Degree of Centralization in the Constitutional Division of Powers

It might come as a surprise to certain provincial politicians, but comparatively, Canada exhibits a greater degree of decentralization in its constitutional division of powers than most other federations (at least those included in this comparative study). Canada's Constitution establishes significant areas of jurisdiction for the provinces, and these have generally held up against federal encroachment over time. Additionally – and unlike other federations in this analysis – Canada's federal government lacks effective constitutional override provisions such as broad legislative oversight, expansive emergency powers or special instruments or mandates that would allow it to change subnational legislation or direct it to specific tasks.

This relatively decentralized system might also surprise many of the Fathers of Confederation, as Canada's Constitution was not deliberately designed in this fashion. As mentioned earlier in this chapter, Canada's constitutional authors felt they were designing a highly centralized federation, free from the substantial subnational powers that they felt helped to destabilize their American neighbours.[297] Instead, Canada's current constitutional trends came about through an extended period of political evolution and judicial interpretation which began shortly after 1867. This saw the expansion of provincial powers, limitations placed on federal jurisdiction and an effective elimination of the federal government's special prerogatives of reservation and disallowance.[298]

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[297] Edwin R. Black, *Divided Loyalties: Canadian Concepts of Federalism*, (Montreal & Kingston: McGill-Queen's University Press, 1975), 31-32.

[298] Both of these powers are rooted in the prerogatives of the Crown and its representatives in the provinces (known as Lieutenant-Governors). They are described later in this section; see page 150-151.

One of the curiosities of Canada's constitutional history is the reliance upon the United Kingdom for legal doctrine and judicial interpretation. Until 1949, the highest court of appeal in Canada was not the Supreme Court, but rather the Judicial Committee of the Privy Council (JCPC), a group of legal experts and judges in the British House of Lords. Thus, all disputes concerning the division of powers were ultimately decided not by the federally appointed Supreme Court, but by the distant, imperial JCPC. This may account for the completely opposite path in Canadian jurisprudence compared to their American neighbours. In the United States, a more decentralized constitution was pulled in the opposite direction by a Supreme Court that expanded the scope of federal powers, while in Canada, the reverse was true.[299]

The period of 19th century jurisprudence was particularly influential in defining the division of powers in Canada and its relatively decentralized outcome. Macdonald and many of his supporters believed that they had endowed the federal government with sufficient powers to remain dominant. Specifically, federal authority over trade and commerce (Section 91(2)) was seen as a centralizing federal power, (akin to the Interstate Commerce clause in the United States).[300] Perhaps understanding that this general economic power might not be enough, the Canadian Constitution also allocated to the federal government general residual power and the ability "to make laws for the Peace, Order and good Government of Canada".[301] This so-called "POGG" clause was meant to

[299] This parallel is even more accurate when one considers that in many of the key cases in which the JCPC ruled in favour of expanding provincial jurisdiction (or limiting federal), the case was initially ruled in the opposite fashion by the Supreme Court of Canada. Without the intervention of the JCPC, it is likely that Canadian jurisprudence would have paralleled the American example. See: Russell, *Constitutional Odyssey*, 41 and Stevenson, *Unfulfilled Union*, 45-49.
[300] Russell, *Constitutional Odyssey*, 41-43.
[301] Section 91.

provide federal authority for any matter that was not explicitly under provincial jurisdiction and encourage federal dominance in any disputes.

It seems the JCPC had another perspective on how these powers should work in practice. Between 1880 and 1896, the most active period of judicial appeals concerning the division of powers, 18 cases were heard by the high court. Of these, 75% (15) were decided in favour of the provinces.[302] In a series of important decisions, the JCPC generally curtailed the reach of both the trade and commerce power and the POGG clause, while at the same time affirming provincial authority over property rights and civil law.[303] The JCPC also eroded the semi-colonial status of the provinces by declaring that they were as entitled to the prerogatives of the Crown as the federal government, reinforcing the concept of divided sovereignty in Canadian federalism.

These rulings may have occurred decades prior to the period that is being analyzed but they form the basis for understanding the modern Canadian Constitution. While more recent domestic courts have not been quite so one-sided in their rulings, the initial interpretations by the JCPC formed the basis for modern Canada's relatively decentralized Constitution.[304] Provincial governments, generally eager to maximize their power, have been keen to protect their jurisdiction, whatever its origins. The consequence of this is that, unlike in some other federations, federal encroachment into provincial or even shared jurisdiction must be negotiated rather than simply asserted under the auspices of a general constitutional principle. Intergovernmental conflict and legal challenges are often the result when the federal government tries to intrude over

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[302] Russell, *Constitutional Odyssey*, 42.
[303] Stevenson, *Unfulfilled Union*, 48-51.
[304] Donald. V. Smiley, *Canada in Question: Federalism in the Seventies*, 2nd ed., (Toronto: McGraw-Hill Ryerson, 1976), 23-24.

provincial objections. Moreover, despite the opportunity afforded them by Section 94 of the Constitution, no Canadian provinces have delegated any constitutional responsibilities to the federal government.[305]

The decline in the use of the federal instruments of reservation and disallowance has paralleled and reinforced this trend of decentralization. Both of these involved the use of Crown powers by the Lieutenant Governor of a province, technically a representative of the monarch, but in practice, appointed on the advice of the federal government. Reservation allowed a bill passed by a province to be held back for up to a year (by the Lieutenant Governor refusing it royal assent) to allow the federal government to consider the matter. Disallowance was the outright refusal of a Lieutenant Governor to sign a provincial bill into law. Both of these powers were exercised at the discretion of the federal government, mimicking two of the methods that imperial Britain used to control local legislatures when Canada was a collection of colonies.

Early Canadian history saw a widespread use of both of these powers, allowing the federal government to strike down provincial legislation that it found undesirable. Between 1867 and 1896, the federal government used these powers to disallow 65 provincial acts, an average of just over two per year.[306] This proved to be the peak for reservation and disallowance however, as the 20th century saw a marked reduction in their usage. Since 1911 disallowance has only been used 17 times, with the most recent occurrence in 1943. Reservation has been used more recently (1961), but it has not led to

[305] Marc-Antoine Adam, "Fiscal Federalism and the Future of Canada: Can Section 94 of the Constitution Act, 1867 be an Alternative to the Spending Power?" in *Transitions: Fiscal and Political Federalism in an Era of Change*, ed. John R. Allan, Thomas J. Courchene and Christian Leuprecht, (Montreal & Kingston: McGill-Queen's University Press, 2009), 308-310.
[306] Russell, *Constitutional Odyssey,* 39.

the rejection of legislation since before 1945, the starting point of this study.[307] This erosion of these special override clauses stands in contrast to other federations, but especially the United States where the national government commonly uses coercive tools such as "mandates" in intergovernmental relations.[308]

The consequence of the growth of provincial power through judicial interpretation and the erosion of reservation and disallowance is a more decentralized federation compared to both Canada's past and other federal countries. As Simeon and Papillon put it:

> The result is a high degree of autonomy for the provincial governments combined with a high degree of interdependence among them. Intergovernmental cooperation and coordination is necessary if the needs of citizens are to be met effectively.[309]

This is consistent with the high level of intergovernmental agreement formation found in Canada – indeed it encourages them! Strong provincial powers, defined by early court decisions and defended by assertive Premiers, combined with a lack of coercive federal override clauses have created an environment in which most federal initiatives must be negotiated with the provinces, rather than simply imposed (a result seen in the more centralized federations in this study). Moreover, provinces must negotiate with each other to deal with inter-jurisdictional issues. This creates more opportunities for intergovernmental agreements to be made, which helps explain their frequency in Canada.

3. The Size and Status of the Federal Spending Power

[307] It must be noted, however, that these powers still technically exist in the Constitution.
[308] For more, see the Chapter 10 (United States).
[309] Simeon and Papillon, "Canada," 92.

When considering how the federal spending power affects the formation of intergovernmental agreements in Canada, it is important to reiterate that there are two components to this variable. The first is a quantifiable measurement of how much the federal government spends by transferring money, both conditionally and unconditionally, to the provinces while the second is a more complicated question of the legitimacy, scope and use of this type of spending.

Much like the constitutional division of powers, Canadians might be surprised with the level of financial decentralization that exists, especially when placed in a comparative context. When Canada's original constitutional document – the British North America Act – was brought into law in 1867, excise taxes and duties were the sole responsibility of the federal government, something that guaranteed the financial supremacy of Ottawa.[310] Direct sources of taxation – sales taxes, personal and corporate income taxes – were equally available to both the federal and provincial governments, but at the time, these were inconsequential, reserved only for emergencies. The same could be said about natural resources and licensing fees, revenue streams primarily reserved to the provinces. However, in the postwar era of this analysis, the tables have turned. Tariffs are increasingly limited as a source of government revenue, especially after the passage of the Free Trade Agreement with the United States in 1989. Instead, personal and corporate income taxes, as well as sales taxes have become the most important revenue sources and they are accessible to both orders of government.[311] Moreover, the growth of Canada's natural resource industries, especially the highly lucrative oil and gas

[310] Stevenson, *Unfulfilled Union*, 32.
[311] Statistics Canada, "Consolidated provincial and territorial government revenue and expenditures, by province and territory, 2009," http://www40.statcan.gc.ca/l01/cst01/govt56d-eng.htm (accessed November 18, 2010).

sector, has left the provinces with near-exclusive jurisdiction over one of the most valuable sources of funds. This contrasts with other federations such as Australia and the United States, where the federal government has significant claim over resource revenues.

This is all to say that it should not be surprising that Canada's provinces are among the least dependent upon federal funds in this study. The table below illustrates the relatively low percentage of provincial revenue that is dependent upon federal transfers in Canada.

Table 5.1: Percentage of Subnational Revenue from Federal Grants (Canada)[312]

	1971	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Canada	25.99	24.24	20.66	20.42	18.20	17.48	14.44	18.07	18.94	19.83	6

Canada's sixth-place ranking is ahead of only Germany in this measure of financial decentralization, and clearly behind fifth- place America (26.56% average). More recently, the provinces' reliance on federal revenues may be even smaller. Using a different calculation, Watts' review of the distribution of finances in federations found that, between 2000 and 2004, Canadian provinces relied on federal transfers for only 12.9% of revenues, placing them last of 16 countries (including Germany).[313] Additionally, the significant role of an unconditional equalization program and the very general conditions of the health and social spending transfers mean that only a small proportion of provincial revenue is dependent upon transfers with specific conditions.[314]

[312] Based upon data from the IMF's World Financial Yearbook.
[313] Watts, *Comparing Federal Systems*, 3rd ed., 105. The difference between these two sets of figures can be explained by the sources. Watts' data comes from a variety of government and secondary sources, including the IMF and the OECD while the data for Table CA-1 is strictly from the IMF.
[314] Watts points out that given the very general conditions of both the Canada Health Transfer and Canada Social Transfer there is at least an argument to be made that they are effectively unconditional grants. If this argument is used, then only 3.7% of provincial revenues are dependent upon conditional transfers, a paltry amount. See: Watts, *Comparing Federal Systems*, 3rd ed., 107-108.

This finding would seem to be contradictory with the large number of intergovernmental agreements that Canada has made. According to the hypothesis, as the federal spending power grows in size and as subnational governments are more reliant upon it, transfer payments and grants should encourage agreement formation. In Canada, however, agreement formation has remained high, even as provincial reliance on federal funds has decreased.

If there is a means to reconcile this seeming contradiction it lies not in the size of the federal spending power, but in how it is used. The spending power has long been a contested concept in Canada. The Constitution does not directly define the scope of federal government spending, whether to declare it unlimited or to place it strictly within the boundaries of Ottawa's jurisdiction. The courts have, thus far, upheld – or at least failed to overturn – the spending power, but adding to the controversy, the Supreme Court of Canada has not brought forth a definitive ruling.[315] As such, the exercise of the spending power has been left up to the interpretation of the federal government, which has generally viewed it as an unlimited ability to spend money in provincial jurisdiction, usually through both conditional and unconditional transfer payments.[316]

However, unlike in other federations, the federal government of Canada lacks a clear method to determine how the money is spent. By contrast, the American federal government is able to invoke special override powers to ensure the conditions for their funding are met. Germany and Switzerland both have constitutions that invest broad legislative powers with the federal government, while South Africa and the United

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[315] Quebec. Commission on the Fiscal Imbalance. *The "Federal Spending Power" Report: Supporting Document 2*, (Quebec City: National Library of Quebec, 2002), 9-15.
[316] Mollie Dunsmuir, "The Spending Power: Scope and Limitations," (Ottawa: Library of Parliament, 1991), http://www.parl.gc.ca/Content/LOP/researchpublications/bp272-e.htm (September 28, 2011).

Kingdom have provinces that are so reliant on federal government for their funding that the spending power is a more coercive tool. In Canada (and Australia) however, it is impossible for the federal government to ensure that federal funds will be spent as desired without some kind of negotiation. This opens the door for intergovernmental coordination and potentially, national intergovernmental agreements. Nowhere is this phenomenon more apparent than in the 1950s and 60s as Canada was beginning to build its welfare state. The Constitution granted the provinces jurisdiction over most issues of health, education and welfare policy, but the federal government possessed the funding to develop government programs in these areas. A number of important agreements were struck, with the provincial governments agreeing to certain federal conditions in order to receive funding of social assistance, pensions and government health insurance.[317] More recently, the use of the spending power has contributed to the development of more recent agreements on the social union and childcare and early learning.[318]

Without the use of its spending power, the federal government would have a much-reduced ability to influence important policy areas such as healthcare, education and welfare. Without federal funding, the provinces would be unable to create extensive social programs (at least without some kind of significant tax transfer). Finally, without a federal override power or the ability for provinces to unilaterally clear tax room, both parties must negotiate with each other in order to realize their goals. Though the size of

[317] Among the agreements which were formed on the basis of national standards are the Disabled Persons' Allowance (1955), the Hospital Insurance and Diagnostic Act Agreement (1958), the Agriculture and Rural Development Act Agreement (1962) and the Canadian Pension Plan Investment Fund Agreement (1964). This is only a selection of the agreements, but unfortunately is impossible to truly determine which agreements were specifically results of the spending power without complete access to the texts of all accords. However, the examples illustrate at least the role that the spending power has played in agreement formation, even if it is not possible to truly quantify the extent.

[318] Social Union Framework Agreement (1999) and Federal-Provincial-Territorial Multilateral Framework on Early Learning and Child Care (2003).

the federal spending power is (comparatively) small, it is clear that its role within Canadian federalism allows it to disproportionately encourage the formation of national intergovernmental agreements. This concept of disproportionality will be revisited in the comparative chapter as it provides an unexpected dynamic to the relationship of the spending power and agreement formation.

4. The Size and Scope of the Welfare State

For an intergovernmental agreement to be created there must be some policy or policy area that crosses jurisdictional lines (constitutional or territorial), either between subnational units or between the national government and subnational units. The larger a government is and the more policy areas it occupies, the more opportunities there are for these inter-jurisdictional matters to develop. In this regard, Canada represents a good "median" case: there is a significant welfare state in Canada, but it clearly ranks behind the European federations in size and scope.

Table 5.2: Canadian Welfare Spending as a Percentage of GDP[319]

	1980	1985	1990	1995	2000	2005	AVG	Rank
Canada	13.7	17.0	18.1	18.9	16.5	16.5	16.78	3

According to the OECD's data, Canada has seen welfare spending rise as a share of the total economy over 25 years from 13.7% to 16.5%. This trend is consistent with all other federations as each one of them has seen an increase in welfare spending between 1980 and 2005. However, comparing Canada to the other six countries does present a couple of unique features that are worth noting. First, Canada's comparative ranking in

[319] Data collected from the OECD Social Expenditure Database.

welfare spending has fallen during this period, even as spending as a percentage of GDP has actually increased. In 1980, Canada ranked third in welfare spending and again in 1985 before peaking in second place in 1990, behind only Germany. By the time data were gathered in 2000, however, Canada had fallen to fifth place, where it would remain. Thus, even though spending has been increasing overall, it has not kept pace with the other federations considered here. This fluctuation in ranking hints at the second unique feature: Canada's highest years of welfare spending were not 2000-2005. Instead, welfare spending peaked between 1990 and 1995, before dropping by 2.4% of GDP. This is in contrast to almost all other countries, which had their highest spending years in 2005 (the small exception is Australia, which peaked in 2000 with a modest reduction of 0.7% by 2005). This early peak is consistent with Canada's deficit problems in the mid-1990s, which led to a significant cutback in federal transfer payments for healthcare, post-secondary education and welfare in 1996.[320]

If national intergovernmental agreements were perfectly correlated with welfare spending, we would expect to see the trend of agreement formation follow the rise and fall of spending. This, however, does not seem to be the case. In the period between 1985 and 1994, 20 national intergovernmental agreements were formed in Canada; if agreements coincide with welfare spending as a percentage of GDP, this should be the peak period between 1980 and 2005. However, between 1995 and 2004, there were also 20 national agreements, despite the shrinking size of the state.

[320] Douglas M. Brown, "Fiscal Federalism: Searching for Balance," in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, edited by Herman Bakvis and Grace Skogstad, (Don Mills: Oxford University Press, 2008), 72.

Table 5.3: Canadian Welfare Spending as a Percentage of Total Federal Spending[321]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Canada	50.62	48.82	46.43	45.17	45.18	53.77	51.14	68.24	68.79	53.13	4

Another measure of welfare spending (Table 5-3) can offer a slightly different perspective. By this measurement, welfare spending as a portion of the federal government budget didn't peak until the last year of the data (2007). In fact, from 1972 until 2000, Canadian welfare spending remained between 45.17% (1985) and 53.77% (1995) of the federal budget; this is a relatively narrow range compared to the increase of over 17% by 2005. However, as with the OECD's measurement, the various fluctuations, including the large increase between 2000 and 2005, do not seem to produce appreciable differences in agreement formation.

Canada seems to lack a decisive trend in either welfare spending or its relationship to the number of national intergovernmental agreements formed. Spending has ranked in the middle of the pack of the seven federations considered and fluctuations in spending relative to both GDP and total government expenditure have not yielded noticeable changes in agreement formation. And yet, it would be erroneous to suggest that that the size and scope of government spending in Canada has no relationship to intergovernmental agreements. At the very least, the welfare state provides the opportunity for governments to coordinate policy and possibly form agreements, even if each additional dollar does not seem to increase the number of agreements. Agreements pertaining to areas such as health, education and welfare make up more than a quarter of all agreements formed. This does suggest that the growth of the welfare state in Canada at least provides some opportunity for agreement formation.

[321] Data collected from the IMF World Financial Yearbook.

The role of the welfare state is more apparent when considered in concert with the federal spending power and the Canadian division of powers. Although Canada's provinces have access to more financial resources than the subnational governments in many other federations, they are also responsible for very large and expensive policy areas such as health and education. By contrast, the federal government possesses greater financial resources, but fewer commitments, allowing it to have a surplus which can fund transfer payments. This so-called "vertical fiscal imbalance" provides the impetus for intergovernmental coordination while Canada's considerable welfare state provides ample opportunities for agreements, even if overall spending is not the very highest.

5. The Existence of Lasting Forums for Intergovernmental Relations

The Canadian political system has been criticized in the past for centralizing power in the hands of the executive and reducing the ability of legislatures to check the power of the Premiers and the Prime Minister. One consequence of strong executives however, is that it has empowered the process of executive federalism, placing it as the main intergovernmental mechanism of Canadian federalism.[322] Lacking any serious forum for intrastate federalism and without a strong tradition of inter-legislative relations, virtually all intergovernmental business must run through the institutions of executive federalism.

To address this need, Canada has dozens of intergovernmental bodies, ranging from peak meetings of first ministers to groupings of senior bureaucrats which come together more than once a year. Since 1973, the Canadian Intergovernmental Conference Secretariat (CICS) has acted as the organizing body and secretariat for meetings.

[322] Smiley, *Canada in Question,* 2nd ed., 54-58.

Between 1973 and 1997, they were responsible for providing services and support to 1,832 conferences at the first minister, minister and deputy minister levels.[323] If 1973-74 is excluded (CICS's first year), then there have been an average of 79 senior intergovernmental meetings each year in Canada.[324] These meetings have become even more frequent in recent years, with another 1256 occurring since 1997, an average of over 96 gatherings per year.[325] These meetings cover a wide variety of policy areas. Among the most common are: aboriginal affairs, agriculture, education, the environment, finance and the economy, health, human resources and social services, industry, intergovernmental relations, law and justice, natural resources, trade and transportation.[326] Moreover, a number of these meetings, particularly at the ministerial level, have become increasingly institutionalized, establishing regular schedules for meetings, decision-making rules and including bureaucratic support for participants.[327]

Thus, Canada has a significant number of intergovernmental councils and meetings at the ministerial and deputy ministerial levels – but what of the peak institutions? Here, it is something of a "tale of two meetings" as the First Ministers' Meetings (FMM) and the Annual Premiers' Conferences (APC) have taken divergent

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[323] See: Canadian Intergovernmental Conference Secretariat, *Report to Governments 1996-1997,* (Ottawa: Canadian Intergovernmental Conference Secretariat, 1997), http://dsp-psd.pwgsc.gc.ca/Collection/CE31-1-1997E.pdf (accessed October 2, 2011), Appendix C. This is not to say that this is the total of all intergovernmental meetings in Canada. The CICS organizes and attends a large majority of these meetings, but by no means all of them. Moreover, the Secretariat is primarily responsible for serving meetings at the highest levels and thus, gatherings of officials below the deputy minister level are not included.

[324] The Lowest total is found in 1974-75 with 42 meetings, while the highest occurred in 1985-86, when there were 130 such gatherings.

[325] Data taken from Annual Reports found on the CICS website, available at: http://www.scics.gc.ca/menu_e.html .

[326] Ibid.

[327] Julie Simmons, "Securing the Threads of Cooperation in the Tapestry of Intergovernmental Relations: Does the Institutionalization of Ministerial Conferences Matter?" in *Reconsidering the Institutions of Canadian Federalism,* ed. J. Peter Meekison, Hamish Telford, Harvey Lazar, (Montreal & Kingston: McGill-Queen's University Press, 2004), 291.

paths.[328] The APC has become an increasingly frequent and institutionalized body, especially when compared to its FMM counterpart. Between 1960 - when the practice of holding annual meetings between the Premiers arose – and 2002, at least one APC was held each year. In contrast, during the same period there were eight years in which no FMM was held.[329] Recent data confirms the increasing disparity in regularity: between 2000 and 2010, only 12 official FMM were held, while there more than 43 Premiers' meetings.[330] This is at least in part due to how these meetings are organized. APC are called by the agreement of the Premiers to discuss common interests, with a rotating chair which spreads the burden of organization and agenda-setting. In contrast, FMMs are scheduled solely based on the invitation of the Prime Minister. If the federal government does not have any pressing business that it wants to address in a national – and highly publicized forum – then it can choose to simply not schedule a meeting. This reflects reluctance by Ottawa to give the provinces "a national platform from which their political status can be enhanced to bring pressure on the federal government."[331] While these meetings do tend to become more frequent at times – generally during rounds of mega-constitutional negotiations – their "ad hoc" status means that they do not have the same degree of institutionalization as a forum like the Council of Australian Governments.

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[328] First Ministers' Meetings are also known as First Ministers' Conferences (FMC).

[329] The eight years with no meetings are: 1962, 1972, 1977, 1988, 1995, 1998, 2001 and 2002. See: Canadian Intergovernmental Conference Secretariat, *First Ministers' Conferences 1906 - 2004,* (Ottawa: Canadian Intergovernmental Conference Secretariat, 2005).

[330] This number for the Premiers is actually lower than the true number as it only takes into account those conferences served by the CICS. After 2003 and the creation of the Council of the Federation, some of this work was to be handled by its own Secretariat.

[331] Martin Papillon and Richard Simeon, "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations," in *Reconsidering the Institutions of Canadian Federalism,* ed. J. Peter Meekison, Hamish Telford, Harvey Lazar, (Montreal & Kingston: McGill-Queen's University Press, 2004), 127.

If First Ministers' Meetings have been less institutionalized, the Premiers have charted the opposite course. The Premiers meet like clockwork each year, with at least one formal APC and usually a few other meetings, sometimes concerning specific policy areas. More recently, Quebec Premier Jean Charest has led the charge towards even greater institutionalization and permanence through the establishment of the Council of the Federation. Since 2003, the Council has served as the peak institution for interprovincial and territorial relations, replacing the APC. It has regular meetings (at least twice a year), its own secretariat and a mission to encourage closer relations between the provinces.

Taken as a whole, Canada's system of intergovernmental forums and meetings is large, active and essential to intergovernmental policy making. At the ministerial and deputy-ministerial level, there are a number of bodies and dozens of meetings per year. At the level of peak intergovernmental institutions, there are two major bodies, the First Ministers' Meetings and the Annual Premiers' Conferences/Council of the Federation. While the FMM may be less institutionalized than its solely-provincial counterpart, it is clear that both of these forums, as well as ministerial councils, are important contributors to intergovernmental agreements. They provide numerous opportunities every year for the discussion of mutual concerns and the ability to engage in coordination of intergovernmental relations, sometimes through national agreements. Even the FMM are frequent enough to have a clear impact on intergovernmental relations as a number of them end with the formation of a formal agreement.[332] As such, Canada's large web of

[332] Some examples of this are the 1957 meeting which led to the financing of hospital insurance, the 1964 meeting, which contributed to agreement on the Canada Pension Plan, the 1994 meeting which contributed to the Agreement on Internal Trade and the 1999 meeting which led to SUFA.

intergovernmental forums provides ample opportunities for the formation of national agreements and the large numbers of agreements seem to confirm this.

6. The Number of Subnational Governments at the State/Provincial Level

Canada has ten subnational units known as provinces along with another three jurisdictions known as territories. While the territories elect their own legislatures and have their own Premiers to represent them in intergovernmental relations, they are not endowed with the full constitutional powers that provinces possess. Territorial governments only have access to powers devolved to them by the federal government and rely upon federal transfers for nearly all of their funding.[333] While they have become increasingly active in Canadian intergovernmental relations, including consenting to some agreements, their reliance upon the federal government for jurisdiction and financing put them in a much different position than the provinces. Because of this, they have been excluded from the count of subnational governments.

With ten provinces, Canada ranks exactly in the middle of this analysis (fourth). Given the frequency of intergovernmental meetings (as discussed in the previous section) and the large number of national agreements, it is clear that this number of subnational governments is not a sizeable impediment to agreement formation. Moreover, as third-place Germany has sixteen subnational governments and a large number of agreements, it is clear that any threshold at which significant coordination problems might set in is higher than the ten provincial governments in Canada.

One other element worth discussing under the heading of subnational governments is the role of Quebec in intergovernmental agreement formation. The

[333] Jennifer Smith, *Federalism*, (Vancouver: University of British Columbia Press, 2004), 77-80.

examples of the United Kingdom and Switzerland demonstrate that having subnational governments which represent a particular linguistic or cultural minority may exacerbate the coordination dilemma based on the number of governments. Given the extensive record of national agreement formation in Canada, this is clearly not the case. This is likely due to a number of important considerations regarding Canada and Quebec, as compared to other federations. Unlike either the UK or Switzerland, Quebec's French population is the only major cultural or linguistic cleavage between Canada's provinces.[334] In the UK, each subnational government represents a different nationality, while in Switzerland, not only are there linguistic distinctions between the French, German and Italian-speaking cantons, but also a long standing religious division between Protestants and Roman Catholics. In Canada, Quebec's unique character provides a single, clear cultural and linguistic cleavage to be managed, as opposed to the multiple differences found in other federations.

Quebec's distinct interests could affect the formation of national intergovernmental agreements in one of two ways. In the first, Quebec could discourage agreements by pursuing an agenda different from the rest of Canada. This can cause Quebec to opt-out of an otherwise national consensus (as was the case with the Social Union Framework Agreement) or pursue a separate, parallel arrangement (such as the Quebec Pension Plan).[335] The second way Quebec potentially affects agreement formation is by encouraging them. Given Quebec's sometimes rocky relationship with the federal government and even other provinces, intergovernmental agreements have

[334] This is not to say that this is the only cleavage in Canada, or even between the provinces. There are other regional and economic identities between the provinces, but the difference between's Quebec's French population and the rest of Canada has been the most significant, consistent and enduring.
[335] Where possible, this has been noted in the record of intergovernmental agreements.

been seen by Quebec as creating institutionalization and certainty within Canadian intergovernmental relations. Quebec has long complained about sudden shifts in federal arrangements, leading to a desire for more permanence and predictability. The formation of the Council of the Federation in 2003 – the institutionalization of the Annual Premiers' Conference – is a recent example of how Quebec can lead the charge for intergovernmental institutionalization. Although it is impossible to determine every agreement where this has occurred, it provides a possibility for at least some instances of agreement formation.

Given that this study uses a 90% threshold for determining national-level intergovernmental agreements, Quebec's role in discouraging these accords has not been measured, while any agreements in which it is an impetus have been included. For the purpose of this study, given the threshold, Quebec's distinct cultural and linguistic character has the effect of encouraging national agreement formation, as opposed to discouraging it.

7. The Existence of a Body for Intrastate Federalism

If it were not for the United Kingdom, Canada would be the best of example of a federation with a total lack of intrastate federalism. Given that Canada's Senate was modeled on the British House of Lords and has gone without significant reform since Confederation (although the Conservative government under Prime Minister Stephen Harper has made it a stated policy to introduce elections for Senators)[336], it should not be

[336] This is not the first example of a Canadian government considering the reform of the Senate. Throughout the 20th century, numerous proposals were suggested for reform, including a reallocation of seats (to better exemplify regional or even political equality). See: Lowell Murray, "Which Criticisms are

surprising that it fails to serve as a useful forum for the representation of provincial interests at the centre.

The Senate's key departure from the example of the House of Lords was the allocation of seats based upon regional equality. As was discussed in the section on Canada's government, this was a necessary concession to the Maritime colonies, as they felt they would be overwhelmed by the influence of Ontario and Quebec in a system that was purely based on representation by population. Despite these intentions, this regional distribution did not prove to be the basis for the effective representation of provincial viewpoints within federal political institutions. This lack of intrastate federalism is a direct consequence of another decision reached at Confederation: the selection method for Senators.

While the smaller provinces may have won concessions in the distribution of Senators, they lost ground when it was decided that the Governor General should select them, on the advice of the federal cabinet. This has put the selection of Senators into the portfolio of the Prime Minister, who is under no obligation to consider the wishes of the provinces in this process. Instead, Prime Ministers have used this opportunity to fill the Senate with long serving party members or to honour private citizens. This prerogative even allows the Prime Minister to appoint members of his own party to the Senate as representatives of provinces where the federally governing party has little to no support. Although it would be inaccurate to claim that this produces a chamber of party drones who simply follow the wishes of party leaders in the House of Commons – the appointment of Senators until age 75 grants them significant latitude – it eliminates most

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Founded?" in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal, (Montreal & Kingston: McGill-Queen's University Press, 2003).

possibilities for the representation of the provincial governments and arguably, provincial interests.

The crucial element in defining intrastate federalism is in the selection method. If some of the processes of intergovernmental relations are going to be resolved through federal political institutions, then representatives must be able to speak on behalf of subnational governments (full intrastate federalism) or at least represent the interests and politics of their constituent unit (partial intrastate federalism). Clearly, Canada's Senate embodies neither of these possibilities. Until this or some other reform is implemented however, Canada's lack of intrastate federalism will continue to force provincial interests and intergovernmental collaboration to be addressed outside the institutions of the federal government. This is consistent with the large number of national intergovernmental agreements found in Canada and the pivotal role that executive federalism plays in Canadian intergovernmental relations. Without a stronger role for the provinces, the Senate will continue to serve as chamber for sober second thought, but not one that reduces the formation of intergovernmental agreements.

Conclusion

Canada is among the most active federations in forming intergovernmental agreements in this comparative analysis, forming 92 national accords between 1945 and 2009, an average of 1.46 per year. This makes Canada the second-most prolific in terms of agreement creation and in a group with Australia and Germany as the most active in forming new intergovernmental institutions. Thus, Canada's institutional context should possess a significant number of factors conducive to agreement formation and limited inhibitors and alternatives.

The Canadian federation's institutional features provide ample encouragement for intergovernmental collaboration, and thus, agreements. With its strong provinces, Canada is the most decentralized of any of the seven cases compared. This leaves many areas and tasks outside of the unilateral control of the federal government and increases the importance of intergovernmental coordination. Further opportunities are presented by the prominent role played by the federal spending power. While one of the smallest in strict quantitative terms, Canada's federal government relies on its financial resources to open up new avenues for national intergovernmental agreements that might otherwise be unavailable. Much like Australia, the Canadian welfare state is not large by comparison to some of the other cases, notably the European federations, yet it still serves as the basis for a certain degree of intergovernmental coordination. All these conducive factors are tied together and enhanced by a robust set of institutions devoted to the conduct of intergovernmental relations, with meetings numbering in the dozens every year. Despite little contribution from overlap, Canada has a strong set of factors which encourage intergovernmental agreements.

If the features that are conducive to coordination between Canada's governments can be said to be amongst the strongest of the seven federations studied, the inhibitors and alternatives are the exact opposite. While Canada's ten provinces (and three territorial governments) are more numerous than Australia's and are the median case in this study, this seems to provide no difficulties for coordination, judging by the frequency of meetings between representatives. Moreover, Canada's Senate provides no amount of intrastate federalism and thus no substitute to the normal processes of intergovernmental relations and the creation of agreements.

With strongly conducive features, virtually no inhibitors and no alternatives to intergovernmental agreements, Canada's institutional framework provides a healthy environment for agreement creation:

CON (*Strong*) – INH (*Weak-none*) – ALT (*None*) = High IGA Formation

As Canada's formula is identical to Australia, it is not surprising that this federation is also fully consistent with the predictions of the theory. Canada has a number of factors which contribute to intergovernmental agreement formation. Even ones that initially seem to support fewer agreements (overlap) are co-opted by a system of intergovernmental relations which has encouraged the formation of intergovernmental agreements for decades and relies on these institutions as an essential part of defining pan-Canadian politics. Canada provides another example of a particular institutional environment favourable to the production of national intergovernmental agreements.

Chapter Six: Germany

Source: CIA World Factbook

Formal Name: Federal Republic of Germany (Bundesrepublik Deutschland)

National Capital: Berlin

Subnational Governments: 16 states known as *Länder*: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Niedersachsen, North Rhine-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Schleswig-Holstein, Thueringen.[337]

Introduction:

While the history of the German people may be long, the modern incarnation of the German state is relatively young. In 1949, the Federal Republic emerged from the post-World War II wreckage of occupied Germany along with its communist counterpart, the German Democratic Republic. Despite the threat of Soviet invasion and its recent experience with the totalitarian Third Reich, the Federal Republic of Germany developed an enduring system of cooperative federalism that emphasized coordination between governments. This arrangement has even proven durable enough to allow for the absorption of five East German länder into the existing structure of the Federal Republic in 1990.

Today, Germany remains the most populous country in the European Union, with the largest economy. Even with so much focus on Germany's place in Europe today, federalism remains an important consideration as evidenced by the recent reforms in 2006. Germany remains not only an interesting case for any study of federalism, but an important model for emerging federations. [338]

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[337] Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt and Thuringia were not part of the Federal Republic of Germany until unification in 1990. These länder were not active as administrative or political entities between 1952 and 1990.

[338] Douglas Irvine, "Federalism and the new constitution" in *Constitution-Making in the New South Africa*, ed. Alexander Johnston, Sipho Shezi and Gavin Bradshaw, (London: Leicester University Press, 1993), 22-25.

History

Although the modern German federation is relatively new, Germany's experience with the concept of divided sovereignty is much more extensive. Throughout the last one thousand years, the periods in which the German people have been subject to a single, unified authority have been rare and short-lived; instead, various forms of multilevel governance have been the norm. The longest lasting of these was the Holy Roman Empire, which emerged from the empire of Charlemagne to reign over most of central Europe and Northern Italy at its widest extent. Unlike its namesake, however, the Holy Roman Empire was more of a loose confederation of hundreds of small states and principalities than a centralized and unified state. Initially, the individual states did not possess full sovereignty, although they did have a great deal of autonomy.[339] By the 14th century however, the constituent units of the Empire had grown in power: the *Reichstag* – the Imperial Diet - had important authority to make laws and even set out a basic constitution, while the Golden Bull of 1356 established that all future Emperors would be chosen by the rulers of seven leading states, known as Electors.[340] The divided sovereignty of medieval Germany was further complicated by the prevalence of the feudal system within most states as well as the emergence of "circles" – regional groupings within the Empire.[341]

While the balance of power between the Emperor and the princes shifted constantly, the Empire remained remarkably durable, even surviving the divisive Thirty Years' War (1618-48) which was fought mainly on Imperial territory, with the states as

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[339] Arthur Gunlicks, *The Länder and German Federalism*, (Manchester: Manchester University Press, 2003), 10.
[340] Rudolf Hrbek, "Germany," in *Handbook of Federal Countries, 2005*, ed. Ann L. Griffiths and Karl Nerenberg, (Montreal & Kingston: McGill-Queen's University Press, 2005), 150.
[341] Gunlicks, *The Länder and German Federalism*, 12-13.

the principal belligerents. It was during this period that some of the stronger states managed to expand their territories – a slow progression towards larger states that would eventually provide the basis for the future länder.

The Peace of Westphalia 1648 proved to be the beginning of the end for the Empire, especially for its role as a model for early federalism. The individual states were recognized as sovereign while the power of the Emperor was increasingly confined to what he could draw on from his own territories.[342] In spite of this decline, the Holy Roman Empire did not quickly break up. It was not officially dissolved until 1806 when Napoleon Bonaparte defeated the last Emperor and forced his abdication. This led to many of the former states forming the Rhine Confederation – effectively a puppet of Napoleon's France - and eventually the German Confederation (*Deutscher Bund*) in 1813, following the defeat of Napoleon in Russia.[343]

The German propensity to adopt multilateral and confederal arrangements was soon driven off course by the rise of Prussia. Throughout the twilight of the Holy Roman Empire in the 18th century, Prussia rose from a small duchy in what is now Poland to vying with Austria for the dominant position in Central Europe. The Austro-Prussian War of 1866 concluded with Prussia gaining ascendancy in central Europe and Austria losing most of its influence in Germany. This led to the formation of the new North German Confederation with an expanded Prussia as the leading member – the foundation for the unified German state which was formed in 1871.[344]

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[342] As the Emperors, by this time, were primarily drawn from the Hapsburg dynasty that ruled Austria, as well as parts of the Netherlands, Spain and Hungary, this power was not inconsiderable. However, with the rise in power of the constituent states, power was increasingly derived from military strength, as opposed to Imperial authority.

[343] Hrbek, "Germany," 150.

[344] Chad Rector, *Federations: Political Dynamics of Cooperation,* (Cornell: Cornell University Press, 2009), 117-120.

The German Empire (also known as the Second German Reich), founded in 1871, was neither fully democratic nor federal, by today`s standards, but it did perpetuate the German tradition of enshrining federal elements in government. The Bundesrat continued from the North German Confederation, allowing each of the 25 states a weighted vote on national issues. The individual states maintained control of some important matters such as religion, education and law enforcement, as well as the responsibility to administer and implement much of national law.[345]

Given this continued commitment to federalism and multilevel governance in Germany, it is interesting that the post-World War I Weimar Republic eroded many of these institutions. The new republic was a constitutionally a federation, but it was founded upon the principle of popular sovereignty, as opposed to an association of states, and was founded with a more centralized constitution that would help aid reconstruction.[346] More legislative powers were concentrated at the centre and the new *Reichsrat* (which replaced the Bundesrat) was granted only a suspensory veto.[347] One notable development for German federalism was the evolution of the German subnational governments between 1919 and 1932. For the first time, they became known as länder and were reduced in number from 25 to 17.[348] This centralization was only a mild precursor to the intense concentration of power that occurred following the rise of National Socialism in 1933. Through the dual means of violence and intimidation, as well as national legislative authority, the Nazis centralized power in Berlin and the party.

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[345] Gunlicks, *The Länder and German Federalism*, 25-31.
[346] Elazar, *Federal Systems of the World*, 2nd ed., 91.
[347] Swenden, *Federalism and Second Chambers*, 83.
[348] Gunlicks, *The Länder and German Federalism*, 31.

The länder were eliminated as autonomous, democratic units, becoming only administrative districts for Berlin.[349]

Following the destruction of World War II, the relatively short-lived existence of a unitary Germany was ended, as the country was divided and occupied by the Allied powers. The occupying powers used their authority not only to dismantle the centralized infrastructure of the Third Reich, but also to restore and reorganize the länder.[350] When it became clear that the Soviet Union was developing its area of occupied Germany on an independent path, the Western Allies (France, the United Kingdom and the United States) called upon leaders from the länder governments to form a committee to draft a "basic law" for a new federation.[351] In 1949, after months of negotiations, it was decided that this document would become the constitution for the new Federal Republic of Germany (known colloquially as West Germany), while the Soviet-occupied east formed a communist state known as the German Democratic Republic. Initially federal and democratic in character, the GDR quickly revealed its autocratic nature by effectively eliminating the East German länder in 1952.[352]

Famously, this division was not permanent. The collapse of European communism and the Soviet bloc was dramatically signalled by the fall of the Berlin Wall in 1989. The GDR restored the five länder governments of the East and entered into negotiations with representatives from the Federal Republic. A reunification treaty was

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[349] See: Jeremy Noakes, "Federalism in the Nazi State," in *German Federalism –Past Present, Future*, ed. Maiken Umbach, (Houndmills: New York: Palgrave, 2002), 113-145 for a full description of this period.
[350] Only some of the länder were originally reconstituted in their current form . Many of these were further combined and subdivided before achieving their current boundaries . See the section on subnational governments for more information.
[351] Gunlicks, *The Länder and German Federalism*, 166. West German leaders and the Allies were initially concerned that the creation of a constitution would be taken as endorsing a permanent split between the West and the East and titled it the Basic Law.
[352] Mary Fulbrook, "Democratic Centralism and Regionalism in the GDR," in *German Federalism –Past Present, Future*, ed. Maiken Umbach, (Houndmills: New York: Palgrave, 2002), 146-147.

signed in August 1990 and ratified by both the West and East German legislatures in September of that year. On October 3, 1990, German reunification was finally realized. It is important to remember (for the continuity of this analysis), that the unification of the Federal Republic and the Democratic Republic did not create a third, new country. Rather, the five länder of East Germany were granted entry into the existing Federal Republic. Thus, the existing constitutional and international order was maintained (with alterations to allow for the representation of the new länder in federal institutions); in technical terms, reunification saw the Federal Republic of Germany expand, rather than the formation of a new country.[353]

Government and Political Structure

The Basic Law enshrines Germany as a parliamentary republic, with a bicameral federal legislature. The principle of responsible government is central to this system, similar to parliamentary democracies in the British tradition. Germany, however, departs from the British model in a couple of notable ways. One, as a republic, Germany's head of state is the Federal President (*Bundespräsident*) as opposed to a monarch or their representative. However, unlike France or the United States, Germany's president plays a symbolic role and rarely exercises power independently (much like the role of the monarch in the United Kingdom). Two, Germany's second chamber, the *Bundesrat*, serves as a chamber for subnational representation and includes direct representatives of the state governments. This structure causes the Bundesrat to play two roles in the German parliament. One is as the customary "check and balance" against the decisions of

[353] Stefan Oeter, "Federal Republic of Germany," in *Legislative, Executive, and Judicial Governance in Federal Countries,* ed. Katy, Le Roy, Cheryl Saunders and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 141.

popular representation in the lower house. The other is as a conduit for the interests of the länder to be expressed within national politics and legislation. The effects of this dynamic on intergovernmental agreements will be discussed as greater length later in this chapter.

The lower house of the federal parliament, the *Bundestag*, serves as the chamber for popular representation. Elections occur every four years and 598 members are elected in a system of mixed proportional representation. Half of these are elected in local constituencies, known as direct mandates, while the remaining 299 are drawn from party lists and allocated proportionally based on popular vote totals.[354] What is interesting about this arrangement is that unlike some systems of proportional representation, it does not simply add power to the national party organizations. The rules and organization for candidates pursuing direct mandates are determined by the party organization in the länder, while the party lists are determined by the national leadership. This gives both the state and national arms of political parties an important role in elections to the Bundestag and adds an element of federalism even to elections in the lower house.[355]

In contrast, the Bundesrat or Federal Council is explicitly a chamber for federalism and the representation of subnational interests. Germany's Bundesrat is often held up as archetype for intrastate federalism as it allows for the direct participation of the

[354] In Bundestag elections, voters cast two votes on their ballot: one for the candidate of their choice in their local constituency and one for their preferred party list. The 299 constituency seats are first allocated on the basis of which candidate won a plurality. Following this, the second (party) vote is used to calculate the percentage of seats that each party is entitled to. The remaining 299 seats are then allocated amongst the parties to make the total of all seats (i.e. all 598) approach the proportions dictated by the party vote. If a party has won more local mandates than they might have won using only the overall party vote, additional seats are sometimes added over and above the normal 598 in order to compensate other parties. Only parties that have won at least 5% of the party vote or three direct mandates are eligible for seats from the party list. Thus, "the second vote takes priority; the first vote is only secondary", in terms of determining seat totals. See: Eckhard Jesse, "The Electoral System: More Continuity than Change," in *Institutions and Institutional Change in the Federal Republic of Germany,* ed. Ludger Helms, (New York: St. Martin's Press, 2000), 125-128.

[355] Oeter, "Federal Republic of Germany,", 142-143.

länder governments in the federal legislative process. Delegates are chosen by the government of each länd and are generally members of cabinet (senior bureaucrats will often participate in committees, but cannot vote in the plenary sessions).[356] As such, the Bundesrat is a "continuous body" – members change as governments at the state level change or choose to replace their representatives.[357] Delegates to the Bundesrat are not independent in any sense, possessing an imperative mandate: they are required to act only on the instruction of their länd government and cast their votes as a block. In cases of one-party majority government in the länder, this process is relatively straightforward. However, in the frequent instances of coalition governments, there must be agreement within the länder's delegation to the Bundesrat, even if multiple parties are represented. When a consensus cannot be reached, delegations must abstain as they are not permitted to split their vote. These abstentions are often given increased importance due to the rules governing votes in the Bundesrat. In order to approve a bill or motion, there must be a majority of the total number of votes in the Bundesrat, not simply a majority amongst those casting a vote on any particular measure.[358] Thus, abstaining from a bill is essentially a "no vote"; causing bills to fail that might otherwise have passed under the rules of other legislative bodies.

Unlike the American or Australian Senates, the German länder do not have equal representation in the Bundesrat. Rather, each länd is guaranteed a minimum of three votes, with additional votes granted for passing certain population thresholds: states with more than two million citizens get four votes, those over six million get five and any over

[356] Watts, *Comparing Federal Systems*, 3rd ed., 151.
[357] Gunlicks, *The Länder and German Federalism*, 344.
[358] Oeter, "Federal Republic of Germany," 143-145.

seven million receive six votes.[359] Thus, while the Bundesrat is not a chamber that attempts to achieve proportionate representation, it likewise does not enshrine an equal voice for each of the länder.

The Bundesrat also departs from the example of other federal upper chambers in its authority. Instead of consistent rules governing the Bundesrat's role on all legislation, its authority is dependent on the type of matter being considered. On "normal" legislation, including the budget and central financial legislation, the Bundesrat has only a suspensory veto which can be overturned by a vote in the Bundestag.[360] This requires a simple majority for most cases; however, if the Bundesrat's objection was greater than a two-thirds majority, the Bundestag's override likewise requires a minimum two-thirds majority.[361] However, on matters pertaining to legislation affecting the länder's powers or administration of laws, the financial arrangements between the länder and the federal government or constitutional provisions that concern the länder (known collectively as *Zustimmungsgesetze*), the Bundesrat possesses an absolute veto. It is difficult to be more specific (while retaining any brevity) regarding the extent of the *Zustimmungsgesetze* as there is no single list that clearly defines which matters apply – instead, there are specific

[359] Until reunification in 1990, the largest länder in the Federal Republic received only five votes. However, the addition of the five East German länder upset the balance of power in the Bundesrat because the new states had a combined population less than North-Rhine Westphalia, but would receive fifteen votes to NRW's five. Thus the largest länder were granted an additional seat, allowing them to block constitutional reforms that might have been passed over their uniform objection (Gunlicks, *The Länder and German Federalism*, 345). The current distribution of votes in the Bundesrat is as follows: four states have 6 representatives (North Rhine-Westphalia, Bavaria, Baden-Württemburg and Lower-Saxony), one has 5 representatives (Hesse), seven have 4 (Saxony, Rheinland-Pfalz, Berlin, Schleswig-Holstein, Brandenburg, Saxony-Anhalt and Thuringia) while four have 3 (Hamburg, Mecklenburg-Vorpommern, Saarland, Bremen).

[360] Martin Brunner and Marc Debus, "Between Programmatic Interests and Party Politics: The German Bundesrat in the Legislative Process," *German Politics,* 17, no. 3(2008): 234. This is known as Einspruchsgesetze.

[361] Swenden, *Federalism and Second Chambers,* 84-86.

stipulations throughout the Basic Law.[362] What is clear is that the Bundesrat has veto powers over a great deal of legislation: beginning in the 1950s, at least 40% of all federal legislation required Bundesrat approval, rising to 60% by the 1990s.[363] One of the major thrusts of the recent federalism reforms in 2006 was to reduce the percentage of legislation that can be vetoed in the Bundesrat from this high point back to around 40% in order to make it easier to pass bills.[364]

As a parliamentary system, the German federal executive is drawn from and responsible to the Bundestag. Following an election, the first sitting of the Bundestag elects the Chancellor from amongst its members. Because Germany's system of proportional representation almost never grants a majority to one party in the Bundestag, the election results are determined by earlier negotiations between the parties when a coalition is usually formed by the largest party and one or more smaller partners. Once the Chancellor is selected, he or she nominates members of the federal cabinet for the President to appoint – these are also determined in the coalition negotiations. Once assembled, the Chancellor and the Federal cabinet are responsible for introducing legislation, most notably the budget. While the Cabinet must maintain the confidence of the Bundesrat, as an interesting change from classic parliamentary tradition, the government cannot be defeated unless the Bundestag can agree on a replacement. Thus, only in rare circumstances do German Bundestags last for less than a full term of four years.[365]

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[362] Oeter, "Federal Republic of Germany," 145.
[363] Watts, *Comparing Federal Systems*, 3rd ed., 150-152.
[364] One of the problems with the rules in the Bundesrat is that because abstentions are effectively treated as "no votes", the presence of even a few unhappy coalitions amongst the länder can stop legislation from being passed.
[365] Wolfgang Rudzio, "The Federal Presidency: Parameters of Presidential Power in a Parliamentary Democracy" in *Institutions and Institutional Change in the Federal Republic of Germany*, edited by Ludger

The governments of the länder are similar to the national parliament, with the principle exception that they are all unicameral. Each of länd has its own state constitution which stipulates the organization of their governments. Broadly speaking, the sixteen länder have similar legislatures – all are parliamentary systems, elected by some form of proportional representation, though some of these are pure PR systems and some are mixed.[366] Similar to the federal government, the legislature votes for a Prime Minister who then appoints a cabinet. One notable difference between the legislatures in the länder and the federal Bundestag is that at the state level, one-party majorities are a possibility and this eliminates the needs for a coalition arrangement.[367] Another important difference is that the legislatures in the länder have fewer legislative duties, while the administrations have more responsibilities; this is caused by the way in which Germany's Basic Law divides power between the orders of government (something discussed at greater length in the section on overlap below).

On the whole, Germany's political institutions have a number of shared characteristics. The federal and länder legislatures are parliamentary, elected by a method of proportional representation. This tends to produce coalition governments in order to command a majority of members in the legislature. Moreover, at the national level, the länder have a strong role through both the Bundesrat and the overlapping party system – all elements that reflect the interdependent and federal character of Germany's politics.

Helms, (New York: St. Martin's Press Inc. 2000), 56. The only circumstances in which the Bundestag may end sooner is if the Chancellor successful petitions the President to call early elections to solve an impasse or if a new Chancellor cannot be chosen.

[365] Oeter, "Federal Republic of Germany," 151.

[366] Ibid.

[367] Gordon Smith, "The 'New Model' Party System," in *Developments in German Politics 3*, ed. Stephen Padgett, William E. Paterson and Gordon Smith, (New York: Palgrave MacMillan, 2003), 95-98.

Intergovernmental Agreements in Germany

Germany has two types of formal intergovernmental agreements, based upon how they are concluded.[368] Executive agreements, known as *verwaltungsabkommen*, are negotiated between the Prime Ministers and Ministers of the länder and require no direct involvement of the legislatures.[369] Intergovernmental contracts or agreements, known as *intraföderale staatsverträge*, are effectively treaties between the länder. Once negotiated, they involve the passage of a law by all the signatories.[370]

The legal status of both *verwaltungsabkommen* and *staatsverträge* was debated in the 1960s as the Basic Law stipulates only that there is federal law and länd law, with the former taking primacy in a conflict. By the 1970s, it was generally concluded that both agreements were formal; in particular, Vedder argues that *staatsverträge* occupy something of a "third level" of law, above the level of the subnational governments, but below federal law.[371]

With that in mind, how many written, national agreements can be found in Germany? Unfortunately, there is not a perfect, current registry available for both *verwaltungsabkommen* and *staatsverträge*. Thankfully, Christoph Vedder in his book *Intraföderale Staatsverträge* compiled a list of all of these treaties from the founding of the Federal Republic up until 1995. In the 45 years between 1950 and 1995, 40 national *staatsverträge* have been created at a rate of 0.89 per year. While there is no

[368] This system of having two types of formal agreements - one legally binding as a kind of legislative treaty, the other an administrative or executive accord - is paralleled by the United States. The U.S. has a similar system structure to agreements with interstate compacts serving the same role as *intraföderale staatsverträge* while administrative agreements are akin to Germany's *verwaltungsabkommen*. See Chapter 10 for more details on American agreements.
[369] Christoph Vedder, *Intraföederale Staatsverträge*, 46.
[370] Ibid.
[371] Ibid. 352-53.

corresponding database for *verwaltungsabkommen* available, Vedder notes that there are at least as many of these executive agreements, and likely more.[372]

Looking only at the record of *staatsverträge* formation Germany would effectively be tied for third with the United Kingdom and behind Canada and Australia. However, if one makes the logical assumption (based on the available information) that there are at least as many *verwaltungsabkommen*, then that total can be doubled to 80 national agreements in 45 years, or 1.78 agreements per year. Using this figure would make Germany the leader in this study in the formation of intergovernmental agreements. It is clear that formal, national intergovernmental agreements are an important and prolific feature of German intergovernmental relations. The remainder of this chapter will attempt to identify those factors of German federalism that help to encourage the formation of such agreements.

1. The Degree of Overlap that Exists in the Constitution

If there is one element to German federalism that can be said to be unambiguous, it is the high degree of overlap and shared responsibilities between the federal government and the länder. Unlike the models of dual and classical federalism found in countries such as Canada and the United States, the Federal Republic intentionally adopted a system of cooperative federalism: rather than allocate legislative and administrative powers over policy areas solely to one order of government, the German Basic Law instead gives some responsibility for most tasks to both.[373] Generally, the

[372] Christoph Vedder, email message to author, July 2009.
[373] Hans-Peter Schneider, "The Federal Republic of Germany," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 124.

Basic Law gives legislative primacy to the federal government, while providing the länder with the authority over the implementation of national and state laws; this is sometimes referred to as "administrative federalism"[374]. As Kramer puts it: "the German tradition... is characterized by mutual connections, interconnections, and overlapping of the centralized and decentralized state units."[375]

Watts' comparison of constitutional competencies provides a clear indication of the level of constitutional overlap produced by the German system of federalism. Of the 47 policy areas identified by Watts, 35 (75%) have some role for both the national and subnational governments. This is the clear leader of all the federations in this comparison, a full 5% percent ahead of second-place Australia (at 70%) and well ahead of third-place South Africa (60%).[376] With the exception of some of the federal government's international responsibilities, such as diplomatic relations and defence, Germany's Basic Law allows for both the national and subnational governments to have a role in almost every policy area.

This overlap is deepened by Germany's particular system of administrative federalism. To use Canada as an example, constitutional overlap is primarily caused by a broad interpretation of the division of powers. For example, while education has been clearly established as a provincial responsibility, the federal government has justified its involvement in post-secondary education funding partly through its authority over training and the labour market, and partly through its concern with research and development. Thus, while both orders of government may be active within a field (and

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[374] Thorlakson, "Comparing Federal Institutions," 7.
[375] Jutta Kramer, "Federal Republic of Germany," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, (Montreal & Kingston: McGill-Queen's University Press, 2005),144.
[376] See Appendix H for the full breakdown.

may desire some means of coordination), they can technically act in parallel. For most areas of overlap in Germany, however, coordination between governments is essential as both orders are required to enact any policy.[377] To use the same example of post-secondary education, the Federal Republic creates framework legislation for the funding and regulation of colleges, universities and training programs, setting out funding, curriculum and teaching guidelines, and targets for research and graduation rates. The länder must then work within this legislation to provide education to students. Federal lawmakers and planners must work with ministers and bureaucrats in the länder in order to see their laws implemented, while these same state officials look to the national government to provide oversight, coordination and funding. This interdependence between the federal government and the länder is so complex and pervasive that it has been criticized for delaying needed government action as well as making democratic accountability nearly impossible.[378] This became serious enough that in 2006, a "grand coalition" was formed by Germany's two leading parties: the Christian Democrats (CDU) and the Social Democrats (SPD). The coalition introduced and passed the *Federalism Reform Act 2006*, which attempted to clarify the roles of the federal government and the länder, reduce the number of matters that the Bundesrat could veto and grant the länder more autonomy in the implementation of federal programs.[379] While it remains to be seen how much of an effect this Act will have, the fact that it was deemed necessary at all is testament to the intertwined nature of German national and subnational governments.

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[377] Simone Burkhart, "Reforming Federalism in Germany: Incremental Changes instead of the Big Deal," *Publius* 35, no. 1 (2008): 2-5.
[378] Ibid.
[379] Watts, *Comparing Federal Systems*, 3rd ed., 36.

To manage the existing overlap, some of the required coordination occurs through national legislation and the negotiations between the federal government and the Bundesrat, but this is clearly not sufficient to address the level of overlap that is found in Germany. This is especially true in areas where there is overlap between governments, but where federal legislation fails to create a national consensus, such as media and telecommunications. In such instances, the länder have often worked amongst themselves to form such a consensus using intergovernmental agreements.

This amounts to a federation in which the vast majority of government business requires the direct involvement of the national and subnational governments to address issues of both vertical and horizontal coordination. Moreover, this is not a case of governments acting within the same policy field independently, but rather governments that must work together in a coordinated manner to enact any policies. As such, even though the federal government's broad legislative powers provide it with the means to coordinate governmental action through national laws, the level of overlap is so great as to allow for other opportunities for coordination via intergovernmental agreements.

2. The Degree of Centralization in the Constitutional Division of Powers

Attempting to assess the degree of centralization in the German federation is not a simple matter. When the Federal Republic was founded in 1949, the Western Allies that sponsored the formation of this new state were very concerned that placing too much power in the national government might assist in the rise of a new autocratic government. The Constitution of the Weimar republic had centralized more authority in the federal government than the pre-1918 German Empire, which some of the Allies felt was

exploited during the rise of the National Socialists.[380] The very process that was used to create the Basic Law sought to correct this by building the state upon the foundation of the existing länder, as opposed to a national popular assembly. This push for decentralization was countered by the concern among many delegates that a weak central state would not be able to effectively reconstruct the still-devastated country, create effective national standards and government programs, or provide security in the face of rising Cold War tensions.[381]

The end result of this tension was the lack of a clear victory for either side, at least initially. Indeed, the Basic Law's division of powers can be primarily characterized as overlapping and interdependent, rather than centralized or decentralized. If the degree of centralization is solely defined by the balance of exclusively-held jurisdictions between the national and subnational government, Germany clearly could not be deemed very centralized**.**

Of the 47 policy areas surveyed by Watts in his comparison of federal constitutions (see *Appendix H*), only 10 (21%) are exclusive powers of the federal government. This the second lowest total of the seven federations in this study, with only seventh-place Australia (13%) having a smaller area of federal jurisdiction.[382] Thus Germany's central government has fewer areas of exclusive constitutional jurisdiction than other federations that have been considered "decentralized" by one measure or another, including Canada, Switzerland and the United States.

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[380] Wolf D. Gruner, "Historical Dimensions of German Statehood: From the Old Reich to the New Germany," in *German Public Policy and Federalism: Current Debates on Political, Legal, and Social Issues,* ed. Arthur B. Gunlicks, (New York & Oxford: Berghahn Books, 2003), 18-19.
[381] Kramer, "Federal Republic of Germany," 143-146.
[382] The United States is just above Germany with 22% of policy areas in the jurisdiction of only the federal government.

Despite this low level of federal exclusivity, Germany is still seen by some as a more centralized federation, with Schneider going so far as to term it a "unitary federal system".[383] While there are a number of arguments that might be made in support of this contention, three have specific importance to the relationship between centralization and the formation of national intergovernmental agreements. First, according to Watts' comparison of constitutions, Germany, while lacking a high level of federal exclusivity, has almost no state exclusivity at all. Only two areas (4%) were found to fall solely into the länder's jurisdiction: municipal affairs and primary and secondary education; only South Africa has fewer areas of exclusive subnational jurisdiction. This amounts to a very small area in which the länder would avoid coordination through national legislation and thus, be more likely to rely upon formal agreements. As such, the division of powers suggests that while Germany is not especially centralized, it is certainly not decentralized.[384]

The lack of a large area of exclusive subnational jurisdiction is especially important when examining the second element of centralization: the ability of federal legislation to establish national standards in areas of concurrent jurisdiction. Article 31 of the Basic Law stipulates that in all cases, "Federal law shall take precedence over Länd law". Given that 75% of enumerated and implied powers in Germany are held concurrently by federal and state governments, this, in theory, gives the federal government the final authority over 96% of all policy areas**.** According to Schneider, this has led to an increasing degree of centralization – especially as the courts have deemed

[383] Schneider, "The Federal Republic of Germany," 127.
[384] It is worth noting, however, that there is a smaller range between the seven cases for exclusive state jurisdiction than there is for exclusive federal authority. State jurisdiction ranges from a low of 2% (South Africa) to a high of 24% (United States) while federal totals begin on the low end of 13% (Australia) and the top out at 59% (United Kingdom).

some disputes over concurrent jurisdictions to be political matters, and thus, not justiciable.[385]

Lastly, it is also important to acknowledge that, unlike the Swiss case, German administrative federalism grants less autonomy to the länder to interpret and enact federal law. In the Swiss federation, federal law acts, in most instances, as a piece of framework legislation – laying the foundation for a government program, but leaving great latitude to the subnational governments to interpret and enact it.[386] In contrast, administrative federalism in Germany is not quite so flexible. Some federal legislation fulfills a role similar to the Swiss model, establishing basic guidelines for a program and then leaving it in the hands of the länder to administer. The Federal Republic, however, also possesses the ability to stipulate more direct regulations and in the case of direct orders, even allow for constant oversight and management of the länder in the execution of their responsibilities.[387] The greater amount of coordination and regulation achieved via federal legislation, the fewer opportunities that arise for intergovernmental agreements to fulfill the same role.

With such potential for centralization, it seems inconsistent that Germany would be so prolific in forming national intergovernmental agreements. However, it is not so much an inconsistency as an oversimplification – the three factors that encourage centralization are checked by several caveats. First and foremost, the role of the Bundesrat acts as a check on unfettered federal power. While the Bundesrat also serves a partisan purpose, due to Germany's integrated party system, the länder's interests are

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[385] Schneider, "The Federal Republic of Germany," 127-128.
[386] Watts, *Comparing Federal Systems*, 3rd., 31.
[387] Lars P. Feld and Jürgen von Hagen, "Federal Republic of Germany," in *The Practice of Fiscal Federalism: Comparative Perspectives*, ed. Anwar Shah and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2007), 130-134.

represented. Federal legislation that directly affects the länder's responsibilities must have their approval to take effect. Second, the area in which the länder are competent is quite large, even if most if it is held concurrently with the federal government. The Basic Law grants the länder the reserve power while allocating only a small area exclusively to the federal government. As such, the länder possess significant legislative room to undertake their own agendas. Even if the federal government "crowds out" some of the opportunities for agreements via national legislation, the länder have a large and flexible jurisdiction that will present other possibilities for coordination. Finally, while Germany's version of administrative federalism may be more centralized than the Swiss model, this is not to say it establishes a quasi-unitary system. In particular, matters with particular local connotations such as education and culture exhibit a significant degree of subnational autonomy.[388] Moreover, the extensive size of the German government (as will be discussed later) provides ample opportunities for all types of government action, federal, state or concurrent.

Taken together, it is clear that Germany's federal government possesses a great deal of authority and has the ability to create national consensus through its legislative authority. This is not, however, an unfettered authority as the länder possess some control through the Bundesrat, broad residual powers and at least some flexibility through their administrative responsibilities. On balance, it seems more accurate to define Germany's division of powers as overlapping and interdependent, as opposed to truly centralized.

3. The Size and Status of the Federal Spending Power

[388] Schneider, "The Federal Republic of Germany," 132.

Much like the division of powers, the size and status of the spending power in the Federal Republic of Germany is a complicated issue. The system of cooperative federalism creates a complex web of fiscal federalism in which both the national and subnational orders of government are intricately tied together in raising revenue, funding government programs and developing infrastructure.[389] There are very few wholly-independent revenue sources that either government can access, while most spending must be coordinated as it involves outlays from both orders of government.

All other things being equal, such a complicated system of overlapping fiscal roles might provide fertile ground for national intergovernmental agreements the way in which overlapping legislative and administrative responsibilities do. However, the regulation of most fiscal powers, including taxation, spending and borrowing, is governed by federal law, with the states having input through the Bundesrat. In terms of raising revenue, the main sources of taxation – personal and corporate income tax along with the value added tax – are shared between the federal government and the länder.[390] However, unlike other federal countries in which the tax room is shared, but each order of government is free (in theory) to adjust their own rates as appropriate, the taxes in Germany are collected together and the rates, along with the respective shares of the revenue, are determined by federal law.[391] As this is a matter which affects the länder, it requires the approval of the Bundesrat to pass, allowing for any negotiation to happen within that chamber. Moreover, because revenues are split from a single source based upon formulas found in federal law, this eliminates the need for many (but not all) of the vertical transfers found

[389] Gisela Färber, "On the Misery of the German Financial Constitution," in *German Public Policy and Federalism: Current Debates on Political, Legal, and Social Issues*, ed. Arthur B. Gunlicks, (New York & Oxford: Berghahn Books, 2003), 51-55.
[390] Feld and von Hagen, "Federal Republic of Germany," 134.
[391] Ibid., 134-135.

in other federations. This is demonstrated in *Table 6.1*, which shows the small percentage of länder revenue that is reliant on direct federal transfers. It is the lowest amongst all seven federations in this comparison.

Table 6.1: Percentage of Subnational Revenue from Federal Grants (Germany)[392]

	1972	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Germany	18.25	20.20	17.75	15.51	16.09	17.05	16.56	15.98	14.85	16.92	7

Similarly, much of government spending is dependent upon federal legislation and the länder responsibilities to enact laws. This can come in multiple forms, including framework legislation that the länder can interpret, national programs which are funded via joint revenues, specific grants or transfers, as well as projects with joint funding.[393] This is to list only the most common types of government activities which involve both the national and subnational governments. Again, most of this occurs through the national legislative process.

One final element that helps to depress the effect of the spending power in encouraging intergovernmental agreements is the lucrative equalization system that underpins German fiscal federalism. The joint taxes are themselves distributed via a complex formula, which then allows for a system of equalization between the länder.[394]

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[392] Data was gathered from the International Monetary Fund's World Financial Yearbook. This is corroborated by Watts' figures in his book *The Spending Power in Federal Systems: A Comparative Study* which found that in 1986, 15. 5% of state government revenues in Germany came from federal transfers, while the figure was 18.3% in 1996. This is the lowest of the federations which he compares. Watts' most recent figures in the third edition of *Comparing Federal Systems*, however, seem to be inconsistent with other available data, as he reports Germany's länder relied on transfers for 43.8% of their revenues between 2000 and 2004. As this is inconsistent with other available data – including Watts' other figures regarding the percentage of state budgets reliant upon conditional transfers (9.8%) – this figure is considered an outlier. See: Watts, *The Spending Power in Federal Systems*, 53 and Watts, *Comparing Federal Systems*, 3rd ed., 105-108.

[393] Feld and von Hagen, "Federal Republic of Germany," 132-33.

[394] Färber, "On the Misery of the German Financial Constitution," 55-56.

This program brings all länder up to approximately 90% of the average fiscal capacity, while a further set of grants from the federal government (with minimal conditions), raise this to 97.5%.[395] This mostly-automatic system of equalization leaves less room for discretionary federal spending that might serve as the impetus for intergovernmental agreement formation.

For the spending power to have a significant effect on the rate of intergovernmental agreement formation, certain conditions must occur. The subnational governments must have jurisdiction (exclusive or leading) in areas of national importance while the federal government needs to possess enough revenues to enable financial transfers. In Germany, however, there is a tangled web of funding and legislative responsibilities. The national government does not have to "buy" entry into particular policy fields – with rare exception, they already have access. Complex funding and equalization arrangements, most of which are non-discretionary and governed by statutes, further reduce the possibility of more grants. Thus, while it is not impossible that the spending power might be the impetus for a few intergovernmental agreements, it appears to be a poor explanation for Germany's extensive record of agreement formation.

4. The Size and Scope of the Welfare State

While many of the other features of German federalism remain a complicated web of overlapping jurisdiction and shared finances, one area in which it is unabashedly straightforward is welfare spending and the size of government. Germany was the originator of the modern welfare state under the Chancellorship of Otto von Bismarck and

[395] Feld and von Hagen, "Federal Republic of Germany," 134-35.

this policy leadership seems to have continued in the amount the Federal Republic spends on government programs.

Table 6.2: German Welfare Spending as a Percentage of GDP[396]

	1980	1985	1990	1995	2000	2005	AVG	Rank
Germany	22.7	23.2	22.3	26.5	26.2	26.7	24.60	1

Table 6.2 demonstrates the growth of German welfare spending as a function of GDP, rising from 22.7% in 1980 to 26.7% in 2005. This has earned Germany the distinction of having the largest welfare state in this study, by a wide margin. Germany's average welfare spending, at 24.6% of GDP, represents a commitment of 5% more of its GDP than second-place Britain. Furthermore, Germany has been consistent: while all other countries changed positions at some point within this comparison, the Federal Republic has been ranked first every year and by a wide margin. The smallest gap between the first and second-place countries occurred in 1985 when Germany spent 3.4% more of its GDP on welfare spending than the United Kingdom. This clear distinction between Germany and the other countries should not be disregarded on the assumed basis that the federations in question are simply low-spending welfare states. Germany ranks fifth compared to thirty other OECD members when welfare spending is measured as a percentage of GDP.[397]

[396] Data collected from the OECD Social Expenditure Database.
[397] According to the OECD's Social Expenditure Database, only Austria, Denmark, France and Sweden spent more. The period of time measured is the same as the one used in this study, 1980-2005. See: http://www.oecd.org/document/9/0,3746,en_2649_34637_38141385_1_1_1_1,00.html

Table 6.3: German Welfare Spending as a Percentage of Total Federal Spending[398]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
Germany	67.40	71.07	69.98	70.04	67.68	N/A	N/A	72.63	72.14	70.13	1

The same pattern is evident when welfare spending is considered as a percentage of total federal spending. Once again, Germany is the clear first-place federation, ranking first in every year, with the exception of 2007, when Switzerland exceeded Germany in spending by 3%. Germany's average however, is 3% higher than second-place Switzerland and much higher than third place Australia (average 55.73%).

By any measure then, Germany has a large and developed welfare state. Although the growth of welfare spending may have slowed in recent years, it still represents the largest system of social programs among the seven federations compared here.[399] While many of the primary government programs are established via federal politics and legislation, a high level of spending may help to create new areas in need of coordination.[400] For example, while primary control over post-secondary education funding is found within federal legislation, several *staatsverträge* have been formed to address related issues, such as the granting of degrees and the funding of future research. Thus, even when new social programs or welfare spending do not directly lead to a specific intergovernmental agreement, overall spending increases can create new opportunities for collaboration. Of the 40 *staatsverträge* created between 1950 and 1995, 13 agreements pertain directly to healthcare or education alone. Since national legislation can serve as an alternative to intergovernmental coordination concerning the welfare

[398] Data collected from the IMF World Financial Yearbook.
[399] Martin Seeleib-Kaiser, "The Welfare State: Incremental Transformation," in *Developments in German Politics 3*, ed. Stephen Padgett, William E. Paterson and Gordon Smith, (New York: Palgrave MacMillan, 2003), 145-151.
[400] Huber and Stephens, *Development and Crisis of the Welfare State,* 146-155.

state, the large size of the German state still provides ample opportunities for agreements. Given the large size of Germany's welfare state, at least in comparison to the other cases, it is consistent that there should also be a prolific record of intergovernmental agreement formation.

5. The Existence of Lasting Forums for Intergovernmental Relations

It might be assumed that given the central place of the Bundesrat in German politics, there would be a limited number of intergovernmental forums which would play only a secondary role compared to the federal second chamber. This belief would be mistaken. According to Kramer: "numerous forums and conferences have come into existence to coordinate policy within the federation and among the Länder".[401] Although the Basic Law makes no mention of these intergovernmental bodies this has not stopped them from becoming an essential part of German intergovernmental relations.[402]

While the presence of the Bundesrat clearly has not precluded the formation of intergovernmental forums and networks amongst Germany's länder (both with and without the federal government), what is surprising is the number of bodies, their level of institutionalization and the frequency of their meetings. There are dozens of intergovernmental forums in Germany, with at least twenty which bring together ministers from amongst the länder – one for every major (and even minor) policy area.[403]

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[401] Kramer, "Federal Republic of Germany," 152

[402] Ibid, 162. Also: Arthur Benz, "Intergovernmental Relations in German Federalism - joint decision-making and the dynamics of horizontal cooperation," (paper presented at a conference on the federalization of Spain, Zaragoza, Spain, March 27, 2009), 1-2.

[403] The Bundesrat's website lists the major länder intergovernmental conferences above those which are committees of the upper chamber itself. In addition to a Prime Ministers' conference, they cover the following policy areas: Agriculture, Labour and Social Policy, Construction, Europe, Finance, Health, Equality, Home Affairs, Integration, Youth and Families, Justice, Education and Culture, Regional Planning, Sports, Environment, Consumer Protection, Traffic, Economy and Science. See: Germany,

This only covers intergovernmental bodies at the national level – they are further supplemented by other regional forums.[404] If these ministerial institutions were not enough, Kramer has identified more than 950 "discussion and working groups" at the administrative level, evidence of a vast network of intergovernmental ties among bureaucrats and officials. Many of these are not recent developments either, but arose early in the history of the Federal Republic. Three in particular – the Conferences of Prime Ministers, Education and Cultural Ministers as well as Housing Ministers – were founded before the Federal Republic even came into being (1947, 1948 and 1948 respectively).[405]

Virtually all meetings of these intergovernmental forums follow clear rules for organization, scheduling, rules for meetings and decision making as well as funding.[406] One body, the Conference of the Ministers for Cultural and Educational Affairs even has an independent bureaucracy, employing 216 people in 2004. Meetings are also relatively frequent, with ministerial councils coming together at least once or twice a year.[407] In an interesting contrast to North American federations, in Germany, the peak intergovernmental forums (first ministers) meet more often than regular ministerial bodies. The Conference of Prime Ministers, which includes only the leaders of the

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Bundesrat, "Fachministerkonferenzen, Ministerpräsidentenknferenz," 2011, http://www.bundesrat.de/cln_171/nn_11246/sid_D32D0F5C598BDE83030078A52972CFFA/nsc_true/DE/gremien-konf/fachministerkonf/fachministerkonf-node.html?__nnn=true (accessed February 19, 2011).

[404] Benz, "Intergovernmental Relations in German Federalism," 10-11.

[405] Ibid, 19.

[406] Ibid, 8.

[407] See: Bundesrat, "Fachministerkonferenzen, Ministerpräsidentenknferenz," 2011, http://www.bundesrat.de/cln_171/nn_11246/sid_D32D0F5C598BDE83030078A52972CFFA/nsc_true/DE/gremien-konf/fachministerkonf/fachministerkonf-node.html?__nnn=true (accessed February 19, 2011) and Benz, 2009, 18.

länder, meets at least four times per year, while the Chancellor also invites the first ministers of the länder to several meetings each year.[408]

With so many long-standing and institutionalized forums for intergovernmental relations, spanning virtually all areas of government policy, perhaps it should not be surprising that Germany leads this comparison with the largest number of intergovernmental agreements. Should any opportunity for national coordination arise, it is unlikely to be missed by the vast network of intergovernmental bodies which meet like clockwork throughout the year.

6. The Number of Subnational Governments at the State/Provincial Level

Germany is a unique case in this comparison in that the number of subnational governments has changed a few times since 1945. When the Federal Republic was founded in 1949, there were eleven länder formed out of the territories occupied by the Western Allies.[409] Some of these länder were based upon historical communities, while others were effectively creations of the Allies. This latter was quickly apparent as citizens and leaders in Baden, Württemburg-Baden and Württemburg-Hohenzollern expressed dissatisfaction with the division. A referendum in 1951 found that a majority of these territories favoured a merger and the creation of a *Südwestaat* (southwest state).[410] A year later, this mandate was realized with the creation of the new länd of Baden-Württemburg. Thus, the total number of länder decreased from eleven to nine.

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[408] See Kramer, "Federal Republic of Germany," 162 and Germany, Bundesrat, "Ministerpräsidentenknferenz." 2011. http://www.bundesrat.de/cln_161/nn_8758/DE/gremien-konf/fachministerkonf/mpk/mpk-node.html?__nnn=true (accessed February 19, 2011).
[409] The länder in 1949 were: Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern.
[410] Gunlicks, *The Länder and German Federalism*, 40-41.

This new total was short-lived however, as the situation regarding the Saarland was resolved five years later. After having been annexed by France in 1945, the Saarland was finally returned to Germany in 1957 and it joined the Federal Republic as a new länd.[411] This raised the total number of full subnational governments to ten; the number it would remain at until reunification. West Berlin was often included in matters that concerned the rest of the länder, but was not formally granted status as a full subnational government until 1990.[412]

The most significant change to Germany's subnational governments came in 1990 when the western and eastern parts of the country were unified under the Basic Law and institutions of the Federal Republic. The ten West German länder were suddenly joined by six new colleagues: five länder newly reconstituted from the former territory of the communist German Democratic Republic and a sixth from the reunified city of Berlin, which was formally granted full status. This raised the total number of subnational governments to sixteen – the current total for the federal republic.

Whatever the number of the länder however, it is clear that it has not had a significant impact on the formation of national intergovernmental agreements. During the Cold War, the Federal Republic totalled only ten subnational governments, the same number as Canada. Given the large number of agreements formed by both countries, it seems safe to conclude that ten subnational governments is not a significant impediment to the formation of national intergovernmental agreements. This was also confirmed by the close and constant ties between the länder through the Bundesrat, as well as other intergovernmental institutions, which was discussed in the previous section.

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[411] Hrbek, "Germany," 152-153.
[412] Gunlicks, *The Länder and German Federalism*, 42.

The only question is whether the accession of six new länder to the Federal Republic in 1990 might see Germany cross a threshold past which forming a national consensus becomes more difficult. The available evidence indicates that this was not the case. Between 1991 and 1995, nine new *staatsverträge* were formed between all the länder, a faster rate than that under the original Federal Republic. The new East German länder also joined existing *staatsverträge* that were negotiated before reunification.[413] This was aided, in part, because Germany lacked the internal linguistic and cultural divisions of Switzerland (the federation that ranks one spot higher in terms of the number of subnational governments) to exacerbate the divisions between the länder. Clearly though, whether Germany has eleven, nine, ten or even sixteen subnational governments, these numbers have proven to be no obvious impediment to the formation of national intergovernmental agreements.

7. The Existence of a Body for Intrastate Federalism

The very concept of intrastate federalism is intrinsically tied to Germany and its Bundesrat. The Federal Republic has effectively become the modern model for the direct participation of subnational governments within the federal legislature.[414] In theory, this should provide ample opportunity for the business of intergovernmental coordination to occur within the federal legislature instead of through the formation of national intergovernmental agreements. Given the large number of agreements that have been formed, however, this hypothesis requires further scrutiny, at least in the German context.

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[413] Vedder, *Intraföederale Staatsverträge.*
[414] Thomas O. Hueglin and Alan Fenna, *Comparative Federalism: A Systemic Inquiry*, (Toronto: Broadview Press Ltd., 2006),.222.

Asides from simply repudiating the hypothesis concerning intrastate federalism, there are two explanations for Germany's seeming contradiction. One, Germany's federal system is such fertile ground for intergovernmental agreements that any effect that the Bundesrat has on agreements is not enough to completely impede their formation. In this case, the effects of intrastate federalism could be seen as less powerful than the other variables (at least in the German example). Two, while Germany may be a model for the participation of subnational governments in the federal legislature, it may not be a perfect match with qualities of intrastate federalism as defined by this analysis. While a combination of the two may be the best explanation, the remainder of this section will focus on the features of intrastate federalism, as the first explanation is impossible to conclusively quantify.

According to the original hypothesis, a federal country with a full degree of intrastate federalism should form fewer national intergovernmental agreements because some of the business of intergovernmental coordination will take place within the national legislature. In order for a federation's second chamber to exhibit the full degree of intrastate federalism, it must have three characteristics. First, state governments must have direct representation within the chamber itself. While popular interests - as in the current American and Australian Senates – may coincide with the programs of state governments, they are not replacements. A representative of a state government will necessarily have different interests than a popular delegate, such as a desire to protect subnational jurisdiction. Second, full intrastate federalism requires equal, or at least disproportionate, representation for the subnational governments. Weighted representation for larger states in a federal second chamber creates incentives for smaller ones to pursue the more "level" playing field of executive federalism. Third, the second

chamber must have sufficient power to influence national matters that might otherwise be addressed through intergovernmental relations.

By these criteria, Germany's Bundesrat is a good, but not a perfect fit. Clearly, the Bundesrat involves the direct participation of subnational governments. The länder governments appoint ministers as representatives to the chamber and instruct them in how to cast their votes (which may not be split). Additionally, the Bundesrat clearly has the power to affect national matters, notably those issues that pertain directly to the länder. Moreover, the broad reach of federal legislation allows matters addressed in the national legislature to affect most areas of German government and society. While the Bundesrat only possesses a suspensory veto over issues not related to the länder and federalism, this distinction should have, at most, a small impact on the formation of intergovernmental agreements.

The one dimension where Germany's Bundesrat does not perfectly fulfill the ideal of intrastate federalism is in the weighting of each länder's delegation. As all länder are guaranteed a minimum of three seats, the Bundesrat is still disproportionately weighted in favour of the smaller states. Yet, the larger states are given a bigger say in the chamber, with the largest receiving double the votes (6) of the smallest länder. Using the current distribution of seats, this would allow the six largest länder, combined with only one other länd (of any size), to secure a majority in the Bundesrat. On any issue that might divide the large länder from the small, the smaller states may have an incentive to pursue some kind of intergovernmental coordination outside the federal legislature, if possible. While it is impossible to specify exactly how many potential agreements this has affected, it is reasonable to consider that this may have had some small effect.

On balance however, Germany's Bundesrat is much closer to an ideal form of intrastate federalism than the imperfect iterations found in federations such as Australia and the United States. Given the large number of national agreements that have been formed in Germany, it is clear that in the case of Germany – the factors encouraging agreements seem to be much stronger than any reductive effect of the Bundesrat.

Conclusion

Germany's system of cooperative federalism eschews neat divisions of legislative, executive and financial power; instead, the Basic Law enshrines an arrangement in which both orders of government have a clear role to play on most issues. For the purposes of this analysis, it is clear that, on balance, Germany's cooperative federalism has provided fertile ground for the formation of national intergovernmental agreements. Between 1950 and 1996, the governments of the Federal Republic formed approximately 80 national agreements or 1.77 per year, putting it in the same range as Australia and Canada.[415] Despite a similar number of agreements, Germany is a very different federation from the two previously discussed, making it an interesting contrast - a federation with institutional differences but a similar number of agreements.

The five variables that represent the factors conducive to coordination in Germany tend to exist at one extreme or the other. The ability of the spending power to produce coordination is minimal, as transfers occur not only from the federal government to the länder, but also from the länder to the federal government. Many of these transfers are tied into non-discretionary programs such as equalization, which further limits the

[415] This is using the estimated figure of total formal German agreements based on the doubling of the total number of staatsverträge that were identified.

potential for agreements. The significant centralized authority, at least in terms of legislative powers, granted to the federal government by the Basic Law also eliminates this as a potential source of coordination (as well as providing the source for an alternative to agreements).

Balanced against these limited avenues for coordination are three very strong institutional features. First, Germany exhibits the greatest degree of overlap of any federation in this comparison. While the federal government may have broad legislative powers, the centre must work with the länder in order to actually implement an agenda. Virtually all policy areas involve some form of coordination between the federal or länder governments, or even just between the länder, as in the case of certain types of media regulations. Second, Germany's welfare state is the largest of all seven federations and the scope of government regulation is broad. If Australia and Canada can form agreements based on their much smaller welfare states, then certainly the much larger German state can provide ample opportunities. Finally, Germany, much like the previous two federations, has a substantial network of institutionalized forums dedicated to intergovernmental relations between first ministers, ministers and senior bureaucrats. Together, these very strong elements provide more than enough encouragement for intergovernmental coordination in Germany.

Unlike Australia and Canada however, the German federation does have certain features which might reduce the likelihood of intergovernmental agreements. While the number of subnational governments seems to provide only a weak obstacle to agreement formation both before and after reunification, intrastate federalism is a different matter. Germany's Bundesrat is often regarded as the archetype of intrastate federalism, with the länder directly participating in the federal legislative process. This high degree of

intrastate federalism provides a clear alternative to intergovernmental agreements as the Bundesrat is able to funnel some intergovernmental business through the federal political institutions. However, given the large number of agreements that have been created in Germany, this alternative does not seem to have a large enough effect to reduce the number of agreements, relative to other prolific federations.

Thus, Germany possesses a number of factors which are very conducive to coordination that are expected in a federation that forms a large number of agreements as well as an alternative (the Bundesrat) that is more likely to be associated with cases which have formed fewer agreements. This produces a slightly different summary formula from that of Australia or Canada:

CON (*Strong*) – INH (*Weak-none*) – ALT (*Some*) = High IGA Formation

With the presence of a clear alternative to intergovernmental agreements, Germany's institutional environment is not quite as fertile (in theory) for agreements, yet has formed more than either Australia or Canada. This is by no means a contradiction of the theory, but an important consideration to return to once the results of the other country case studies have been considered. Germany may be a case that is particularly disposed to the creation of intergovernmental agreements.

In many ways, the desire for coordination is infused into not only the institutions of German federalism, but the political culture of the federation itself. According to Charlie Jeffery, the desire to establish national standards has been pervasive:

> Even where the Länder retained exclusive powers, there developed an instinct for coordination also directed at producing common, nationwide standards. The most well-known example of this 'self-coordination' of the Länder is the Conference of Ministers of Culture, which sets common frameworks for school education from

> primary school through to school-leaving qualifications. In most fields of responsibility of the Länder, this kind of 'self-coordination' became the norm.[416]

This kind of behaviour helps explains why Germany has one of the most robust and active systems of intergovernmental relations and agreement creation of the federations in this comparison.

[416] Charlie Jeffery, "Federalism and Territorial Policy," in *Developments in German Politics 3*, ed. Stephen Padgett, William E. Paterson and Gordon Smith, (New York: Palgrave MacMillan, 2003), 44-45.

Chapter Seven: South Africa

Source: CIA World Factbook

Formal Name: Republic of South Africa

Capital: Pretoria, Gauteng[417]

Subnational Governments: There are nine subnational units, known as provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, North West, Northern Cape and Western Cape.

Introduction:

Emerging from the repression of the infamous apartheid regime, the modern Republic of South Africa has only existed since 1994. Despite its seeming youthfulness, the South African political system is a product of its long history, and reflects an attempt to achieve a compromise between unity and diversity. Stereotypes of South Africa tend to depict it as a tense balance between a black, African majority and a white, European-descended minority, but the reality is far more complicated. The country is home to dozens of ethnic groups and hundreds of tribes; even the white minority is not uniform, made up of descendents of both British and Dutch settlers. The Constitution officially recognizes eleven different languages, while making special mention of more than a dozen more.[418] Beyond these ethno-cultural differences, South Africa also has great economic disparities; it is at once the wealthiest nation in Africa (measured by GDP), yet also one of the poorest, with a large proportion of its population unemployed and living in

[417] South Africa actually lists three capitals. Pretoria is the executive capital and seat of the President, while Cape Town in the legislative capital and Bloemfontein is the judicial capital.
[418] Section 6(1) establishes the official languages of South Africa as: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Subsection 5 includes two provisions to promote another 15 languages based on significance to certain communities or religions in the country.

poverty.[419] South Africa's nine provinces and its national government face the challenge of managing these many cleavages in this young federation.

History:

The modern political history of South Africa has roots in the colonial legacy of the region. While native African peoples have lived in the region for millennia, many of the modern cleavages originated with the arrival of European settlers in the mid-17th century, when the Dutch East India Company took an interest in the area as a supply port for its global trading routes.[420] The strategic value of South African supply bases drew other European competitors, notably the British, who also attempted to establish bases and colonies throughout the area. Competition and conflict arose between European settlers, as well as indigenous African peoples, intensifying during the 19th century and culminating in a series of wars including the Anglo-Zulu War (1879) and the First and Second Boer Wars (1880-81 and 1899-1902, respectively). This last war concluded with the British annexation of the other South African European colonies as well as the indigenous nations.

Direct rule by the United Kingdom over South Africa would prove to be short-lived however. Conflict was frequent between the British and the Afrikaners, as the British government attempted to exercise its newfound dominion and anglicize the region. These tensions were further exacerbated by the repression of the Zulus as well as the rest of the black population, leading to protests and revolts. This tumultuous experience

[419] The OECD found in 2008 that South African unemployment had reached 24%, though GDP continued to increase. See: Organization for Economic Co-Operation and Development, "Country statistical profiles 2010: South Africa," http://stats.oecd.org/index.aspx?queryid=23123 (accessed May 14, 2011).
[420] These Dutch settlers were the people who would become known as Boers or Afrikaners. See Nigel Worden, *The Making of Modern South Africa: Conquest, Segregation and Apartheid,* (Oxford: Blackwell, 1994), 7-10.

convinced London that direct rule would be too difficult and too costly, leading to the introduction of home rule. The *South Africa Act 1909* created the Union of South Africa, which formally brought together the four territories that the British possessed into a new dominion within the Commonwealth.[421] Despite the British experiences in Canada and Australia, the diverse nature of South Africa's residents and the pre-existing political boundaries, federalism was not chosen as a model for the new dominion.

The new Union seemed to resolve the tensions amongst the Afrikaners and the British as it was "celebrated as the reconciliation between (their) interests".[422] Yet, as the new state was helping to end the conflict between Europeans, it was institutionalizing the racial divide between the white minority and the disenfranchised black majority. One of the starkest means of repression was the creation of separate "reserves" for black South Africans, termed "Homelands" by the South African government and known more commonly as "Bantustans".[423] These areas, independent in law, but effectively controlled by the South African government, were part of the justification for the Apartheid regime instituted in 1948: blacks in South Africa could be disenfranchised as they possessed their own lands where they were sovereign.[424] This was, inadvertently, South Africa's first experience with a system resembling federalism.

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[421] Worden, *The Making of Modern South Africa*, 30-32. The Union Act did not come into effect until 1910. The four territories were the two British colonies, the Cape and Natal, and the Boer republics, the Orange Free State and the Transvaal.

[422] Janis Van Der Westhuizen, "South Africa," in *Handbook of Federal Countries, 2005*, ed. Ann L. Griffiths and Karl Nerenberg, (Montreal & Kingston: McGill-Queen's University Press, 2005), 310.

[423] This name comes from a combination of Bantu, the South African governments' term for blacks, and "stan", the suffix for land found in central Asia. The first of these was introduced in 1913, but the name "Bantustan" was not developed until the 1940s.

[424] Leonard Thompson, *A History of South Africa*, (New Haven & London: Yale University Press, 1995), 190-192. The 1970 Bantu Homelands Constitution Act even cancelled the citizenship of any black South Africans living outside the Bantustans on the grounds that their citizenship would be transferred to these homelands.

Once Apartheid collapsed in the early 1990s, this experience of using a federal-like system as part of the repressive regime gave federalism a negative reputation amongst many in the constitutional debates, notably members of the largest liberation party, the African National Congress (ANC).[425] The ANC sought a strong, unitary government that would have the power to reconstruct the country and encourage economic growth, but were opposed by a number of groups seeking a more decentralized alternative. Important minority groups, such as the Zulus and many white South Africans saw federalism as a means of gaining autonomy in the new republic.[426] In order to bridge these divergent goals, South African leaders were inspired by the German model of cooperative, administrative federalism, as opposed to the Anglo-American theory of watertight, competitive federalism.[427] Nine provinces were established to cover the territory of South Africa and while some of them were rooted in pre-existing divisions (such as original European colonies or even black Homelands), the boundaries were not drawn to accommodate ethnic, racial or cultural groups.[428] Although neither the interim Constitution of 1994 nor the permanent Constitution of 1996 labelled this system as "federal" – instead, they used terms such as "devolved" or "cooperative governance" – both documents included the constitutional features that are necessary for a federation.[429]

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[425] Robert Schrire, "The President and the Executive," in *South Africa: Designing New Political Institutions,* ed. Murray Faure and Jan-Erik Lane, (London: Sage Publications, 1996), 65, 73.

[426] The main opposition party, the National Party, was supported by many whites and sought a federal model as it would reduce the central government's powers and potentially grant them a region or two where they could form a majority or at least a large minority. See: Klaas Woldring, "Federal Aspects of the New South African Constitution: Prospects for Regional Integration," in *Reaction and Renewal in South Africa,* ed. Paul B. Rich, (New York: St. Martin`s Press, 1996), 248-250.

[427] Murray, Christina, "The Republic of South Africa," in *Legislative, Executive, and Judicial Governance in Federal Countries,* ed. Katy Le Roy, Cheryl Saunders and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 259.

[428] Van Der Westhuizen, "South Africa", 313.

[429] These include separate orders of government, a constitutional division of powers, and a second chamber that allows for provincial representation in the federal government. See: Watts, *Comparing Federal Systems,* 3rd ed., 9.

Since 1996, this "federal" constitution has been the basis of politics and law in South Africa.

Government and Political Structure:

South Africa's government draws heavily from the Westminster model of its former colonial authorities. However, unlike Canada or even Australia, South Africa takes more liberties with its interpretation of the British template, with a republican executive, proportional representation and the direct involvement of provincial governments within the national legislature – features more common to continental European democracies.

The national Parliament is bicameral, with the National Assembly serving as the chamber of popular representation and the National Council of Provinces (NCOP) acting as a body for provincial representation. The National Assembly is made up of 400 members, elected by proportional representation in nine provincial multi-member constituencies and one additional national constituency.[430] With no single-member constituencies and a closed-list method for choosing candidates, the system emphasizes the election of parties, rather than individuals.[431] In order to create a legislature that was inclusive of smaller political movements, the parties standing for election to the

[430] South Africa's system of proportional representation uses the Droop quota. The Droop quota allocates seats in a Single Transferable Vote system by taking the total number of valid votes cast and dividing that by the number of seats plus one and then adding one to this result (or in formulaic terms: $(v/s + 1) + 1$). This creates a threshold or quota for allocating seats to the parties which is both the smallest number of votes needed to elect candidates to all available seats. See: Henry Richmond Droop, "On methods of electing representatives," *Journal of the Statistical Society of London,* 44, no. 2 (June 1881): 141–196, reprinted in *Voting matters Issue 24* (October 2007): 7–46.

[431] Murray,("The Republic of South Africa,", 265) claims that focus on parties, rather than individual candidates was important given the prevalence of illiterate voters. This emphasis has been confirmed more recently with the addition of the 14th Constitutional Amendment which removed the ability of members of the National Assembly or provincial legislatures to switch parties while still maintaining their seats. It also banned the mergers of parties during a parliamentary session.

Assembly only need to surpass a threshold of 0.25% of all votes cast, much lower than the levels in other PR systems.[432]

By contrast, members of the NCOP are selected indirectly as membership is determined by provincial elections and decisions of their respective executives and legislatures. Section 60 of the Constitution allocates each province a delegation of ten members, consisting of six permanent delegates and four special delegates. The six permanent members must be selected proportional to the party balance in the provincial legislature and are nominated by the parties that are entitled to these seats (and subsequently approved of by the legislature).[433] The four special delegates consist of the Premier (or his/her representative) who chairs the delegation, as well as three other members who may be changed from time to time and are generally appointed by the provincial government based upon their specialty regarding the legislative business at hand.[434] In addition to these stipulations, the overall delegation must also be representative of the party balance in their respective provincial legislatures. For any matters that affect provincial jurisdiction, each provincial delegation receives only one vote and must follow the directives of the provincial legislature. For all other votes, members are able to vote individually, but then the NCOP has a reduced ability to reject legislation approved by the Assembly.[435]

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[432] Nico Steytler, "Republic of South Africa," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, (Montreal & Kingston: McGill-Queen's University Press, 2005), 329.

[433] The Constitution allows for limited flexibility in this regard, as the proportionality of delegates is explicitly established in Schedule 3 of the Constitution. Thus, while the provincial legislature technically appoints the permanent members, it is the eligible parties who are responsible for their selection.

[434] Johan de Waal, "Constitutional Law," in *Introduction to the Law of South Africa*, ed. C.G. van der Merwe and Jacques E. du Plessis, (The Hague: Kluwer Law International, 2004), 68.

[435] Ibid., 68. On provincial matters, if the NCOP rejects or amends legislation approved of in the National Assembly, a mediation committee is struck to come to an agreement between the two Chambers. If this is not successful, the NCOP can be overridden, but only by a two-thirds majority vote in the Assembly (unlikely, given the inability of legislation to find support in less than half the provinces). However, when

In the design of its executive, South Africa departs from other parliamentary models (both Westminster and continental European) by fusing the roles of Head of State and Head of Government into the Office of the President. At the beginning of a session of Parliament, the President is elected by the members of the National Assembly, which effectively assures this role falls to the leader of the majority party. The President then resigns his or her seat in the Assembly and appoints a Cabinet primarily from the members of the National Assembly, who retain their seats.[436]

This might suggest that the distinction between the South African President and the Prime Minister from a pure Westminster system is one of semantics; however there are a number of small, but interesting, distinctions. First, the President, as the Head of State, maintains all respective functions including conferring honours, summoning "commissions of inquiry", issuing pardons and assenting to legislation.[437] This last is important as the President is technically empowered to reject legislation and return it to Parliament for further consideration if he or she has "reservations about the constitutionality of the Bill"[438]. Although this provision has yet to be tested, it demonstrates a marked difference between the President and a Westminster Prime Minister. Second, by resigning their seat in the Assembly, the President creates a distinction between their office and that of legislators and cabinet members. While the President must retain the confidence of Parliament, this subtle distinction is reflected in the Constitution in Section 102 which allows for motions of non-confidence in either the

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the Parliament considers matters not directly related to provincial jurisdiction, the NCOP's veto or amendments may be pushed aside by a simple majority vote in the Assembly. See also Steytler, "Republic of South Africa," 329-330.

[436] Section 91 also provides a provision to allow no more than two members of the Cabinet to be appointed from outside the Assembly.

[437] The full listing of the President's powers as Head of State is found in Section 84.

[438] See: Section 79.

President and the Cabinet or the Cabinet alone.[439] Finally, the national executive as a whole has the right to intervene directly into provincial administration, subject to the approval of the NCOP; this will be explored at greater length in the section on centralization. These distinctions might seem of little importance, as they have generally not been tested, however they are important evidence of a deliberate departure from a pure Westminster or European parliamentary model.

The design of the provincial governments is precisely detailed by the Constitution (Sections 103-150) and generally resembles the national executive and legislature, both in their structure and their electoral systems. The largest institutional distinction is that provincial legislatures are unicameral, though other small differences exist as well. Murray identifies these as: limitations on the size of provincial executive committees to eleven members (Section 132), the lack of deputy ministers to support elected officials and the fact that the Premier does not resign his or her seat as the President does.[440] A final important difference is that the provinces have significant responsibilities in implementing national legislation and programs, similar to the federal systems found in Germany and Switzerland.[441] This means the provinces' executives have the responsibility to not only to enact their own policies (which are often shaped by national legislation), but also to implement the laws and regulations of the national government.

While understanding these institutional features of the South African political system is essential for any analysis of its federal system, alone it misses an important and influential characteristic of this federal system: the dominance of the African National

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[439] Johan de Waal also notes that a vote of no-confidence in the President essentially requires an acceptable replacement candidate to be available because otherwise, Section 50 stipulates that if the Presidency remains vacant for 30 days, an election must be scheduled. See: de Wall, "Constitutional Law," 69-70.
[440] Murray, "The Republic of South Africa," 274.
[441] de Waal, "Constitutional Law," 73-74.

Congress (ANC). As the liberation party led by Nelson Mandela, the ANC famously challenged the Apartheid regime and became the country's leading party once free and fair elections were established in 1994. In the four national elections since the end of Apartheid, the ANC has never even flirted with defeat, let alone a minority government, as their percentage of the popular vote was at its lowest in 1994 at 62%.[442] Indeed, the only uncertainty in election results is whether the ANC will manage to achieve the two-thirds majority needed to amend the Constitution. Given that the largest opposition party, the Democratic Alliance, draws the majority of its support from the white minority and has trouble attracting large numbers of black voters, ANC dominance seems likely to continue, at least in the medium-term.[443]

This dominance has important implications for South Africa's system of federalism and intergovernmental relations. As previously mentioned, the South African system of proportional representation puts the emphasis on choosing a party, rather than a candidate, for both the national and the provincial orders of government. Moreover, parties in South Africa (most notably the ANC) are single, unified entities without distinct provincial wings as is the case in federations such as Canada and the United States; thus, the leadership of a party extends across all orders of government. The dominance of central party authorities is further exacerbated by the holding of national and provincial elections at the same time. This timing has allowed Democratic Alliance leader Helen Zille to challenge the ANC in national elections while also being elected as Premier of Western Cape simultaneously. However, the most significant effects can be found in the dominant ANC party, which has not only triumphed in national elections, but has

[442] The 2004 election saw the ANC receive its highest percentage at just under 70% of the popular vote.
[443] Economist, "Your friendly monolith: the ANC remains all-powerful," *The Economist*, June 3, 2010, http://www.economist.com/node/16248694 (accessed July 20, 2010).

consistently controlled six of the provincial governments, while fighting over the remaining two.[444] In provinces that have elected an ANC majority, the Premier is appointed (known as "deployed" in South Africa), by the ANC leader, who has always served as the President. According to Murray, this has a significant impact on the federal system:

> Deployment from the centre means that the premier is in fact accountable not to his or her legislature, but rather, to the central authority. Nor is the premier accountable to the local party organization. Its leadership may be excluded from cabinet and the provincial government, which now essentially acts as an agent of the centre.[445]

This direct relationship between the ANC's leadership and the Premiers of most provinces not only exacerbates centralization (which could affect agreement formation), but it also allows for an additional conduit of intergovernmental coordination that is not available in all other federations: intra-party relationships.[446] It is worth bearing in mind this unique feature as we proceed through the analysis of the variables affecting agreement formation.

Intergovernmental Agreements in South Africa:

Until 2005, South Africa lacked a specific term or framework for the formation of intergovernmental agreements. However, in August of that year, the national government passed the Intergovernmental Relations Framework Act (IRFA) which was designed to create a new environment for intergovernmental relations in South Africa.[447] Among the

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[444] As of the most recent round of elections in 2009, only Western Cape had a non-ANC government, as the Democratic Alliance won a majority. In the past, however, the Inkatha Freedom Party, an ethnic Zulu party, has formed the government in KwaZulu-Natal (most recently in 1999).
[445] Murray, "The Republic of South Africa," 274-275.
[446] Watts, *Comparing Federal Systems*, 3rd ed., 50.
[447] South Africa, *Intergovernmental Relations Framework Act, 2005*. (assented to August 10, 2005), South Africa Government Gazette, Vol. 482, no. 27898, 2005.

measures meant to encourage cooperation and reduce conflict was the inclusion of a new intergovernmental instrument: the implementation protocol. Implementation protocols have been described by the Department of Provincial and Local government as:

> ... a mechanism by which two or more organs of state must cooperate in order to exercise a statutory power, perform a function, implement a policy or deliver a service. The implementation protocol sets forth the anticipated outcomes of the joint work, details roles and responsibilities, the sources of funding and other resources and their envisaged use, performance targets and oversight mechanisms to ensure that the intended outcomes materialize.[448]

The IRFA also stipulates that the agreements must be formal, written and signed by all participants.[449] This highly institutionalized framework marked a dramatic departure from the informal realm of intergovernmental relations prior to 2005 as well as differentiating South Africa from other federations with less well-defined systems.

Whether under the original, non-institutionalized framework between 1996 and 2005, or the five years since the passage of the IRFA, the result has been the same for the formation of formal, national intergovernmental agreements: nothing. While the day-to-day business of intergovernmental relations persists in South Africa, there has been a complete dearth of formal agreements formed between the national and provincial governments or solely between the provincial governments. While South Africa is not short of active intergovernmental forums, the outcomes of these institutions are advisory, legislative or "not formally binding".[450] The Department of Provincial and Local Government, the department primarily responsible for intergovernmental relations at the

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[448] South Africa, Department of Provincial and Local Government, *The implementation of the Intergovernmental Relations Framework Act – An Inaugural Report 2005/06 – 2006/07*, (Pretoria: Department of Provincial and Local Government, 2007), 38.
[449] South Africa, *Intergovernmental Relations Framework Act, 2005*, 35(4b).
[450] Nic Olivier, "Intergovernmental Relations in South Africa: Conflict Resolution within the Executive and Legislative Branches of Government," in *Intergovernmental Relations in Federal Countries,* ed. Peter Meekison, (Ottawa: Forum of Federations, 2002), 77-78. A larger discussion of these institutions can be found in the discussion of the seventh variable, the existence of lasting forums for intergovernmental relations, in this chapter.

national level, has recorded no examples of formal national agreements or any usage of the implementation protocols. This finding has been reiterated by Professor Jaap de Visser, of the University of Western Cape, a researcher in multilevel governance, who confirmed that implementation protocols had not yet been utilized by the federal or provincial governments, nor were there existing examples of formal intergovernmental agreements.[451] The complete lack of any kind of formal, national intergovernmental agreements sets South Africa as a unique case in this investigation, and the remaining sections of this chapter will be devoted to understanding how each of the different variables may have contributed to the lack of agreement formation.

1. The Degree of Overlap that Exists in the Constitution

Enshrining a significant degree of overlap between the orders of government was one of the explicit goals of the South African Constitution. Rejecting a federation of watertight compartments in favour of a more European, administrative model was one of the key compromises made during the debates over the new South African constitution.[452] The first section of the Constitution that details the institutions of government addresses this directly in a chapter entitled "Co-operative Government". Section 40 affirms the interconnected nature of the South African federation by declaring: "In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated." Section 41 goes into greater detail, stipulating that all orders of government must remain unified in the Republic, maintain friendly relations, coordinate their actions and effectively resolve any conflicts that arise.

[451] Jaap de Visser, emails to the author, June 24 and September 25, 2008.
[452] Murray, "The Republic of South Africa," 274.

As Steytler argues, this was a deliberate attempt by the framers of the South African Constitution to enshrine a system of cooperative federalism similar to Germany's.[453]

Without further reinforcement and greater specificity in the division of powers, however, these principles might turn out to be mere platitudes. By applying Ronald Watt's analysis of jurisdictional responsibility to South Africa's Constitution, some sense of the degree of overlap can be observed. Of the 45 categories directly addressed by the Constitution, 27 or 60% are explicitly defined as concurrent or are granted in some form to both orders of government. This clear majority would suggest that South Africa's division of powers contains a high degree of overlap. In a comparative context though, this conclusion might be somewhat tempered. Of the seven countries in this analysis, South Africa's rating of 60% overlap in jurisdictions ranks only third, behind Germany (75%) and Australia (70%). Thus, while South Africa's division of power has a high degree of overlap, it is certainly not the highest among the federations considered in this study.

Describing South Africa as the federation with only the third highest degree of overlap might lead one to underestimate the level to which its governments are interdependent. The significant degree of concurrency between the national and provincial governments is especially evident in the areas outside of exclusive national authority.[454] An examination of Schedules 4 and 5 of the Constitution reveals that virtually all policy fields outside of national jurisdiction are held jointly by the provinces and the national government. Schedule 5, which lists the areas of exclusive provincial jurisdiction, is exceptionally small, containing guarantees only for specific items such as

[453] Steytler, "Republic of South Africa," 325.
[454] Ibid., 326.

ambulance services, local libraries and museums, provincial sport and recreation, veterinarians, and provincial roads and traffic. By contrast, Schedule 4 is a substantial list of areas of concurrent jurisdiction, including important policy areas such as agriculture, the environment, health services, housing, economic policy, transportation, trade and welfare. Not only are these powers much more numerous and significant than the exclusive provincial areas, they tend to crowd out this meagre allowance (it is clear that healthcare policy as a whole will have at least some consequences for ambulance services, for example).

Returning to Watts' categorization, this division of powers leaves virtually no areas of exclusively subnational jurisdiction (only one area, other types of taxation, is solely held by the provinces) but a very large area of overlapping jurisdictions. Of the 28 policy areas that are not reserved solely to the national government, 27 (96%) are shared between both orders of government, the highest proportion of this study. If the federal and provincial governments in South Africa both had significant areas of independent responsibility, they would be free to legislate and administer these, without the necessity of coordination. The lack of an exclusive provincial jurisdiction means that fields such as primary education and municipal services, which are often exclusively subnational in federal systems, are subject to multiple orders of government, opening these areas up to potential intergovernmental coordination through agreements.

If we can conclude that South Africa possesses somewhere between a relatively and very high level of constitutional overlap, why are there no intergovernmental agreements to show for it? Aside from simply repudiating this hypothesis – a premature conclusion – the best explanation can be found in a more complete reading of the Constitution. Rather than simply allowing the governments of South Africa to navigate

through the deep and complex web of overlapping jurisdiction, the framers of the Constitution included a number of centralizing features to ensure coordination between governments, a reality that will be discussed in the next section.

2. The Degree of Centralization in the Constitutional Division of Powers

South Africa's federal system has been described in the past as a "quasi-federation", due to the perception that it grants the central government a much stronger degree of power than the provinces.[455] The central government is seen as the dominant entity because the Constitution provides a number of special powers that allow it to encroach on provincial jurisdiction or even override their decisions.[456]

An examination of the division of powers found in the Constitution reveals that 17 (38%) of the enumerated policy areas are reserved to the national government alone. This ranks third of the seven cases, well behind both the United Kingdom (59%) and surprising Switzerland (49%), while placing just ahead of Canada (35%). Moreover, the clear majority of jurisdictions are held concurrently by the national and provincial governments. This would suggest that South Africa is defined more by overlap and concurrency than centralization in the powers of its national government. Such a conclusion would be premature, as a broader reading of the Constitution and an understanding of the South African political system indicates that centralization, rather than cooperation among equals, is the norm for this federation.

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[455] Greg Taylor, *Characterisation in Federations: Six Countries Compared*, (Berlin, Heidelberg: Springer Berlin Heidelberg, 2006), 123.
[456] Heinz Klug, "South Africa: From Constitutional Promise to Social Transformation," in *Interpreting Constitutions: A Comparative Study*, ed. Jeffrey Goldsworthy, (Oxford: Oxford University Press, 2006), 277-278.

While Schedule 4's expansive range of concurrent powers suggests an equal partnership between the national government and the provinces, Section 146 grants the national government clear supremacy. Subsections 2 and 3 present a nearly exhaustive list of circumstances in which national legislation prevails over provincial, including:

- If an issue "cannot be regulated effectively" by individual provinces.
- If the national legislation is attempting to provide necessary uniformity by adopting common norms and standards, frameworks or national policies.
- If the national legislation is needed to: maintain national security or economic unity; protect the common market and the mobility of goods, services, capital and labour; promote the economy across provincial borders; ensure equal opportunity or access to government services; protect the environment; defend the economic, health or security interests of other provinces or the country; or, finally, if the overridden provincial legislation "impedes the implementation of national economic policy."

Although Section 146(5) allows provincial legislation to prevail if none of the above stipulations apply, it is difficult to envision a situation in which a piece of national legislation could not be justified on one of these grounds.[457] While the courts may attempt to urge cooperation and harmonization between national and provincial laws where possible, the provinces have little recourse in any conflict where a decision of primacy must be made.[458] Thus, the inclusion of Section 146 alters the division of powers from one of clear overlap, to a system allowing for greater centralization and the expansion of national power.

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[457] Klug, South Africa: From Constitutional Promise to Social Transformation," 277.
[458] Jonathan Klaaren, "Federalism," in *Constitutional Law of South Africa*, edited by Matthew Chaskalson et al., (Kenwyn: Juta, 1999), 5-2, 5-8.

One area that might have provided some degree of decentralization is the provincial implementation of national legislation, as is the case in Germany and Switzerland.[459] Yet this comparison cannot be taken too far, as South African provincial government have significantly less autonomy in determining how to implement federal legislation than their European counterparts. Not only does the national government have the power to specifically set standards and directives for provincial governments through its wide legislative powers, but the Constitution also grants oversight of the provincial executive branch. Section 100 provides the national executive with the ability to intervene directly in provincial jurisdiction if a provincial executive fails to fulfill the directives and obligations provided by national legislation. The grounds for such an intervention are similar to the grounds for legislative override, covering broad justifications such as maintaining national standards, managing the economy and protecting the country.[460] Such an intervention will remain temporary unless approved by the NCOP, but given the centralized party system, as long as the party in power controls five of nine provinces, such approval would be easily forthcoming. This adds to the centralized nature of the South African federation, providing the national government with ample opportunities to consolidate power and override provincial decisions.[461]

Finally, even the meagre set of exclusive provincial powers is not safe from central government control. Subsection 44(2) grants the national legislature the ability to pass legislation in exclusively provincial matters (Schedule 5). As with the other powers

[459] de Waal, "Constitutional Law," 74..
[460] See Section 100(1) b for the complete listing.
[461] It is worth noting that these same centralizing powers are granted to the provincial governments in their relationship with local governments, under Section 139.

mentioned, this ability is subject to restrictions, but these are as weak as those governing legislative and administrative supremacy.

The South African Constitution may appear, at first, to encourage overlapping jurisdictions and cooperative government, but a more complete understanding demonstrates the prevalence of centralizing instruments. Whether a matter of legislation or administration, the central government has the power to create and enforce a national solution to any problem requiring intergovernmental coordination. Issues such as public health, infrastructure development, transportation and economic growth all have provincial implications or affect concurrent jurisdiction, yet all have been addressed via national legislation.[462] A less powerful national government might be forced to work with the provinces to coordinate policies via formal intergovernmental agreements; however the strength of national institutions is exacerbated further by the ANC's dominance which leads to a federal system in which national and multi-jurisdictional issues are directly resolved by the central government through national legislation.

3. The Size and Status of the Federal Spending Power

Even if the national government did not possess a number of constitutional instruments to achieve a dominant position in the distribution of powers, the South African federation might be described as highly centralized simply based upon the financial relations between the centre and the provinces. The national government has almost total control of all significant revenue sources, while the provincial governments are reliant upon federal transfers for almost the whole of their budgets.

[462] Examples include: the National Health Act 2003 (which included a specific section stipulating actions which must be fulfilled by the provinces),the Housing Act, 1998, and the National Land Transport Act, 2009.

Like most elements in a federation, financial centralization begins with the Constitution. South Africa's fundamental law reserves virtually all major sources of income to the federal government alone, including: customs, income tax (both personal and corporate), natural resource revenues, value added tax, retail sales taxes and excise duties.[463] Only two revenue sources are open to the provinces: user fees and the taxation of gambling and lottery monies. The largest revenue source outside of direct federal jurisdiction, property taxes, is reserved specifically to local governments, further handicapping the revenue-raising powers of the provinces. Thus, the provinces begin with almost no means to raise their own revenue, making them very dependent on federal transfers, even more so than local government.[464]

Watts' comparison of financial arrangements in federal systems quantifies how this distribution of taxation authority creates a very centralized financial system. Examining national government revenues as a percentage of total government revenues, South Africa's central government collected 82% of all funds between 2000 and 2004.[465] This is a greater share than any other country in this investigation (Australia ranks second at 74.8%), with the exception of the United Kingdom, which was not included in Watts' comparison. This high level of centralization in revenue generation has led to the provinces' mammoth dependence upon federal transfers for their revenue. Watts found that in the same period, South African provinces relied on transfers for 96.1% of their

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[463] Joachim Wehner, "Fiscal Federalism in South Africa," *Publius* 30, no. 3 (2000): 60.
[464] Ibid.
[465] Watts, *Comparing Federal Systems*, 3rd ed., 102. This is technically 5th in his comparison, behind Nigeria (98%), Mexico (91.3%), Russia (91.0) and Malaysia (86.9%). However, this should not be taken to mean that the provincial governments collect the other 18% of total revenues. Instead – although Watts does not provide a breakdown – it is far more likely that the bulk of this is collected by local governments via property taxes and user fees.

revenues, highest of all the federations in his study.[466] This is significantly ahead of other centralized federations such as Nigeria (89%) or Spain (72.8%), and more than double the rate in Australia (45.6%), the highest-ranked country that appears in both Watts' research and this study.

Watts' results are corroborated by the IMF's Government Statistics Yearbook, which has tracked subnational revenue from federal grants for the countries in this investigation.[467] If we begin as far back as 1972, it is clear that South Africa's subnational governments have depended upon national transfers for the vast majority of their revenue (see *Table 7.1*).

Table 7.1: Percentage of Subnational Revenue from Federal Grants (South Africa)[468]

	1973	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
S.A.	83.51	N/A	86.23	85.65	83.63	94.38	96.08	96.63	95.96	90.26	2

The average is 90.26%, ranking second, just behind the UK at 91.1%. However, this longitudinal comparison also includes results from the pre-1994 Apartheid regime. If only the period from 1995 to 2007 is examined, the average is 95.76%, ahead of even the UK and closer to Watts' result. Whatever the measure used, the result is the same: the national government controls almost all revenue sources and the provinces are highly dependent upon financial transfers.

With such a significant imbalance in the ability to raise revenue and overlapping jurisdictions, South Africa should allow for a prominent role for the federal spending

[466] Watts, *Comparing Federal Systems*, 3rd ed., 105.
[467] The Yearbook does not, as of yet, identify a separate order of government in the UK. However, data for the devolved administrations can be found in their budgets and used for the purposes of comparison. See Chapter 9 on the United Kingdom for more information.
[468] Results were collected from the IMF's World Financial Yearbook series.

power, and thus, agreement formation. With no national intergovernmental agreements, this is clearly not the case. Two possible explanations exist for this. First, South Africa's distribution of powers allows for the national government to legislate in virtually all areas of provincial jurisdiction, even before its override powers are considered. As the national parliament is able to create framework legislation in these areas, it can use its spending power directly through a legislative framework, as opposed to an intergovernmental agreement. This contrasts with a country such as Canada, where direct spending across a more watertight division of powers is more difficult. Second, while it is not possible to discern exactly where it is found, it may be reasonable to infer that there is a tipping point in the relationship between the federal spending power and agreement formation. In countries such as Australia and Canada, subnational governments are reliant upon federal transfers for an important percentage of their revenues, but not for their entire budgets. Moreover, their jurisdictions - even in Australia, with its significant degree of overlap – are more independent than in South Africa, with its powerful central government. As such, the national and subnational governments must engage in negotiations and reach agreements in order to determine the spending of federal funds. However, in South Africa (as well as the United Kingdom), the provinces are so completely dependent upon the centre for their revenues that they must accept most, if not all, directives from the federal executive. Thus, the South African case seems to indicate a situation in which the immense reservation of financial resources to the national government has bolstered agreement-reducing centralization, rather than an approach that tends towards interaction and coordination.

4. The Size and Scope of the Welfare State

Assessing the size and scope of the welfare state in South Africa is more difficult and complicated than with the other case studies in this investigation. Although there are a number of statistics, measurements and research papers that track the size of government, particularly in education, health, social protection and pensions, comparisons with other countries are difficult as the measurements must include the same programs to be effective.[469] This investigation has used two primary means for comparing the size of the welfare state across the selected case studies: the OECD's Social Expenditure Database, which expresses spending as a percentage of GDP, and the IMF's Government Finances Yearbook, which measures welfare state spending as a percentage of total government spending. Unfortunately, while South Africa is an affiliated non-member country, the OECD's measurement does not track its spending. The IMF does provide some data, though not a complete time series.

Table 7.2: South African Welfare Spending as a Percentage of Total Federal Spending[470]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
S.A.	N/A	N/A	N/A	5.62	N/A	N/A	N/A	N/A	49.49	27.56	7

The IMF's data (*Table 7.2*) only has entries for two of the periods studied, 1985 and 2007. In the first, welfare spending was tracked at 5.62% of total government spending, however this measurement is from the Apartheid regime and has limited relevance to the new constitutional and political order. The data from 2007 lists welfare spending at 49.49% of total spending and provides a more effective comparison with the

[469] Consistently tracking government intervention and welfare policies across a number of countries is especially difficult because of the scope of these activities. For example, some studies incorporate only social assistance grants and other poverty assistance programs, while other measurements include these, pensions and even education spending. The best effort has been made to find as many commonalities between different measurements as possible.

[470] Data collected from the IMF World Financial Yearbook.

cases in this study. This is the lowest of any of seven countries, almost ten percent lower than the United States (59.30%), and well below the average of 64.97%. While this does not give us an indication of trends in spending since the foundation of the post-Apartheid republic in 1994, it does demonstrate that South Africa lags behind in spending, compared to the advanced economies of this study.

Although there is a lack of reliable, comparative indicators, studies focusing on South African spending alone may provide more details of the welfare state. Even if these numbers cannot be directly compared to other countries, significant changes in spending over time could have an influence on agreement formation and are worth analyzing. Looking at the potential growth of the welfare state in South Africa, Burger found that social spending had been rising in nominal terms since 2000.[471] Growth was especially strong between 2003 and 2006, when spending rose from almost 37 billion Rand to 57.7 billion.[472] When viewed as a percentage of the economy however, this 20 billion Rand increase is less significant. Social grants stood at 2.9% of GDP in 2003, but by 2006, they had only risen to 3.3%, despite increasing by more than half in nominal terms.[473] Moreover, grants were expected to decrease somewhat in real terms, making up only 3.2 % of GDP by 2008. Yet, neither the increase in spending (in nominal and real terms), nor the slight retrenchment of recent years has been seen to drive agreement formation.

Similar results can be found in a 2010 OECD study which took a wider view of government spending, examining education, health and social spending. The OECD also

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[471] Philippe Burger, "South Africa economic policy: Are we moving towards a welfare state?" *World Economics Colloquium of the University of Bremen*, No. 104, (July 2007), 25.
[472] Ibid.
[473] These grants were made up of welfare payments, including income support, child support, veteran, and disability grants.

noted an increase in social spending between 2000 and 2006, although their calculations have it beginning at 3.2% of GDP in 2000 and peaking at 4.8% in 2006, before decreasing in real terms to 4.4% by 2009.[474] This seems to be the only aspect of the welfare state that has seen a noticeable increase however; health spending has only slightly increased (2.9% in 2000 to 3.4% by 2009) while education funding has actually fallen in real terms (5.5% to 5.4% in the same period). Although it is impossible to perfectly compare these numbers to the OECD's Social Expenditure database (they use a different "basket" of polices), it is interesting to note that at its peak in 2006, total education, health and social spending in South Africa amounted to 13.4% of GDP.[475] This would still place South Africa as the lowest of the cases in the OECD's Social Expenditure comparison, below the United States at 21.4% (which includes 5.5% of GDP in education spending, to make the figures comparable).[476] While it must be stressed that this comparison is not a perfect one, the gap is significant enough to indicate that South Africa is the smallest spender on the welfare state.

As South Africa has no national intergovernmental agreements it is clear that the size and scope of the welfare state has not driven agreement formation. The evidence that is available points to a lower level of spending in South Africa than in any of the other six countries. This would be consistent with the lack of agreements as a smaller welfare state

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[474] Murray Leibbrandt, Ingrid Woolard, Arden Finn and Jonathan Argent, "Trends in South African Income Distribution and Poverty since the Fall of Apartheid," *OECD Social, Employment and Migration Working Papers*, 104 (May 2010), (Directorate for Employment, Labour and Social Affairs), 53-54. http://www.oecd-ilibrary.org/docserver/download/fulltext/5kmms0t7p1ms.pdf?expires=1318626091&id=id&accname=guest&checksum=8C714CF778CF7CC9F2166E41439B19D2 (accessed October 10, 2011).

[475] This included education spending at 5.3% of GDP, social grants at 4.8% and health at 3.3% for a total of 13.4%.

[476] According to the CIA's World Factbook, American education spending was 5.50% of GDP in 2007. If this was added to the original total in the Social Expenditure figures, it would place the US welfare state spending at 21.4% of GDP, well ahead of South Africa's total. Available at: https://www.cia.gov/library/publications/the-world-factbook/rankorder/2206rank.html (accessed May 14, 2011).

provides fewer opportunities for intergovernmental coordination than a larger, more complex one. Moreover, as federal legislation seems to be the dominant instrument of intergovernmental coordination, any amount of government business that crosses jurisdictions is likely to be contained in such legislation. Thus, a lower level of welfare state spending seems to be yet another factor working to limit the likelihood of agreement formation in South Africa.

5. The Existence of Lasting Forums for Intergovernmental Relations

With a federal order that is highly centralized, a political system dominated by a single party and no record of agreement formation, it might be expected that South Africa is also lacking any type of formal arena for intergovernmental relations. In fact, the opposite is true, as South Africa possesses a number of lasting forums for intergovernmental relations. When the Intergovernmental Relations Framework Act was passed in 2005, it contained a specific section devoted to "Intergovernmental Structures".[477] The Act lists the criteria for establishing any national or provincial intergovernmental forum, as well as laying out basic rules and lines of communication, confirming their potential importance as a part of South African federalism.

The President's Coordinating Council (PCC) occupies the peak position as a body for executive federalism in South Africa. Consisting of the President, the Deputy President, the finance minister, the public service minister, all nine Premiers and a representative of local governments, the PCC is seen as the "senior consultative body".[478]

[477] This is not to suggest that such forums did not exist prior to 2005, only that they were codified in the IRFA. Chapter 2 of the Act addresses intergovernmental structures at the national, provincial and local levels of government.
[478] South Africa, DPLG, *The implementation of the Intergovernmental Relations Framework Act*, 22

While the PCC possesses no formal or statutory authority (though its existence is confirmed in law through the IRFA), it meets twice a year and is the principal body for federal-provincial relations and for interprovincial relations.[479]

The PCC is not an orphan of South African intergovernmental relations either, as it is joined by a number of other intergovernmental forums, notably the MINMECs. MINMECs are ministerial councils in specific policy fields consisting of the federal Minister and the nine relevant Members of Executive Councils (hence the abbreviation). These cover a wide range of policy areas, and some are very active. For instance, both the Budget Council (Finance Minister and MECs) and the Council of Education Ministers (CEM) were established through statutes and must be consulted on issues of finance and education that affect the provinces.[480] The Financial and Fiscal Commission (FFC) was also created to provide a lasting central body for financial matters, and advises governments as well as approving loans.[481] These are joined by a number of statutory and non-statutory bodies which cover all aspects of government policies from healthcare to foreign relations.[482]

If South Africa has a developed system of intergovernmental structures, why then does it have no intergovernmental agreements to show for it? Surely, with so many meetings in an institutionalized setting there would be at least one or two formal agreements between the participants. The answer to this apparent contradiction is found

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[479] Olivier, "Intergovernmental Relations in South Africa," 77-78.
[480] The Intergovernmental Fiscal Relations Act 97 of 1997 established the Budget Council and the requirement for consultation, while the National Education Policy Act 27 of 1996 did the same for the CEM. See Olivier, 76-78.
[481] South Africa, *Financial and Fiscal Commission Act 1997*. (assented to December 19, 1997), South Africa Government Gazette, Vol. 390, no. 18514, 1997..
[482] This description only scratches the surface of South African intergovernmental forums (it obviously neglects provincial councils which involve representatives from municipalities). South Africa's Intergovernmental Relations Audit of 1999 has a more complete, if dated list, while Olivier's slightly more recent work has a listing as well.

in the actual results and outcomes of these bodies. The South African government's "Guide for Practitioners" refers to MINMECs and other structures as "consultative forums", where issues and legislation are discussed and advice is sought from the participants.[483] While some of these councils may meet often, their discussions are often informal.[484] Even the peak institution, the PCC, is viewed as a "non-formal" body, making decisions that are "not formally binding and enforceable".[485]

In addition to the largely informal discussions and outcomes of these bodies, South Africa's intergovernmental forums have been largely subsumed as part of the national legislative process. Ministers in the national government often use MINMECs to introduce national legislation so their provincial counterparts can have input as well as be forewarned about any significant policy changes. Thus, even though the Budget Council and the CEM are active bodies and must be consulted on new legislation in their respective fields, these recommendations are folded into national legislation, as opposed to creating national intergovernmental agreements.

Despite featuring a large and developed network of intergovernmental forums, South Africa remains without even a single national intergovernmental agreement. Instead of encouraging agreements, these bodies either remain consultative and informal or reinforce the principal method of intergovernmental coordination in South Africa: national legislation. So long as the national Parliament is empowered to legislate on almost any matter, these forums will continue to contribute to that process rather than create their own, independent outcomes.

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[483] South Africa, Department of Provincial and Local Government, *Practitioner's Guide to Intergovernmental Relations in South Africa*, (Pretoria: Department of Provincial and Local Government, 2007), 66.
[484] Olivier, "Intergovernmental Relations in South Africa," 77-78.
[485] Ibid.

6. The Number of Subnational Governments at the State/Provincial Level

Compared to other federations in this study, South Africa has a relatively small number of subnational governments. With nine provinces, it comes fifth in this ranking, well behind the leaders, Switzerland (26) and the United States (50). Countries with similar numbers of subnational governments – Canada and Australia – have shown robust histories of agreement formation. Even federations with much larger numbers of subnational governments – Germany and Switzerland – exhibit at least some intergovernmental agreements. Moreover, South Africa's provinces are not arranged to ensure ethnic majorities which might exacerbate the effects of even a small number of subnational governments, as in Switzerland or the United Kingdom. In short, the number of subnational governments does not contribute to the explanation of why South Africa has formed no national intergovernmental agreements.

While the relationship, or lack thereof, between subnational governments and intergovernmental agreements appears clear, two other elements are worth noting. First, as explained in the previous section, South African subnational governments seem to have little difficulty in meeting with each other. Indeed, there are a myriad of intergovernmental institutions, at the peak, ministerial and bureaucratic level, confirming that the number of governments is no impediment to intergovernmental relations. Second, the pre-eminence of the African National Congress should be re-iterated. Because the ANC has a unified party hierarchy and appoints provincial leadership from the centre, this should, in theory, further reduce any effects that the number of subnational governments has on agreement formation because the centre should be able to compel agreement from most of the premiers and their governments. As no national agreements

have been concluded, there are certainly better explanations for these results than the assertion that nine provincial governments create a coordination problem that cannot be overcome.

7. The Existence of a Body for Intrastate Federalism

Given that the German *Bundesrat* served as the principal model for the National Council of Provinces, it is not surprising that South Africa exhibits a complete degree of intrastate federalism.[486] The NCOP provides direct representation for provincial governments, allowing for their interests and concerns to be addressed within the national legislative process. The Constitution recognizes the importance of direct provincial representation through the NCOP by making its approval necessary for the more extreme means of centralization, such as forcing a provincial executive to comply with national legislation.[487]

The NCOP does differ from the *Bundesrat* in a couple of notable ways which might affect the degree of intrastate federalism that it provides. First, the NCOP does not technically have an absolute veto; instead, its objections – provided they are not solved through a mandatory mediation process – can be overridden by a two-thirds majority in the National Assembly, for matters that affect the provinces, and a simple majority for those that do not. In theory, this could allow for situations in which provincial interests are ignored or defeated by a majority in the Assembly that drew its support from a minority of the provinces, thus weakening the effectiveness of the NCOP. However, South Africa's electoral system makes such a concern highly unlikely, especially for

[486] Steytler, "Republic of South Africa," 329.
[487] Section 100(2) and (3).

national matters that affect the provinces. As provincial and national elections occur simultaneously, use proportional representation and feature a party system that does not have separate wings for provincial and local elections, it is extremely unlikely that a party or coalition that cannot acquire the approval of five provinces in the NCOP could assemble a two-thirds majority in the National Assembly.[488]

The second difference between the NCOP and the *Bundesrat* is the differentiation in delegates. While the German second chamber sees the states appoint delegates directly and cast a single vote on all matters, the NCOP uses a more complicated system. Six of the ten delegates are "permanent" and sit full time as members of the NCOP in Cape Town, while the remaining four include the Premier (or their representative) and three other members appointed temporarily. As these special members are sitting members of provincial governments, their presence in the NCOP is infrequent, possibly allowing for a rift to develop between permanent and special delegates. This situation seems to have been anticipated by the framers of the Constitution, who built in several features to ensure that the NCOP would remain a body of provincial representation and to keep the divisions between the different types of delegates from becoming unmanageable. One, the Premier leads the delegation, establishing a symbolic hierarchy of the delegates.[489] Two, the permanent delegates (as well as the delegation as a whole) must be representative of the party distribution in the provincial legislature.[490] Three, for matters affecting provincial jurisdiction, the delegation may only cast a single vote, similar to the process in the

[488] Murray, "The Republic of South Africa," 268.
[489] Section 60(3).
[490] Section 61. This means that when, for example, the Democratic Alliance manages a rare victory over the ANC in elections in Western Cape, even the permanent delegates will reflect that party's majority and thus, their preferences in the legislature.

Bundesrat.[491] This removes the ability of members from minority parties to cast votes against the interests defined by their provincial government. Moreover, if the previous safeguards (such as the Premier acting as chair) were not enough, the delegation's single vote must be cast based on instructions from the provincial government. While non-provincial matters allow each delegate their own vote and thus, more freedom (at least the freedom to replace provincial instructions with central party directives), for core provincial matters the NCOP functions as a chamber of full intrastate federalism.

The section on centralization described the many ways in which South Africa's Constitution enabled the national government to concentrate power and address interprovincial issues. The NCOP adds to the ability of the national government to coordinate policy across jurisdictions by giving provincial governments a direct say in national legislation. This adds to the power of the centre, by granting it increased legitimacy as well as the ability to address matters that only provincial governments, as opposed to members of the National Assembly, might raise. The legislation that is produced tends to crowd out provincial bills, limiting the need for further instances of coordination via intergovernmental agreements.[492] As expected then the NCOP, acting as a body of intrastate federalism, reduces the need for intergovernmental agreements to act as the means of formal interaction and coordination between governments

Conclusion

The centralization of power in the national executive and Parliament has been the major theme of this chapter. This should come as no surprise as virtually all the elements

[491] Sections 65 and 76 detail the procedures for voting on provincial matters.
[492] Steytler, "Republic of South Africa," 327,328.

of the South African federation strengthen, or at the very least, revolve around the central government. The constitutional division of powers, seeming to create an overlapping, cooperative relationship with the provinces, instead empowers the national government to reach into all aspects of society while also granting it legislative and executive supremacy. A relatively small welfare state further limits the opportunities for South African governments to form intergovernmental agreements.

The forces of centralization are so strong in South Africa that even factors that might normally encourage agreement formation are turned on their heads. The national government's spending power is effectively unstoppable, given its size and jurisdictional reach: rather than encourage negotiation and agreements, it simply increases the dominance of the centre. Likewise, a robust network of intergovernmental forums should, in theory, encourage new agreements. Instead, in a uniquely South African turn, these bodies engage only in informal negotiations and consultations; any decisions or recommendations they do reach are incorporated into the legislative process in Parliament, instead of generating separate agreements. National Council of Provinces, by providing direct representation for the provincial governments, ensures that the practice of intrastate federalism incorporates some of the business of intergovernmental relations into the national legislative process. This creates a clear alternative to agreements.

These institutional features create an environment that is far from conducive to the formation of intergovernmental agreements and provide a strong alternative. Moreover, as has been discussed throughout this chapter, the African National Congress party serves to exacerbate the centralizing effects of many of these features. It should be noted, however, that the ANC is not the sole source of centralization, but rather more of an accelerator. The existence of a competitive, multiparty system would not, on its own,

eliminate the numerous centralizing elements of the Constitution, nor would it reduce the provinces' financial dependence. The only variable that might exhibit a significant change is the role of intergovernmental forums; however, the effects of these bodies would still likely be shaped by the dominant powers of the national government.

Even with this caveat in mind, South Africa still represents a strong group of factors which align against agreement formation. Virtually none of the institutional features encourage coordination, and while there is little impediment from the number of subnational governments, the NCOP and the national legislative process provide alternatives to agreements, as indicated by the formula:

CON (*Weak*) – INH (*Weak-none*) – ALT (*Some*) = Very Limited IGA Formation

This institutional framework is entirely consistent with what would be expected from a federation with no national agreements. This makes South Africa an important case as it demonstrates that an institutional approach can offer a convincing explanation for a case with no agreements as well as in cases with many.

Chapter Eight: Switzerland

Source: CIA World Factbook

Formal Name: Swiss Confederation (*Confoederatio Helvitica* in Latin).

Capital: Bern

Subnational Governments: Known as cantons, there are twenty-six in total: Aargua, Appenzell Ausser-Rhoden, Appenzell Inner-Rhoden, Basel-Landschaft, Basel-Stadt, Bern, Fribourg, Geneve, Glarus, Graubunden, Jura, Luzern, Neuchatel, Nidwalden,

Obwalden, Sankt Gallen, Schaffhausen, Schwyz, Solothurn, Thurgau, Ticino, Uri, Valais, Vaud, Zug and Zurich.

Introduction:

With 7.7 million people and an area of 41,277 square kilometres, Switzerland is the smallest federation examined in this study. While relatively diminutive in size, Switzerland is home to a diverse population and holds an important place in the historical evolution of federal governance as the second formal federation. The Swiss federation incorporates four national languages (German, French, Italian and Romansh), a major religious division (Protestants and Roman Catholics), key differences in political culture (radical populism versus elitist conservatism) and a number of important regional and local identities, many embodied in the twenty-six different cantons.

History

The modern Swiss state is rooted in the Swiss Confederation of 1291, from which it draws its formal name. [493] The cantons of Uri, Schwyz and Unterwalden (later, Obwalden and Nidwalden) entered into a defensive and cooperative alliance, primarily to defend against encroachment of powerful neighbours, such as the Austrian Hapsburgs.[494] While this original alliance was intended to ensure the independence of the cantons

[493] Even though Switzerland is known as the "Swiss Confederation", it has only been a true confederation prior to the 19th century. Since 1848 Switzerland has formally been a federation. For this reason, the alliance which existed prior to the new federal Confederation is sometimes known as the "Old Swiss Confederacy".

[494] It is important to remember that at this time, the cantons of Switzerland - both those within and outside of the original alliance - were all part of the Holy Roman Empire at the time, the supranational confederation of central European states. Membership within the Empire was not a guarantee of peace between neighbours (such as the Swiss and the Austrians), as war was a common occurrence throughout the Middle Ages. Elazar, 1994, 246.

against their foes, it was also somewhat expansionist. The Swiss Confederation grew both through peaceful means - cantons such as Luzern, Zurich and Bern all signed bilateral and multilateral treaties to join the alliance during the 14th century - and bellicose methods - at one point even capturing Milan in the early 16th century.[495] This expansion was eventually halted in 1515 when the Confederation lost the Battle of Marignano to the French and then in 1525, declared a general policy of neutrality, a position that remains influential even to the present day.[496] This political and military policy shift was quickly followed by the dramatic effects of the Protestant Reformation as Zurich was one of the epicentres for this religious upheaval. The Reformation divided the Swiss Confederation as some cantons converted to Protestantism (including many of the larger cities), while some remained staunchly Roman Catholic. Although the Swiss were able to largely avoid the total war and devastation of the Thirty Years' War (1618-48), several conflicts did arise between the Protestant and Catholic cantons which provided the basis for future divisions.[497] In 1648, even though Switzerland had not served as a major theatre for the war, the Confederation gained full independence from the Holy Roman Empire in the Peace of Westphalia.

Despite its small size and internal divisions, the Swiss Confederation continued in one form or another for more than five hundred years. By the turn of the 19th century, it had reached a tense balance between the two main religious factions, as well as its

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[495] James Murray Luck, *A History of Switzerland, The First 100,000 Years: Before the Beginning to the Days of the Present*, (Palo Alto: The Society for the Promotion of Science and Scholarship, Inc., 1985), 130-131. See also: Francis Ottiwell Adams and C.D. Cunningham, *The Swiss Confederation*, London: Macmillan, 1889, 6-9.

[496] Edgar Bonjour, *Swiss Neutrality: Its History and Meaning*, trans. Mary Hottinger, (London: George Allen & Unwin Ltd., 1946).

[497] Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, (London: St. Martin's Press, 1994), 7.

multiple cultures and languages, including French, Germanic and Italian areas.[498] This longstanding confederal form was temporarily swept away by the invasion of revolutionary France in 1798. The French imposed a unitary state, known as the Helvetic Republic, upon the once-sovereign cantons, stripping them of most of their rights and powers. [499] This proved to be massively unpopular, as many of the cantons rejected the abolition of their sovereignty and the Swiss people rejected the imposition of French revolutionary ideas.[500] The rejection was strong enough that Napoleon introduced the Mediation Act in 1803, which returned many elements of the cantonal system, though not a complete restoration of the confederal system that existed prior to 1798. Full cantonal sovereignty was finally restored to its pre-war status at the end of the Napoleonic wars at the Conference of Vienna in 1815.

Despite deepening political and economic relationships between the cantons, the confederal arrangement persisted until 1847. The final collapse of the confederal system and the emergence of a federal country were rooted in the religious schisms that arose three centuries earlier. In the early 1840s, Protestant liberals under the banner of the Radical Party had gained power in many of the cantons and the Conference of Delegates (*Tagsatzung*) which was the body through which the Swiss cantons reached common decisions and policies. Their agenda of greater integration and centralization was opposed by cantons with Conservative governments, most of which were primarily Roman Catholic. Moreover, prosecution of religious minorities in the cantons, both Protestant and Catholic, began to intensify. In response, many of the Catholic cantons

[498] These are not the only cultural or linguistic groups in Switzerland during this period, merely the largest ones.
[499] Luck, *A History of Switzerland*, 305-337..
[500] Ibid. and also Thomas Maissen, "The 1848 Conflicts and their Significance in Swiss Historiography," in *The Making of Modern Switzerland, 1848-1998*, ed. Michael Butler, Malcolm Pender and Joy Charnley, (New York: St. Martin's Press, 2000), 4.

formed the *Sonderbund* in 1845 to protect their religious and political interests.[501] This violated the 1815 treaty between the cantons, which prohibited special alliances, and as a result, members of the *Sonderbund* attempted to withdraw from the Conference of Delegates causing hostilities to break out.

Although the Swiss Civil War (known as the *Sonderbund* War or *Sonderbundskrieg*) was both short and limited (it lasted less than a month and saw fewer than 100 killed), the defeat of the *Sonderbund* led directly to the Federal Constitution of 1848. After being negotiated in the *Tagsatzung*, it was submitted to the cantons for a vote.[502] Two-thirds of the cantons approved the new constitution, leading to its acceptance by the *Tagsatzung* on September 12, 1848 and marking the official beginning of the modern federation of Switzerland.[503] This first constitution was a federal one, establishing a new national order of government. Some substantial revisions were made in a new constitution in 1874, notably granting the central government greater law-making and financial powers and expanding the elements of direct democracy by allowing for referendums at the federal level. It is this constitution that forms the basis of the modern political institutions of Switzerland.

Government and Political Structure

Inspired by the example of the United States as well as their own history, the Swiss have a federal government founded on bicameralism as well as a unique executive. The Federal Assembly consists of two chambers: the National Council (similar to the

[501] The members of the *Sonderbund* included Lucerne, Fribourg, Valais, Uri, Schwyz, Obwalden and Zug.
[502] Linder, , *Swiss Democracy*, 7 describes an inconsistent process, as some cantons put the motion to popular referendum, while others (such as Fribourg and Graubunden) decided by parliamentary vote.
[503] It is notable that despite the reservations of many cantons, all of them acceded to the new federation, even those that did not approve of the new constitution in the referendum.

House of Representatives) and the Council of States (similar to the Senate or the Swiss' own *Tagsatzung*). The National Council acts as the representative house, with 200 councillors elected by the people using a system of proportional representation. The seats are allocated in varying number to each canton based upon its share of the national population.[504] The Council of States acts as the body for cantonal interests in the federal government. There are 46 Councillors, two coming from each "full" canton and one from each "half" canton and these Councillors are elected in a manner determined by each canton.[505] Article 148 stipulates that these bodies "shall be of equal standing", demonstrating the importance placed on both democratic and federal principles in the Swiss government.

The Swiss executive demonstrates elements of the consensual and federal political traditions which are intrinsic to their governing institutions. Rather than the election of a single individual, such as the American President, the Swiss Federal Assembly elects a seven person body known as the Federal Council. Each member of the Federal Council heads their own ministry and though there is an annually-chosen President, this individual is at most a "first amongst equals".[506] Another important difference between this body and executives found in some other federations is that it follows a power-sharing philosophy that attempts to represent the major political, social, religious and linguistic

[504] To provide an idea of the range in representation, the largest delegation comes from the canton of Zurich which receives thirty-four Councillors. Six cantons - Appenzell Ausser-Rhoden, Appenzell Inner-Rhoden, Glarus, Nidwalden, Obwalden and Uri are all represented by only one Councillor. This reflects the disparity in population between an urban canton such as Zurich and some of the small, rural ones.
[505] The terms "full" and "half" cantons are de facto terms used to describe the two different sets of cantons in Switzerland. Although they are not labelled differently by the Constitution, a group of six cantons (Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserhoden and Appenzell Innerhoden) are distinct as they elect only one member to the Council of States by Article 150. Similarly, Article 142 governing required majorities in referenda stipulates that these six cantons shall only count as half a vote. In all other respects, the Constitution treats them the same as any other canton.
[506] Thomas Stauffer, Nicole Töpperwien and Urs Thalmann-Torres, "Switzerland," in *Handbook of Federal Countries, 2005*, ed. Ann L. Griffiths and Karl Nerenberg, (Montreal & Kingston: McGill-Queen's University Press, 2005), 348.

groups. This is not simply an issue of providing a unified appearance for the sake of public relations, but rather a political calculation.

Without the support of these groups, the Council would likely lack influence with the factions present in both chambers of the Federal Assembly and thus, have their power to influence legislation greatly curtailed.[507]

Cantonal governments are similar to the federal government of the Confederation.[508] Each canton is led by an executive council composed of five to seven members. As with the national executive, these ministers are equal and have specific responsibilities. The only significant difference is that the cantonal executives are directly elected by the people as opposed to the members of the assembly which is how selection occurs at the federal level.[509] The representatives to the cantonal legislatures are elected by proportional representation similar to their federal counterparts (the exact details are governed by cantonal constitutions).[510] The primary difference between the federal and cantonal legislatures lies in the fact that most cantonal governments are unicameral, as opposed to the bicameral nature of the Federal Assembly.[511]

The unique nature of Swiss politics does not come from their peculiar executive or bicameral legislature however, but from the existence of several avenues of direct

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[507] Ibid.
[508] This term is still used to denote the national or federal government in Switzerland.
[509] Wolf Linder and Isabelle Steffen, "Swiss Confederation," in *Legislative, Executive, and Judicial Governance in Federal Countries,* ed. Katy, Le Roy, Cheryl Saunders and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 304.
[510] Ibid., 303-304.
[511] A small exception to this unicameral trend exists in the use of *Landgemeinde* as a second legislative body. A *Landsgemeinde* is essentially a public council in which all legal citizens may attend to propose, speak on and cast votes concerning government business. Mainly a device of smaller, rural cantons, only the governments of Appenzell Innerhoden, Glarus, Obwalden, Nidwalden and Appenzell Ausserhoden have used this body since 1928 (and of the five, Obwalden, Nidwalden and Appenzell Ausserhoden abolished theirs in the late 1990s). Nicolas Schmitt, "Swiss Confederation," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, (Montreal & Kingston: McGill-Queen's University Press, 2005), 363.

democracy. First, all constitutional amendments must pass through a national referendum, guaranteeing the people the final say over changes to Switzerland's fundamental law. This includes a double majority system that requires that successful amendments receive support from both a numerical majority as well as a majority of cantons (again, supporting the balance of democratic and federal principles). Second, citizens are able to propose constitutional amendments independently of the legislative process. By securing the support of 8 cantons or a petition signed by 50,000 citizens (30,000 until 1977), a citizen or organization can have an amendment put to referendum, ensuring that elites in the federal government are not able to monopolize the political agenda. Finally, a measure introduced in the 1874 constitutional reforms brought in popular review of federal legislation. Although no judicial review exists for federal legislation in Switzerland, any law passed by the federal government may be challenged by a citizen or organization (provided they can secure the same threshold of support as if they were putting forth a constitutional amendment). If the referendum is successful, the legislation is struck down. Although not a common occurrence, it provides an additional level of popular control over the government of Switzerland.[512]

Intergovernmental Agreements in Switzerland

Swiss intergovernmental agreements are known as *concordats* and they are an important element of Swiss federalism. [513] Unlike other federations such as Australia or Canada where intergovernmental agreements have emerged as useful, but *de facto* instruments, concordats are entrenched in the Swiss Constitution in Article 48. The first

[512] J.-F. Aubert and E. Grisel, "The Swiss Federal Constitution," in *Introduction to Swiss Law*, 3rd ed., ed. F. Dessemontet and T. Ansay, (The Hague: Kluwer Law International, 2004), 23-25.
[513] They are occasionally referred to as inter-cantonal treaties by some authors.

subsection outlines the basis for these accords: “The Cantons may enter into agreements with each other and establish common organizations and institutions. In particular, they may jointly undertake tasks of regional importance together.”[514] Further paragraphs specify that concordats are not to be “contrary to the law, to the interests of the Confederation or to the rights of other cantons”, setting a minimum required standard for their acceptance. In terms of their legal status though, the Constitution only clarifies that agreements cannot be contrary to the law, not that they *are* law. However, Swiss jurisprudence treats concordats as "binding 'intercantonal law'", establishing them as formal, legal treaties.[515] The rules for approving concordats differ from canton to canton, though in a majority, the legislature must pass them as a law.[516]

The data for Switzerland were collected from the University of Fribourg's Institute for Federalism, which until 2005, maintained a database of concordats concluded in Switzerland. As this database contained a comprehensive listing of agreements, whether bilateral, regional or national, it provides strong evidence that concordats are an important part of Swiss intergovernmental relations for there are hundreds listed. However, it seems that the Constitution was unintentionally prophetic because “tasks of regional importance” seem to dominate, as opposed to national matters. Linder and Vatter have observed that concordats tend to form around regional blocs, instead of national consensus, with eastern, German-speaking cantons seeming to be more active than French or Italian ones.[517] Unanimity (or anything approaching it) is difficult and rare, as only 15 concordats include more than 90% of cantons. They have been created at a rate of 0.25

[514] See Article 48 of the Federal Constitution of the Swiss Confederation.
[515] Bolleyer, *Intergovernmental Cooperation*, 175.
[516] Ibid., 96. Some cantons also allow for concordats to be approved through a referendum.
[517] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105.

per year (listed in *Appendix E*). Having the record of Swiss concordats between 1945 and 2005 has also allowed the inclusion of a selection of other multilateral concordats, in order to give a more comprehensive picture of Swiss agreements. These agreements are listed in *Table 8.4* at the end of this chapter.

1. The Degree of Overlap that Exists in the Constitution

Switzerland's division of powers finds similarities with those in Germany and Austria, specifically in its form of administrative federalism.[518] These federations are known for having constitutions that grant broad legislative authority to central governments while leaving the subnational governments with the authority to implement government programs. Thus, when examining overlap in Switzerland and its propensity to affect the formation of agreements, there are two areas to examine: strict overlap of legislative competencies as defined by the constitution (for example, the fact that both the Confederation and cantonal governments are responsible for certain types of roads) and overlap created by administrative requirements (such as the enactment of federal environmental regulations by cantonal authorities).

In the first instance, legislative competencies, Watts' comparison of competencies allocated by federal constitutions provides a useful starting point for examining the degree of overlap. Of the 47 areas that Watts finds enumerated in the Swiss Federal Constitution, 23 of these (49%) have some kind of shared jurisdiction between the federal and cantonal governments (see *Appendix H*).[519] This number of overlapping jurisdictions is comparable to Canada (46%), but well short of Australia (70%) and Germany (75%)

[518] Thorlakson, "Comparing Federal Institutions," 7.
[519] Powers in this overlap category are either explicitly concurrent or have separate enumerated powers for both federal and cantonal governments. Watts, *Comparing Federal Systems*, 194-198.

which are clear leaders in legislative overlap. Much of the overlap seems to be concentrated in the area of social affairs (which will be discussed specifically in a later section) and management of the environment.[520]

It is worth noting that the constitutional revisions of 1999 have increased the degree of overlap and the potential for intergovernmental collaboration. A new Article 45 was included to reaffirm the importance of communication and cooperative decision-making between the Confederation and the cantons.[521] Concerns over how the Swiss will engage internationally, specifically with the European Union, led to the adoption of Article 55, which explicitly provides for consultations with the cantons on relevant foreign policy decisions.[522]

The second instance of overlap, created by the system of administrative federalism, does not seem to create fertile grounds for agreements. Certain policy areas – notably agriculture, civil and criminal law, social security and environmental protection - are specifically divided between the federal and cantonal governments, with legislation determined by the former and implementation by the latter.[523] These are not the only areas of cantonal implementation of federal legislation. The Confederation possesses no "parallel federal administration with its own regional services", meaning that it is reliant upon the cantons for implementation of most of its programs, including those explicitly in federal jurisdiction.[524] This opens up potential areas of administrative overlap to include most of the constitutionally-enumerated policy areas. It also makes it much more difficult

[520] Articles 108 – 120 of the Federal Constitution (entitled Section 8: Housing, Employment, Social Security and Health) details responsibilities over social policy while Articles 73 – 80 (Section 4: Environment and Spatial Planning) concerns environmental powers.
[521] Thomas Fleiner, "Recent Developments of Swiss Federalism," *Publius* 32, no.2 (2002): 111.
[522] Ibid.
[523] Linder, *Swiss Democracy*, 40-42.
[524] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 95-97.

to determine whether or not Swiss governments are holding to a strict division of powers, as both the Confederation and the cantons end up being active in most areas.

The numerous areas of overlap, while providing the possibility for national concordats, have not led to large numbers of national agreements, as is the case in Australia or Germany. Any need for coordination between the different spheres of government, as well as between cantons in these areas, seems to be fulfilled in one of two ways. Firstly, the Swiss traditions of administrative federalism seem to allow for substantial cantonal flexibility in implementation.[525] This allows for federal legislation to serve as the means of coordinating many areas of overlapping jurisdiction. Further coordination, via an intergovernmental agreement, could either be redundant or unable to bridge the wide differences between the cantons. This leads into the second means of coordination, the regional concordat. As opposed to the much rarer national concordat, regional accords seem to be much more prevalent.

Switzerland's Constitution allows for fewer instances of legislative overlap than many of the other federations in this study; however, the system of administrative federalism in Switzerland provides at least some opportunities for overlap and thus, a need for coordination. Despite the initial potential, this coordination seems be achieved via means other than national intergovernmental agreements. It seems that overlap between the jurisdictions of the Swiss federal government and the cantons provides limited grounds for the creation of agreements or is being overridden by more influential features.

[525] Jan-Erik Lane, "Introduction: Switzerland - Key Institutions and Behavioural Outcomes," in *The Swiss Labyrinth: Institutions, Outcomes and Redesign,* ed. Jan-Erik Lane, (London: Frank Cass, 2001), 2-4.

2. The Degree of Centralization in the Constitutional Division of Powers

The Swiss Confederation has long been held up as the quintessential case of a decentralized federation. Existing as a confederation of independent states for over 500 years, Switzerland`s political culture placed great importance on the constituent units, as opposed to the central government. This was affirmed in Article 3 of the Federal Constitution, which states: "(t)he Cantons are sovereign to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation." More than simply allocating reserve powers to the cantons, this Article affirms the Swiss tradition of cantonal sovereignty, which is the basis of its "non-centralized" nature.[526]

Despite this history of decentralization and powerful subnational governments, from a purely constitutional standpoint, the Swiss federation does not appear as a decentralized or non-centralized state. Returning to Watts' comparison of constitutional competencies, 23 policy areas, or 49%, are the sole responsibility of the federal government while only 4 areas, or 8%, are entirely reserved to the cantons.[527] Of the seven cases considered here, only the United Kingdom reserves so many areas of jurisdiction solely to the central government. A similar trend is found in Linder's description of the "main powers of the federation and cantons" as the Cantons have exclusive legislative power over only 2 of 16 areas (Police and Churches). In contrast, the federal government has complete legislative jurisdiction over 7 areas, as well as

[526] Linder (*Swiss Democracy*, 39-42) argues that non-centralization is the most appropriate term for the Swiss federation, as the cantons began with independent authority and sought to delegate certain responsibilities to a central government, as opposed to an existing and powerful central government which granted increased powers to the cantons.
[527] See Appendix H for the complete breakdown.

another 2 areas which specifically require implementation by the cantons.[528] While there is also a high level of concurrency and joint responsibility, it should be noted that in the case of conflict, federal legislation takes precedence (Article 49). This has the potential to further centralize the practical division of powers beyond those already reserved to the federal government, though it seems to be a rare phenomenon due to the consensual nature of Swiss democracy.[529]

This apparent centralization raises a couple of questions. One, how does a non-centralized federation acquire such a seemingly centralized constitution? Two, does this constitutional division of powers lead to a centralized federation in practice, or are there countervailing factors? If this centralization holds true under scrutiny, then it would help explain the lack of national intergovernmental agreements because a high degree of centralization would reduce the likelihood of these accords..

The original Constitution in 1848 was seen by many factions in Switzerland as leaving too little power in the hands of the federal government, leading to a coalition of the Radical and Democratic parties to seek constitutional change in 1874.[530] If decentralization was originally a concern, then it is worth examining the Swiss constitutional change to understand later centralization. Unlike the other federations considered here, the Swiss high court, known as the Federal Tribunal, has no authority to rule on the constitutionality of federal legislation.[531] In the Swiss tradition of direct democracy, the decision of whether a piece of federal legislation is constitutional – or for

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[528] Linder, *Swiss Democracy*, 41. The remaining five areas allow for shared legislative jurisdiction between the cantons and the federal government.
[529] Schmitt, "Swiss Confederation," 358.
[530] Aubert and Grisel, "The Swiss Federal Constitution," 17.
[531] It can, however, rule on the constitutionality of cantonal legislation, including whether a particular canton is properly implementing federal legislation. See: Aubert and Grisel, "The Swiss Federal Constitution," 24.

that matter, simply whether it is desirable – is left with the people, who can challenge and repeal any federal act through a referendum.[532] Thus, any centralization cannot be attributed to the judicial interpretation of the Constitution, as is often argued in the United States. Because Article 3 grants reserve powers to the cantons, the lack of judicial review as a means of informal constitutional reform leaves formal constitutional reform as the only primary avenue of centralization. The mandatory referendum associated with any potential change means that changes cannot exist solely as a compromise between politicians.

To students of American and Canadian federalism, reliance upon only formal constitutional change might indicate that relatively little has changed in the Swiss Constitution in 150 years. Quite the opposite has occurred however, as the Swiss Constitution has seen dozens of changes. Between two major periods of reform in 1874 and 1976, there were 88 successful amendments to the Constitution.[533] An additional 64 proposals were accepted between 1976 and 1997, indicating that constitutional reform has been an ongoing process for the Swiss.[534] Examining these amendments, Aubert and Grisel identify a clear trend:

> Most of the amendments since 1874 have granted the Confederation additional powers. This was notably the case in the fields of civil and penal law (1898), economic law (1908, 1947, 1981 and 1982), social security, transportation, energy, town and country planning (1969), protection of the environment (1971), culture, and taxation, and protection of tenants (1986).[535]

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[532] Challenges to federal legislation are known as "Optional Referenda" (as opposed to Mandatory Referenda, which must take place to ratify changes to the Federal Constitution). Article 141 specifies the general procedures as well as what actions of the federal government are eligible for review.
[533] Aubert and Grisel (17) also record that 83 proposed amendments were rejected. The vast majority of successful amendments (81 of 88) were supported by some elements of Parliament, while the majority of unsuccessful amendments (56 of 83) were proposed by citizens. This demonstrates the importance of elected representatives, even in a context of direct democracy.
[534] Wolf Linder, "Swiss Politics Today," in *The Making of Modern Switzerland, 1848-1998*, ed. Michael Butler, Malcolm Pender and Joy Charnley, (New York: St. Martin's Press, 2000), 100.
[535] Aubert and Grisel, "The Swiss Federal Constitution," 18.

Constitutional change, therefore, has been both frequent and centralizing in nature; the necessity of formal amendments approved by referendum has not proved to be a great barrier to increasing centralization.[536]

This explains how the Constitution sets out a centralized division of powers, but not whether it functions this way in practice. Watts recognized this dichotomy by observing that while the formal division of powers is indeed quite centralized, in practice, the cantons hold a great deal of autonomy in the implementation of federal legislation, leading to a more decentralized federation.[537] Additionally, the cantons maintain strong financial powers that further empower them (this will be discussed in greater detail on the section concerning the spending power).

As was the case with the investigation into overlap, the constitutional centralization presented by the Swiss style of administrative federalism can help explain the limited number of national intergovernmental agreements. We would expect fewer national intergovernmental agreements from a centralized federation because legislation from the central government can accomplish the task of achieving coordination between the constituent units. Effectively, this is what seems to be occurring in the Swiss case. Federal legislation lays out the parameters of a particular policy and then the cantons have a great deal of leeway in implementing this; a national agreement would be redundant. Instead, there seem to be a significant number of regional agreements to further

[536] It is important to clarify that the rules governing the approval of new amendments contribute to the frequency of successful amendments. Switzerland employs a double majority (amendments must be approved by more than 50% of both voters and cantons) system similar to other federations, according to Article 142. Where there is divergence is in the fact the Swiss process only requires simple majorities of voters and cantons (13 required), as opposed to two-thirds (or more) super-majorities in other federations. In practice, this has seen a number of constitutional amendments pass with only 13 or 14 cantons, such as the recent amendments in 1999. If Switzerland were to adopt a higher threshold, it would certainly curtail the frequency of amendments. See: Fleiner, "Recent Developments of Swiss Federalism," 97-123.
[537] Watts, *Comparing Federal Systems*, 3rd ed.. 31.

coordinate between cantons whose policies would be similar. For the purposes of explaining the formation of intergovernmental agreements, the high level of centralization in the constitutional division of powers has a clear effect, despite the decentralized realities of policy implementation.

3. The Size and Status of the Federal Spending Power

In the analysis of the constitutional division of powers, Switzerland was found to have a comparatively high degree of centralization, especially given the country's reputation for decentralized governance. This reputation appears more deserved when examining the distribution of financial powers and the status of the federal spending power.

As was the case with the constitutional division of powers, fiscal powers in Switzerland start from a position of non-centralization, with a slow, but clear movement towards increased centralization over time.[538] Unlike the constitutional division of power, however, the end result of this is that fiscal powers have remained mostly decentralized. Between 1974 and 1994, Thorlakson observed that the federal government's share of government revenues rose from 53% to 64%, while its share of expenditures rose from 43 to 52%.[539] However, more recently, it seems that the growth of federal revenues has halted and even retreated, as Watts found the federal share dropped from 44.7% in 1993 to 40% by 2004.[540] Indeed, Switzerland remains one of the

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[538] Ivan Baron Adamovich and Gerald Hosp, "Fiscal Federalism for Emerging Economies: Lessons from Switzerland?" *Publius* 33, no.1 (2003): 12; Thorlakson, "Comparing Federal Institutions," 13-14.
[539] Thorlakson, "Comparing Federal Institutions," 13-14.
[540] Watts, *The Spending Power in Federal Systems*, 52 and Watts, *Comparing Federal Systems*, 3rd ed., 102. The apparent contradiction between Thorlakson and Watts' numbers can be likely be explained by the fact that thirty percent of federal income tax is paid directly to the cantons. This would account for most of the gap between their figures in the 1990s. See Gebhard Kirchgassner, "Swiss Confederation," in *The*

most decentralized federations when it comes to raising revenue.[541] Compared to federations such as South Africa or Australia, in which the federal government controls upwards of 75% of all government revenues, Switzerland's federal government possesses less financial leverage that might be used to advocate national policies which could produce intergovernmental agreements.

While the fiscal basis for the federal spending power may be narrower in Switzerland than other federations, the use of it in practice is certainly not restricted. In legal theory, the Swiss Constitution restricts federal spending only to those areas in which the federal government has legislative authority.[542] However, as the analysis of the division of powers demonstrated, the federal government has broad legislative powers which grant it at least some access to almost all government business. The federal government's extensive financial reach is further enhanced by the lack of judicial review of federal legislation.[543] With no court to rule whether a particular federal spending program is *ultra vires*, the only legal checks are citizen-initiated referenda. Moreover, seventy percent of all federal transfers are conditional, with no opt-out provisions.[544] As such, while the difference in fiscal capabilities between the federal and cantonal governments is less than in other federations, the legal and effective reach of federal spending is as great or greater.

Practice of Fiscal Federalism: Comparative Perspectives, ed. Anwar Shah and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2007), 329.
[541] Watts, *Comparing Federal Systems*, 101-103.
[542] Watts, *The Spending Power in Federal Systems*, 14.
[543] Ibid, 15.
[544] Ibid, 14-17, 56.

Table 8.1: Percentage of Subnational Revenue from Federal Grants (Switzerland)[545]

	1972	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
SWI	30.81	28.10	27.11	25.64	30.22	28.95	30.97	28.94	28.76	28.83	4

In terms of the use of the federal spending power through transfers, Switzerland ranks somewhere between low to average compared with other federations. *Table 8.1* indicates the percentage of cantonal revenue that comes from federal grants, using data gathered from the International Monetary Fund. While Switzerland does not exhibit the lowest percentages, averaging 28.83% between 1972 and 2007, it is comparable to figures in the United States (26.56%) or Canada (19.83%). The Swiss are also significantly below Australia (48.67%), as well as South Africa and the United Kingdom, both of which see more than 90% of subnational budgets dependent upon federal grants. Thus, while this federal contribution is not insignificant, cantonal governments are less financially dependent than subnational governments in other federations. However, as Kirchgassner, and also Watts, explain, the consensual nature of Swiss democracy means that the use of the spending power is the product of careful deliberations between the federal government, cantons and other powerful interests.[546]

As it pertains to the formation of intergovernmental agreements, the effect of the Swiss federal spending power is somewhat inconclusive. While it has a potentially broad and powerful effect, given the lack of legal restrictions, Swiss cantons are less financially susceptible to its influence based upon their comparatively greater fiscal resources. In the same instance, federal transfers still make up a sizeable portion of cantonal revenues, so federal influence cannot be completely discounted. Fortunately, the record of agreements

[545] Results were collected from the IMF's World Financial Yearbook series.
[546] Kirchgassner, "Swiss Confederation," 329-333. Watts, *The Spending Power in Federal Systems*, 17-19.

can break this potential deadlock. The low number of agreements might suggest the limited effect that the spending power has in driving agreement formation in Switzerland. However, given the fact that the spending power is not especially strong, this should not be a particularly shocking result. What is more telling is the type of agreements that have been concluded. The largest number (4 or approximately 27%) concern matters of Justice and Law, not a realm where the spending power is directly applicable. Moreover, even some agreements that fall into policy fields such as Education and Economic Regulation seem to have limited connection to the spending power (for example, the Intercantonal Agreement on the Recognition of Diplomas or the Agreement on the Sale of Salt). While the policy areas of agreements will be discussed more fully in the next section on the welfare state, the overall lack of intergovernmental agreements combined with the limited number of these that could have been prompted by use of the spending indicate a limited role for it in explaining the formation of Swiss intergovernmental agreements.

4. The Size and Scope of the Welfare State

One consistent theme across all of the cases being studied in this investigation is the establishment and growth of the welfare state. The Swiss are no exception to this trend, seeing the establishment of many programs as well as significant increases in spending that have outpaced most other countries in the last thirty years.

Table 8.2: Swiss Welfare Spending as a Percentage of GDP[547]

	1980	1985	1990	1995	2000	2005	AVG	Rank
Switzerland	13.5	14.5	13.4	17.5	17.9	20.3	16.18	4

[547] Data collected from the OECD Social Expenditure Database.

Table 8.2 demonstrates the growth of Swiss welfare spending as a function of GDP, rising just under 7% over a 25 year period. By contrast, Canada – which began this period with a nearly identical welfare spending percentage at 13.7% - rose to just 16.5%, while the Americans went from 13.1% to 15.9%. While the Swiss are still only ranked 4th in average spending out of the seven cases, the increase has been the largest over this period leaving them in third place with 20.3% (and closer to the U.K.'s 21.3% than Australia's 17.1%).

Some of these dramatic increases in spending can be explained by the fact that the development of the Swiss welfare state has lagged behind other countries. Comparing the Swiss welfare state with OECD averages, Armingeon found that Switzerland established major federal welfare programs such as health insurance, unemployment insurance, family allowance and pensions between eight to seventy years later than the average year in other countries.[548] The principal explanation offered for the slow development of the Swiss welfare state is the constitutional division of powers and the role of referenda in the amendment process. In order to establish a national program, such as compulsory health insurance, the Federal Constitution must be amended to grant that power to the federal government. This means that such a change must gain approval in a national referendum that requires a double majority as well as support in the Federal Assembly, and a number of proposals have been delayed and even rejected by this process.[549]

[548] Klaus Armingeon, "Institutionalising the Swiss Welfare State," in *The Swiss Labyrinth: Institutions, Outcomes and Redesign*, ed. Jan-Erik Lane, (London: Frank Cass, 2001), 148-149.
[549] Ibid.

Table 8.3: Swiss Welfare Spending as a Percentage of Total Federal Spending[550]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
SWI	61.18	65.22	64.63	67.06	67.06	71.98	71.49	65.21	75.41	67.69	2

The growth of the Swiss welfare state is also apparent when examining the total percentage of federal spending allocated to it. Initially, spending rose slowly, gaining only 6 points in the eighteen years between 1972 and 1990. However, between 1990 and 2007 federal spending rose from 67% to 75% (the implementation of compulsory health insurance during the years 1994-96 explains much of this increase).[551]

Comparing these increases with other federations, the Swiss do not stand out in the same way as when we consider welfare spending as a percentage of GDP. The federal government of Switzerland increased its expenditures by 14% over this 35 year period, but this was matched or exceeded by other federations including Australia (14%), Canada (18%) and the United Kingdom (27%). What is notable however, is the high percentage of the Swiss federal budget that is allocated towards welfare spending. With the exception of an aberrant decrease in 2005, Switzerland ranked either first or second in welfare state expenditures.

This data indicates a significant and growing welfare state in Switzerland, both in terms of programs and spending, surely creating the potential for the generation of intergovernmental agreements based on the coordination of welfare policies. Despite this potential, Switzerland has not produced a large number of national agreements pertaining to the welfare state. Switzerland ranks well behind Australia, Canada and Germany in both absolute numbers of agreements as well as yearly averages, and yet, by any measure,

[550] Data collected from the IMF World Financial Yearbook.
[551] Armingeon, Institutionalising the Swiss Welfare State,", 148-150.

Swiss welfare spending outpaces Canada and Australia (while closing in on Germany). This contrast indicates that the existence of a large and growing welfare state is not, by itself, enough to produce agreements – at least in the case of Switzerland. Some of this can be attributed to the use of constitutional amendments to establish the welfare state. In Australia and Canada, the new programs and policies of the welfare state required the federal and state/provincial governments to negotiate in order to accommodate these new developments within the existing constitutional order. In contrast, the people of Switzerland eventually allocated primary authority over welfare programs to the federal government through constitutional referenda, potentially limiting the opportunities for new agreements.

The lack of welfare state agreements is further confirmed if the agreements themselves are examined. In terms of the policy fields occupied by the agreements, a quarter falls into the category of Justice and Law, making it the most numerous category. The second-most numerous area, education, would seem to lend some support to the theory that welfare spending could stimulate the creation of agreements. Among these, there is at least one coordination agreement (recognition of other diplomas) that would likely persist whatever the level of spending. A large number of agreements based upon programs of the welfare state might indicate the influence of these types of programs on the development of national agreements; however, the results do not demonstrate this. Moreover, if the growth of spending and welfare programs is related to the formation of these agreements, we might expect to see two spikes in the number of agreements made. The first should occur between 1990 and 1995, when welfare spending jumped dramatically, from 13.4% of GDP to 17.5%, an increase of 4.1%; a second significant increase in agreements might be expected between 2000 and 2005, with spending rising

from 17.9% to 20.3%, an increase of 2.4%. Examining the record of agreement formation, it is clear that the latter period's increase did not drive the creation of many national intergovernmental agreements, as only one – an agreement concerning lotteries and gaming – was formed. The earlier period between 1990 and 1995, however, is one of the busiest for the formation of agreements as four were concluded at this time. A closer examination of these agreements would seem to indicate, however, that they are not direct results of the growth of the welfare state. Only one agreement falls into a category directly associated with the welfare state (Education) and, as previously mentioned, it would seem to pertain to basic coordination instead of spending. Of the other agreements, only one, the Intercantonal Agreement on Government Procurement, might be related to these spending increases. Even in this case, concerns over procurement might indicate a "spill-over" effect of welfare spending, but this is debatable. The most sympathetic reading of agreement formation between 1990 and 1995 would say that sizeable increases in welfare spending led to one new agreement, which given the size of the increase, is not a very significant result.

Thus, the record of agreement formation provides evidence that Switzerland, despite its continuing increases in welfare state spending and their relative importance to government finances, has not seen a related increase in national intergovernmental agreements. The one important caveat that must be placed on this conclusion is that while this is the pattern at the national level, it is not necessarily the case at the regional level. For example, the period between 2000 and 2005 saw a great deal of activity between some of the cantons on social policy, leading to a number of agreements concerning social institutions, joint funding of several education ventures and compensations for expenses associated with intercantonal cooperation (see *Table 8.4*).

Likewise, looking beyond this period, there are a number of smaller multilateral agreements coordinating income support programs or hospital funding, yet these do not seem to move to the national level. The issues of regional versus national agreements will be explored in the section six, concerning the number of subnational governments.

5. The Existence of Lasting Forums for Intergovernmental Relations

In the case of Switzerland, the issue is not focused on determining whether bodies for intergovernmental relations exist, but rather, if they have any effects on the formation of intergovernmental agreements. More than 500 intercantonal organizations have been identified as having been active at one point during modern Swiss history.[552] Prominent among these are the Conferences of Cantonal Directors, which cover policy areas including Education and Social Affairs. This multitude of intergovernmental bodies is likely a function of a number of factors. First, the large number of cantonal governments invariably makes it easier to find common ground in smaller groups.[553] Second, the degree of diversity in Switzerland allows for particular conferences and associations to develop around cultural, linguistic and religious cleavages, such as associations for French and Italian education ministers. Finally, Watts has observed that federations with a doctrine of separation of powers in government tend to have intergovernmental relations that are more "dispersed".[554] All these factors have likely combined to produce a web of intergovernmental forums, many of which are focused either on a smaller number of participants or a particular policy area. Judging from the record of national

[552] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105.
[553] As but one example, a concordat was signed in 1978 by five cantons (Bern, Aargau, Solothurn, Basel-Land and Basel-Stadt) creating the Interparliamentary Conference of Northern Switzerland.
[554] Watts, *Comparing Federal Systems*, 3rd ed., 119.

intergovernmental agreements, the specific policy forums seem to have been largely unable or unwilling to conclude formal, national accords. The Swiss Conference of Cantonal Ministers of Education (EDK) appears to be one of the few successes in this regard, with three national education agreements.[555]

In recent years however, a "peak institution" for Swiss intergovernmental relations seems to have begun to emerge. Following the passage of a rare unanimous concordat in 1993, the twenty-six cantons formed the Conference of Cantonal Governments (often abbreviated as CdC after its name in French: *Conference Des Gouvernements Cantonaux*) to act as a permanent body for intergovernmental relations. With the Council of States popularly elected by the 1990s, the cantons sought a new forum for intergovernmental relations.[556] Serving as a body of executive federalism, the Conference was formed so that the cantons would be able to coordinate policy among themselves, especially in matters that involved the federal government.[557] In particular, the cantons were interested in combining their efforts in order to influence federal policies concerning European integration and other issues of international relations.[558]

Assessing the effects of the Conference of Cantonal Governments is an interesting task. Two of Switzerland's national concordats since 1993 were developed, at least in part, through the Conference, [559] while new federal legislation in agriculture and scientific

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[555] 1970 Concordat on School Coordination, 1997 Intercantonal University Agreement and the Intercantonal Agreement on Specialized High Schools. Switzerland. Conférence suisse des directeurs cantonaux de l'instruction publique, "Liste des accords, 2011," http://www.edk.ch/dyn/14937.php (accessed March 25, 2010).
[556] Schmitt, "Swiss Confederation," 360.
[557] Ibid., 353.
[558] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105.
[559] Concordats on Procurement (1994) and Reducing Trade Barriers (1998) are listed on the Conference's website. Switzerland, Conférence Des Gouvernements Cantonaux, "Accords sectoriels: Contrats et prises de position des cantons," 2010, http://www.kdk.ch/int/kdk/fr/wissen/bilatabk/accords_sectorielles.html (accessed March 25, 2010).

research has been influenced.[560] When compared to the Council of Australian Governments (its contemporary as a body for intergovernmental relations), it clearly has not been as active in the production of agreements, yet this should not be taken to mean that the Conference has a minimal effect of Swiss intergovernmental relations generally or agreement formation specifically. While pessimistic of the usefulness of other Swiss intergovernmental bodies, Linder and Vatter do highlight the Conference as one body with growing influence.[561] Schmitt credits the Conference in part for some of the revisions in the 1999 Constitution (specifically Articles 42-48 and 55 and 56) which provide a stronger role for the cantonal governments in federal policy.[562] According to Fleiner, these constitutional changes further empower the executive branches of cantonal governments, which will in turn support the work and influence of the Conference.[563]

Thus, while the impact has been minimal in the creation of agreements so far, the Conference of Cantonal Governments does provide a lasting forum for intergovernmental relations. With the changes to the Federal Constitution increasing its relevance, it provides the potential for further development of intergovernmental agreements.

6. The Number of Subnational Governments at the State/Provincial Level

Despite being the smallest federation in this investigation, both in terms of population and geographic area, Switzerland is ranked second in the number of subnational governments with twenty-six[564], ranking behind only the United States.

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[560] It is worth recalling the earlier discussion of the role of federal legislation as a framework for coordination as opposed to a national intergovernmental agreement.
[561] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105-106.
[562] Schmitt, "Swiss Confederation," 353.
[563] Fleiner, "Recent Developments of Swiss Federalism," 111.
[564] When Switzerland's new Federal Constitution was ratified in 1848, it only included twenty-five cantons as subnational units. The twenty-sixth, Jura, was not formed until 1979 (approved via a referendum in

While some distinction is made between "full" cantons and "half" cantons in the laws governing referenda and the Council of States, for the purposes of intergovernmental relations (and all other interactions), all twenty-six have equal standing.[565] With only 15 national intergovernmental agreements over a 50 year period (an average of 0.25 per year), the lack of agreements in consistent with what might be expected from a federation with many subnational governments.[566] However, further examination is required to identify the true effect of the number of subnational governments as opposed to some of the other factors that have been discussed.

Having the complete record of Swiss intergovernmental agreements affords the luxury of being able to identify patterns of agreement formation beyond the national level. These data make clear that the Swiss are not adverse to the formation of formal intergovernmental agreements. *Table 8.4* details a selection of large multilateral or regional agreements and this does not include the even larger number of bilateral or smaller multilateral (three to five participants) concordats. Much like the American case, formal coordination between a small number of cantons is quite common, but once a national consensus is attempted, success is less certain. As Linder and Vatter report, regional agreements have been easier to conclude, especially among a number of the

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1978). Carved out of the existing territory of Bern (which the original territory of Jura had been added to back in 1815 at the Congress of Vienna), the people living in this northern region of Bern had sought greater autonomy based on their minority status along both religious and linguistic lines. While the majority of Bern was both German speaking and Protestant, the Juran region contained primarily German-speaking Roman Catholics and Francophone Catholics. After a number of years of negotiation and a successful referendum, Jura was granted status as a full and separate canton. This provides one of the few examples of a federation forming a new subnational government from the territory of an existing one (as opposed to those federations that add new units via expansion, such as occurred in the Reunification of Germany). See: Linder, *Swiss Democracy*.

[565] Fleiner, "Swiss Confederation," 274-280.

[566] Not only does Switzerland's number of 26 subnational units rank highly in this study, but it is also quite numerous compared to virtually all federations. See Watts, *Comparing Federal Systems*, 3rd ed., 73, for a listing of all federations and their numbers of constituent units.

eastern cantons, while there has been less collaboration between the French and Italian speaking states.[567]

This last point does raise one important question in the case of Switzerland: are the problems with national coordination more of an issue pertaining to linguistic and cultural cleavages as opposed to numerical difficulties? While it would not be unexpected to observe greater cooperation among members of the same linguistic bloc, this is not a clear pattern amongst the agreements. Of the non-Germanic cantons, Jura, Geneva, Neuchatel and Vaud speak primarily French, while Bern, Fribourg and Valais include both French and German, and finally Ticino and Graubunden speak Italian and German/Italian respectively. However, if we examine those agreements that almost meet the required 90% threshold for consideration as a national agreement, we see that while Geneva has most often elected not to join a concordat, there is not another single canton or group of cantons that is opposed to joining one of these near-national agreements. Of the six concordats with between twenty and twenty-three consenting cantons, only eight – Aargau, Appenzell Innerrhoden, Fribourg, Graubunden, Obwalden, St. Gallen and Ticino – have agreed to all of them.[568] The examination of these agreements demonstrates that there is not one particular linguistic or cultural group that is consistently opting out of the largest agreements. With no pattern along Switzerland's linguistic and cultural cleavages, it is much easier to consider that a particular concordat might not meet the needs of every canton, a coordination problem made more difficult by the large number of them. This is not to suggest that the linguistic and cultural differences have no effect, but rather that

[567] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 104-105.
[568] Similar results can be found when looking at some of the larger multilateral agreements in *Table 8.4*, including: the Concordat on the high school and vocational training centre of Wadenswil, the Concordat on the enforcement of judgments in civil matters, the Intercantonal agreement on subsidies for operating deficits and cooperation for the benefit of children and youth centers and the framework agreement for intercantonal cooperation accompanied by compensation for expenses (to name a few of the larger ones).

these are likely to exacerbate the coordination difficulties presented by more than two-dozen subnational governments, rather than provide a barrier by themselves.

7. The Existence of a Body for Intrastate Federalism

Switzerland possesses a *partial* degree of intrastate federalism based upon the Council of States, the second chamber of the Federal Assembly. The Council has tangible powers, allows for equal representation for subnational governments, but the representatives are directly elected by the people as opposed to representing their respective cantonal governments making full intrastate federalism an impossibility.

Before 1848, the Swiss Confederation depended upon the *Tagsatzung* or Conference of Delegates for reaching decisions on common matters. When the cantons formed their new federation, this body became the Council of States as part of a bicameral federal legislature. Acting as a legislative body premised on federal representation, the seats in the Council are allocated based on the equality of states, providing two for each canton. The exception to this is the place of six "half-cantons", which each receive one representative. The existence of half-cantons is due to the fact that the original Federal Constitution in 1848 granted equal representation for all of the initial 22 cantons, including Unterwalden, Appenzell and Basel.[569] These cantons did not remain unified and became divided, with Obwalden, Nidwalden, Appenzell Ausserhoden, Appenzell Innerhoden, Basel-Stadt and Basel-Landschaft emerging in their place. As each of these governments was seen as representing half of the original cantons, each was given half the representation, allowing the preservation of equality amongst all full

[569] The canton of Jura would not be created until 1979, leaving the total at 22 full cantons, instead of the current 23.

cantons.[570] This allows for the first element of intrastate federalism, the ability for the subnational governments to meet on relatively equal footing, rather than have the more populous cantons (such as Zurich and Bern) dominate.

It is in the selection of representatives where the Council of States does not meet the requirements of a body for full intrastate federalism. Currently, all cantons elect their representatives to the Council of States via direct election; these representatives serve a four year term, the same as members of the National Council. Unlike other federations with similar legislative chambers, such as Australia or the United States, this selection method is not specifically stipulated in the Constitution or federal law. According to Article 150, paragraph 3 of the Constitution: "(t)he Cantons shall determine the rules for the election of their representatives to the Council of States". In practice, this means that the cantons determine the eligibility of candidates, the election method and even the term limits. During the 19th century, this usually meant election by cantonal legislatures.[571] By the 1950s, popular election (or election in a canton's *Landsgemeinde*) had replaced legislative selection in all but four cantons.[572] With the rise of popularly-elected representatives, the potential for the Council of States to act as a body of intrastate federalism has become limited.

With that said, there still exists the potential for cantonal governments to have some direct input into the Council, through their representatives. A unique feature of the Swiss Council of States is the ability of its members to sit concurrently in both the

[570] Christopher Hughes, *The Federal Constitution of Switzerland*, (Oxford: Clarendon, 1954), 3-4, 88.
[571] Schmitt, "Swiss Confederation," 360.
[572] Hughes, *The Federal Constitution of Switzerland*, 88.

Council and in their respective cantonal legislatures.[573] Approximately twenty percent of Councillors currently sit at both the federal and cantonal level; in the past, this option was more prevalent with members of cantonal executives serving as Councillors.[574] Despite this interesting instance of overlap between the cantonal and federal legislatures, the Council of States only exhibits a partial degree of intrastate federalism. For the Council to truly act as an alternative to intergovernmental relations, all or virtually all Councillors would have to sit in cantonal legislatures, instead of just a small minority. Moreover, the Constitution places substantial constraints on the cantons influencing representatives one way or another. Article 161 explicitly prohibits voting in the Federal Assembly based on the instructions of another person.[575]

In practice, the Council of States seems to reflect the sectional and political interests of their constituents, with the same political parties running in both it and the National Council.[576] As it does not serve the function of interstate federalism, the Council of States should not impede the formation of intergovernmental agreements. The lack of national agreements, therefore, cannot be primarily attributed to Swiss bicameralism.

Conclusion

[573] This is made possible in part by the part-time nature of the Swiss Federal Assembly, as the body normally sits four times a year, for three weeks each session (barring the calling of supplementary or emergency sessions).
[574] Watts, *Comparing Federal Systems*, 3rd ed., 151; Hughes, *The Federal Constitution of Switzerland*,, 88-89.
[575] While this would be difficult to enforce in the case of a cantonal government giving confidential instructions to a representative serving in both the cantonal and federal legislatures, this Article does prevent cantonal governments from issuing legally-binding instructions, which would have to be publicized in some form.
[576] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 99.

Switzerland always provides a fascinating study for scholars of federalism and this is no different for this investigation. In this study, Switzerland presents an interesting example of an established federation which has developed a limited number of national agreements, as only 15 were formed between 1945 and 2005 (a rate of 0.25 per year). This result is in spite of an active practice of intergovernmental relations, a large and growing welfare state and no impediment from intrastate federalism.

Taken together with the other institutional features which may be conducive to the formation of agreements however, it seems that these factors are average at best. While Switzerland's growing welfare state may provide new opportunities for coordination and thus, agreements, the Swiss style of administrative federalism seems to limit the potential for intergovernmental agreements. In terms of legislative powers, the federal government possesses the lion's share of these and there is little overlap between the orders of government. In practice however, the cantons have significant leeway in implementing federal legislation, which could potentially provide features conducive to coordination. Even with this flexibility, federal legislation can still serve a coordinating function making this an average conducive factor at best. Additionally, while the creation of a new, peak institution for intergovernmental relations in 1993 (the Conference of Cantonal Governments) may provide new opportunities, regional bodies remain important in intergovernmental relations.

While these institutional features do provide the potential for national intergovernmental agreements, they are balanced against a powerful impediment. Though Switzerland's elected second chamber, the Council of States, provides only a partial degree of intrastate federalism and thus, a marginal alternative to agreements, the same cannot be said for the effect of the number of subnational governments.

Switzerland's 26 cantonal governments put it in second place, behind only the United States. The coordination difficulty presented by so many governments may be further exacerbated by the presence of the different linguistic and cultural communities in Switzerland, creating an even greater barrier to national coordination and agreements. The large number of regional agreements serves as evidence to the barriers of achieving national consensus and demonstrates the strength of this impediment. Indeed, these regional accords can even be included as a type of alternative to a national agreement.

Switzerland is a case where the distinction between national intergovernmental agreements (the kind this study is concerned with) and smaller, multilateral/regional ones is important. While regional associations and agreements flourish, the institutional environment does not seem to provide the same prospects at the national level, as can be seen in this summary formula:

CON (*Moderate*) – INH (*Strong*) – ALT (*Few*) = Limited IGA Formation

This summary of Swiss federalism is consistent with the record of agreement formation in Switzerland, as Switzerland is a case where competing institutional forces produce a federation with only a limited number of national agreements. Yet, though Switzerland has formed a relatively low number of agreements in the past, there is the potential for this to change in the future. The growing importance of the Conference of Cantonal Governments, as well as the additional pressures of foreign policy (and the powers that it grants executives) may yet be the impetus for a growth in agreements.

Table 8.4: A Selection of Large Swiss Regional and Multilateral Agreements

Year	Swiss Agreement Title	Participants
1951	Concordat on non-federally licensed cable cars and ski lifts	All but BS, GE, SH & TG (22 cantons total)
1955	Concordat concerning the prospecting and exploration of oil	AG, AI, AR, GL, SG, SH, SZ, TG, ZH
1957	Intercantonal concordat punishing abuses of conventional interest	BE, FR, GE, JU, NE, SH, VD, VS
1959	Concordat on the execution of punishments and measures according to the Swiss Penal Code and the law of the cantons of Northwestern and Central Switzerland (law enforcement concordat)	AG, BE, BL, BS, LU, NW, OW, SO, SZ, UR, ZG
1968	Intercantonal concordat founding the Forestry School Lyss	AG, BE, BL, FR, LU, NE, TI, VS, ZH
1974	Concordat on the high school and vocational training center of Wadenswil	AG, AR, BE, BL, GL, GR, LU, SG, SH, SZ, TG, UR, ZG, ZH
1976	Intercantonal agreement on police cooperation	AI, AR, GL, GR, SG, SH, TG
1976	Agreement between the cantons of AI, AR, GL, GR, SG, SH, TG and ZH on the enforcement of custodial sentences and measures according to the Swiss Penal Code and supplies in accordance with federal and cantonal law	AI, AR, GL, GR, SG, SH, TG, ZH
1976	Agreement between the cantons and the Swiss Red Cross regarding the professional training of nurses, the medical-technical and the medical-therapeutic staff	BL, BS, FR, JU, NE, NW, SO
1977	Concordat on the enforcement of judgments in civil matters	All but AG, AI, AR, BE, SG, SO & ZH (19 cantons total)
1979	Management agreement on the cost of intercantonal police action under Article 16 of the BV	All but BE, BS, JU, SO, VS & ZH (20 cantons total)
1981	Agreement on the rehabilitation center for drug addices at Lutzenberg	AI, AR, GL, GR, SG, SH, TG
1983	Agreement between the Swiss BR and the Government of the French Republic concerning the taxation of income from the work of border workers	BE, BL, BS, JU, NE, SO, VD, VS

Table 8.4: A Selection of Large Swiss Regional and Multilateral Agreements (Continued)

Year	Swiss Agreement Title	Participants
1984	Intercantonal agreement on subsidies for operating deficits and cooperation for the benefit of children and youth centers as well as for the disabled (home arrangement)	AG, AR, BL, BS, FR, GL, JU, LU, OW, SG, SO ,SZ, TG, ZG
1984	Concordat on the implementation of sentences and measures for adults and young adults in Romansh speaking cantons and Ticino	FR, GE, JU, NE, TI, VD, VS
1986	Intercantonal convention for the training in health professions (except medical professionals) (agreement in 1996 on this)	BE, FR, GE, JU, NE, TI, VD, VS
1990	Agreement on the development and operation of the Intercantonal Forestry School at Maienfeld (FM)	AI, AR, GL, GR, NW, OW, SG, SH, SZ, TG, TI, UR, ZG
1992	Inter-regional agreement on contributions at non-university educational institutions in tertiary education (technical school agreement)	All but GE, JU, NE, SO, VD & VS (20 cantons total)
1995	Agreement on cooperation in the hospital sector and the remuneration of hospital services (Eastern Hospital Agreement)	AI, AR, GL, GR, SG, SH, TG, ZH
1996	Agreement on the cooperation and funding for the training of health care professionals	AI, AR, GL, GR, SG, SH, TG, ZH
1997	Intercantonal college (specialized schools) agreement (FHV) for the years 1999-2005	All but AR, BL, GE & UR (22 cantons total)
1997	Intercantonal agreement on the contributions from the cantons to the cost of education in vocational training in agriculture and rural home economics (Agriculture Tuition Agreement)	AG, BL, BS, GL, JU, NE, NW, OW, SH, TG
1998	Intercantonal agreement on specialized colleges (FSV)	All but AR, GE, LU, UR, VD & ZG (20 cantons total)
1999	Intercantonal agreement on the university for special education ZH	AG, AI, AR, GL, GR, OW, SG, SH, SO, SZ, TG, ZG, ZH
1999	Intercantonal agreement on coordinating university policy	BE, BS, FR, GE, LU, NE, SG, TI, VD, ZH
2001	Intercantonal agreement on contributions from the cantons in education and training costs in vocational education training (Vocational Agreement)	AG, BE, FR, JU, NW, OW, SH, SO, TG, TI

Table 8.4: A Selection of Large Swiss Regional and Multilateral Agreements (Continued)

Year	Swiss Agreement Title	Participants
2002	Intercantonal agreement on social institutions	AG, BE, BL, BS, JU, LU, OW, SG, SO, SZ, VS
2003	Intercantonal college agreement until 2005	All but AR, BL, GE, GL, GR, NE & UR (19 cantons total)
2003	Concordat on the establishment and operation of an intercantonal police school Hitzkirch	AG, BE, BL, BS, LU, NW, OW, SZ, TI, UR, ZG
2005	Framework agreement for intercantoal cooperation accompanied by compensation for expenses	AI, BL, BS, FR, GL, GR, OW, SO, SZ, TI, UR, ZG, ZH

Chapter Nine: United Kingdom

Source: CIA World Factbook

Formal Name: United Kingdom of Great Britain and Northern Ireland.

Capital: London, England

Subnational Governments: Northern Ireland, Scotland and Wales (there is no separate subnational government for England).

Introduction:

The United Kingdom (UK) has an interesting place in this analysis as both the oldest and the youngest case. England, the largest component of the union, has existed in some form since the 10th century. The British Crown, the UK's head of state, claims a lineage that goes back to William the Conqueror, whose 1066 invasion established the early foundations for the modern state. Devolved governments such as Scotland and Wales also claim a long history, with Scotland existing as a kingdom as early as 843 and Wales forming a principality during the 12th century. In contrast to these ancient origins, the United Kingdom as a federal system is quite young; it was not until 1999 when devolved governments and legislatures were established in Scotland, Wales and Northern Ireland.[577] Indeed, the UK government still does not refer to their new system of governance as "federal," preferring the term "devolution". Despite these semantics, the UK possesses a number of traditional features of federal systems – enumerated powers for subnational governments, separate subnational legislatures, financial arrangements and intergovernmental relations – as well as the existence of formal intergovernmental agreements, crucial to this research. While it is still evolving, the United Kingdom presents an interesting case for examining the role of intergovernmental agreements within a nascent federal system.

[577] The first example of any type of decentralization is actually Home Rule in Northern Ireland from 1920 until 1973. However, this was seen as a special circumstance and was not intended to change the structure of governance in the rest of the UK as the 1999 devolution did.

History:

While the individual nation-states that comprise the United Kingdom have long and rich histories in their own right, a reasonable starting point for the history of the UK as a whole would be the consolidation and expansion of England. Following the Norman invasion of 1066, the new rulers of England focused on gaining control of their own territory, before expanding into other lands. The first act of unification came with the English conquest of Wales by Edward I in 1282-83, which was then ratified into law by the Statute of Rhuddlan in 1284.[578] Any remaining Welsh autonomy was done away with by Henry VIII, through the passage of the Laws in Wales Acts of 1536 and 1543, which removed the final elements of Welsh administration and law (including the use of the Welsh language in court), while granting English citizenship to Welsh nobility and representation in Parliament.[579] By the mid-16th century, England and Wales had become a single political and legal unit.

Scotland, meanwhile, was in the designs of England as early as the 12th century and by the 13th, Edward I, fresh from his Welsh conquests, attempted to have himself proclaimed feudal overlord of Scotland in 1291. Though these claims did not come to fruition, England and Scotland would engage in a number of wars and armed conflicts over the next three centuries. Though these conflicts resolved little, the most significant step towards their union came following the death of the childless (and thus, heirless) Elizabeth I. James VI, King of the Scots was invited to become James I of England,

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[578] This statute established Wales as a possession of the England, created new administrative divisions and introduced English common law courts (though it did not fully remove all elements of Welsh law). As a point of interest, this conquest also established a tradition that has persisted until the present: conferring the title "Prince of Wales" on the firstborn son of the reigning monarch. In the original case, this was Edward II, born while his father was attempting to subdue Wales, and granted the title to subsume the original Welsh institution.

[579] Vernon Bogdanor, *Devolution in the United Kingdom,* (Oxford: Oxford University Press, 2001), 6.

creating a personal union of the two crowns.[580] Though the kingdoms technically remained separate (with independently-functioning Parliaments and courts), having a single sovereign brought them closer together. Following the English Civil War, in which both Parliaments rebelled against Charles I, and the interregnum, these two countries were brought together in the Act of Union of 1707 as the Kingdom of Great Britain. In this new union, Scotland retained some religious and legal autonomy, but it was represented in and governed by the Parliament at Westminster, completing the political union begun by James I.[581] Alan Trench has described this as a means for Scotland to gain some benefits through a partnership with England, rather than simply being dominated militarily and economically by the larger power.[582]

The Irish path to union lay somewhere between the Welsh and the Scottish. It began with English military dominance: Henry II had himself declared Lord of Ireland following the defeat of the Irish High King in 1171. This established the English monarch as the sovereign of Ireland (known as "the Lord of Ireland" until 1542 and King or Queen, thereafter), though unlike in Wales, this was not accompanied by actual control of the entire state.[583] Beginning in the mid-16th century, the Tudor monarchs, Henry VIII and Elizabeth I, sought real control to accompany their Irish crowns, and used their military and economic power to subdue many of the autonomous clans. Despite the English subjugation of Ireland and the personal union of the crowns in the English

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[580] James seems to have been invited by the English court based on his Tudor great grandmother, Margaret, daughter of Henry VII, and his Protestant religion.
[581] Bogdanor, , *Devolution in the United Kingdom*, 8-10.
[582] Alan Trench, "Introduction: territory, devolution and power in the United Kingdom," in *Devolution and Power in the United Kingdom*, ed. Alan Trench, (Manchester and New York: Manchester University Press, 2007), 3.
[583] At times, the English King's powers would extend barely beyond Dublin and nearby coastal settlements. The rest of the country, known as "Beyond the Pale", fell under the shifting authority of numerous clans. It was this disunity in the rest of Ireland that allowed the King of England to claim the crown of Ireland without actually controlling even a majority of the country.

sovereign, it was more than 250 years later – and almost a century after Scotland – when Ireland was brought into a union with Great Britain through the Act of Union of 1801. Irreconcilable religious and cultural differences made this union short-lived as they provided the seeds for Irish nationalism. By the late 19th century, strong Home Rule and nationalist movements had arisen. By 1921, after decades of debate and armed conflict, the Anglo-Irish Treaty was signed, recognizing the independence of the Irish Free State which comprised all of Ireland, minus six counties of Ulster which possessed large Protestant populations (and became the territory of Northern Ireland).[584]

It was in Northern Ireland where the first devolved/federal elements began to appear in the UK. The Parliament of Northern Ireland was given substantial powers to legislate over local affairs and social policy.[585] Although the government and legislature were suspended in 1972 as "the Troubles" began, this arrangement demonstrated the possibility of devolved government as well as the asymmetry that would define it. The 1970s also saw resurgent debates concerning Scottish and Welsh nationalism and the possibility of devolution began to develop.[586] While the Conservative administrations of Margaret Thatcher and John Major were not responsive to what they saw as the dismantling of the British state, Tony Blair's Labour Party was elected in 1997 promising to see devolution realized.[587] Following successful referenda, a Parliament was formed in Scotland, while Wales created a National Assembly. Home rule was also restored in

[584] The Irish Free State initially gained independence as a British Dominion and was still subject to the British Crown as their foreign representatives. In practice however, this meant fairly limited powers. The establishment of the Irish Republic in 1948 ended this lingering relationship with the UK and the British Crown.
[585] The Government of Ireland Act 1920 primarily conceded constitutional and foreign policy issues to Westminster, granting significant authority to the Northern Irish Parliament.
[586] Trench, "Introduction: territory, devolution and power in the United Kingdom," 5.
[587] Russell Deacon, *Devolution in Britain Today*, 2nd ed., (Manchester and New York: Manchester University Press, 2006), 86-87.

Northern Ireland with the creation of a new Northern Ireland Assembly and Executive (a replacement for the original Parliament); however, this has been suspended multiple times since its creation due to breakdowns in the peace process.[588] By 1999, devolution in the UK had, in a sense, moved the country closer to its (centuries) earlier historical conditions, by restoring some self-government to its constituent nations.

Government and Political Structure:

The government of the United Kingdom is the archetype for parliamentary democracy, exported throughout the British Empire and emulated by countries around the world. The Parliament at the Palace of Westminster – the heart of the UK's political system - evolved over a period of centuries, from a medieval "Grand Council" of bishops and barons to a sophisticated institution which controlled the fate of one-quarter of the world at the height of British imperial power. Without any existing models to influence it or any written constitutional documents, the historical evolution of the UK's central political institutions is particularly noteworthy.

Two events stand out in the early development of Parliament. The first was the famous Magna Carta of 1215, which took the important step of placing the king under the boundaries of the law. This denied the development of a truly absolute monarchy and allowed the early Parliament to gain some influence. The second event was the reign of Edward I, as his attempts to annex Scotland and Wales caused the king to call upon Parliament to raise funds for the military and to use it as a body for receiving input and grievances from his many lands. Edward's Parliaments were among the first which had representatives of the gentry and individual boroughs, as opposed to only the most

[588] Ibid, 198-200.

powerful lords and bishops. This inclusion eventually led to the birth of bicameralism, with Parliament splitting into an upper house of the lords and bishops and a lower house comprised of the gentry and burgesses (sheriffs and other town representatives).[589]

The events of the 17th century – the English Civil War, the execution of Charles I and the culmination in the form of the Glorious Revolution of 1688 – saw Parliament supplant the Crown as the seat of true political power in Britain. However, this should not be confused with the modern, democratic institution. The House of Lords remained a powerful body while eligibility for citizenship (and thus, the ability to vote in and stand for election) was restricted. [590] The Reform Acts of 1832 and 1867 modernized Parliament and increased the powers of the Commons by reorganizing the seats by the principle of representation by population and extending the franchise to all male citizens. These reforms granted the Commons increased legitimacy and assertiveness, leading to conflict with the House of Lords – a conflict the Lords would lose.[591] The *Parliament Act 1911* reduced the Lords to a temporary veto only,[592] while the *Life Peerages Act 1958* allowed lifetime appointments. More recently, the Labour party has reduced the number of hereditary peers to 92 with the *House of Lords Act 1999*. Today, Parliament is still bicameral, but the current Lords play a less powerful role.[593] The transition to a chamber

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[589] Nicholas D.J. Baldwin, "The Origins and Development of Parliament," in *Parliament in the 21st Century*, ed. Nicholas D.J. Baldwin, (London: Politico's Publishing, 2005).
[590] Ibid., 14.
[591] This conflict was especially vehement with the rise of the Liberal party and the administration of Prime Minister Lloyd George. The hereditary peers in the House of Lords were dominated by Conservatives (both ideologically and in partisan affiliation) who resisted many of the Liberals' policies, including new social programming, higher taxes on wealthy landowners and Home Rule for Ireland.
[592] This was followed by the *Parliament Act of 1949* which reduced the duration of the veto from two years to one.
[593] While the House of Lords is clearly less powerful than it was a century ago, it should not be thought of as an impotent body. Even after the latest reforms, the House of Lords defeated 245 pieces of legislation between 2001and 2005, an increase from the 108 defeats between 1997 and 2001. Lest this be thought of as a toothless veto, only 40% of these defeats were later overturned by the House of Commons. See: Philip

dominated by lifetime, instead of hereditary peers means that new Lords are appointed to honour successful citizens, reward retiring politicians and grant representation to groups that are under-represented in the Commons.

For the last century, most political authority in the UK is found in the House of Commons and is based on two principles: representation by population and responsible government. Members of Parliament (MPs) are elected from single member constituencies on a plurality basis, also known as "first past the post". Constituencies are, in theory, organized to ensure that each MP represents an equal number of citizens; in practice, this rule is often not followed strictly to allow for the representation of historical communities and rural areas. Once in Parliament, the government is formed by the party that can command the confidence of the House (usually by winning a majority of the seats). This government is then responsible to the House of Commons, and must rely on support there to pass legislation and stay in power.[594]

The new devolved governments follow strongly in the footsteps of Westminster. Scotland's Parliament is very similar to the UK Parliament, with a first minister and cabinet responsible to the legislature. Where the Scottish Parliament differs is in the fact that it is unicameral and uses a mixed system to elect members, allowing for some proportional representation (PR). The Welsh National Assembly also shares these same distinctions (unicameral, PR) but differs further in the form of its executive. Between 1999 and 2007, the Welsh executive was a committee of the Assembly, not a distinct cabinet. However, this difference has been mostly removed with the *Government*

Cowley and Mark Stuart, "Parliament: More Revolts, More Reform," *Parliamentary Affairs*, 56, no. 2 (2003): 188-204.

[594] In a "hung" or minority parliament, in which one party does not have a majority, it is quite possible that the party in power can be defeated by a vote of no confidence. The current parliament, under Prime Minister David Cameron allows for this possibility.

of Wales Act 2006, which granted independent executive powers to ministers, akin to the UK and Scottish models.[595] The Northern Irish Assembly[596] is also a unicameral body, but members are elected using the single transferable vote. The unique elements of the Northern Irish government are found in the executive, which is closer to the original Welsh format with a dash of consociationalism. The executive is a committee of the legislature, elected by the Assembly. However, seats on the executive committee are allocated by the d'Hondt method[597], allowing for all major parties to have a role – an important condition of the peace process.[598] The fragile nature of this peace process has also led to this Assembly being suspended on four occasions since 1999, most notably for five years between 2002 and 2007.

It is worth noting what does not appear in the above description: England. Despite being the largest region of the UK in population, geography and economy, England does not have it own parliament or assembly – local government or the Westminster Parliament handle all English affairs. This feature will be discussed at greater length in the section on subnational governments.

Intergovernmental Agreements in the United Kingdom:

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[595] See the *Government of Wales Act 2006* especially Part 2 for changes to the executive.

[596] This body should not be confused with the Northern Ireland Parliament, which was created to allow for Home Rule in 1920 and then suspended during the troubles in 1972. The Assembly was a new creation in 1998 as opposed to a resumption of the old Parliament.

[597] The d'Hondt method is a formula for allocating seats in a party-list system of proportional representation. It assigns seats based on the number of votes a party has received divided by the number of seats it has been allocated, plus one (V/s+1). Seats are allocated to the party which has the highest quotient remaining (a party's divisor increases as seats are allocated, thus driving its quotient down) until the all of seats have been distributed.

[598] While all major parties are entitled to representation in the executive based on the d'Hondt method, this does not guarantee that they will actually take these seats. In the past, nationalist parties have refused to fill the seats on the executive that they are entitled to, as a means of expressing their independence and criticizing the Unionist parties that tend to hold a majority. See: James Mitchell, *Devolution in the UK*., (Manchester and New York: Manchester University Press, 2009), 185-194.

Although the United Kingdom can only be said to be in the nascent stages of a federal system, it already has a clearly defined system of intergovernmental agreements. Intergovernmental agreements are known as *concordats* and were defined at the very beginning of devolution.[599] The Memorandum of Understanding and Supplementary Agreements between the UK and the three devolved governments presented a set of guidelines for intergovernmental relations in the new system of devolution, including the role of concordats:

> In addition, the four administrations may prepare Concordats or make other less formal arrangements to deal with the handling of procedural, practical or policy matters between them. Concordats are not intended to be legally binding, but to serve as working documents.[600]

This presents three important elements of intergovernmental agreements in the United Kingdom. First, they are sanctioned as a normal element of intergovernmental relations in this nascent federation. Second, there is a formal category of agreements known as concordats which are distinguished from informal partnerships. The third and final element is that while these agreements may be formal, they are not intended to be legally binding. This is consistent with the British tradition of parliamentary supremacy.

The more complicated feature of intergovernmental agreements in the UK is determining how to define agreements that are *national* in scope. The asymmetry of devolution has created a situation in which all governments are not competent in exactly the same areas. Moreover, given the different systems of government in each devolved administration (such as the differences between Scotland's traditional parliamentary format and Wales' National Assembly), it might be expected that common ground does

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[599] Some specific agreements are referred to as a "Memorandum of Understanding", notably the original devolution agreement in 1999.
[600] United Kingdom, "Memorandum of Understanding and Supplementary Agreements," 1999, 5.

not exist between the devolved administrations and the government of the UK. The situation in Northern Ireland adds a final complication to any discussion of national agreements. The Assembly is inextricably linked to the peace process in Northern Ireland and during those times when this process has broken down, the Assembly has been suspended. During these periods, the functions of the devolved government have been run directly from the UK administration in Whitehall. This has occurred four times since 1999 for a total combined time of almost 6 years, approximately half of devolution's existence. Given this inconsistent record, only the UK, Scotland and Welsh governments were considered when determining whether intergovernmental agreements were national in scope.[601]

Despite these potential obstacles, a number of concordats involving all devolved governments have been successfully concluded. Between 1999 and 2010, eleven concordats have been concluded to which Scotland, Wales and the United Kingdom[602] are signatories (these agreements can be found in *Appendix F*).[603] Data for these agreements has come from the governments of Scotland and Wales, which each maintain an online registry of the concordats that they have agreed to.

At an average of 0.92 national agreements per year, this would seem to place the UK just below Australia, Canada and Germany, which conclude national agreements on a

[601] Leaving Northern Ireland aside in determining whether an agreement is national or not does not indicate that all of these agreements are solely between Scotland, Wales and the UK. Northern Ireland is a signatory to many of these, especially those agreed to in conjunction with the Memorandum of Understanding.
[602] As there is no devolved legislature or government for England, the UK will be a required signatory for an agreement to be considered national in scope. While this would seem to preclude horizontal agreements from counting towards any totals, it is difficult to claim that an agreement between Scotland, Wales and even Northern Ireland could be considered "national", when England is completely left out. No concordats were eliminated from consideration because of this, keeping the data consistent with other cases.
[603] As stated in the methodology, the data for the UK goes to 2010 instead of 2008 because of the UK's short history with devolution and the accessibility of the data. By including the additional two years, it was easier to analyze trends in the UK's record of agreement formation.

regular basis. Upon closer inspection however, six of these agreements were concluded at the beginning of devolution and are related with the general framework of devolution and intergovernmental relation as opposed to recurring government business. This leaves only five national concordats between 2000 and 2010, at a much more modest rate of 0.5 per year. As with other elements of the UK's devolution, this paints a complicated picture that will be explored in greater detail in the following sections.

1. The Degree of Overlap that Exists in the Constitution

Unlike the other cases in this study, any discussion of constitutional overlap must begin by identifying what the United Kingdom's constitution actually is. The UK is one of only a few countries – and the only federal/quasi-federal one – that does not have a single, written document to act as the highest law of the land. The lack of one authoritative document should not be taken to mean that the UK lacks a constitution. Instead, the British tradition of constitutionalism vests importance in a number of sources: particular Acts of Parliament (including the Acts of Union and the Bill of Rights), constitutional convention (such as cabinet government and the office of Prime Minister) and lasting institutions (most notably, the Crown).[604] This leaves the UK with something of a diffuse constitution as well as one that evolves and changes over time– a "living constitution" according to Bagehot – while still allowing for the persistence of principles such as cabinet governance, parliamentary democracy and the rule of law.[605]

With this in mind, the individual Acts of Parliament that set out the framework for devolution become the focus for this constitutional inquiry. There are two groups of laws

[604] Adam Tomkins, "Constitutionalism," in *The Oxford Handbook of British Politics*, ed. Matthew Flinders, Andrew Gamble, Colin Hay and Michael Kenny, (Oxford: Oxford University Press, 2009) 240-241.
[605] Walter Bagehot, *The English Constitution*, 2nd ed., (London: Collins/Fontana, 1973), 5.

that fall into this category: the Acts of Union[606] and the Acts of Devolution[607]. The Acts of Union are less important to a discussion of overlap, but do lay the basis for devolution by demonstrating that the United Kingdom is not a *unitary* state but a *union* one.[608] The Acts of Devolution however, fulfill most of the functions of a constitution in a traditional federation, including defining the institutions of government, the system of fiscal devolution and the division of powers.

As with the structure of devolved governments, the pattern of asymmetry holds true for the division of powers. Rather than a single set of rules clarifying which powers may be exercised by the central government and which are in the purview of subnational governments, the UK actually has three separate sets of rules – one for each devolved government. Comparison between each devolved government is further complicated by the different formats that are used to allocate competencies. In many federal systems, government powers and responsibilities are divided by specifically reserving power to one level of government while leaving the unstated remainder to the other. In the UK however, reserve power alternates between the national and subnational government, depending on the devolved administration in question. The *Government of Wales Act 1998* allows the Welsh National Assembly to legislate only upon those matters that are specifically devolved to it (see Schedule 2 for the specific provisions; Schedule 5 in the

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[606] This group is made up of two laws: the Act of Union of 1707, which joined England and Scotland into the Kingdom of Great Britain and the Act of Union 1800, which brought in Ireland to create the United Kingdom. There is no direct equivalent for Wales as its incorporation into England was done unilaterally via the Statute of Rhuddlan (1284) and later, the Laws in Wales Acts (1535-1542) which formally annexed the territory. This contrasts with the case of Scotland and Ireland, in which their own parliaments passed their respective Act of Union and which were already ruled by the same crown as England.

[607] The Acts of Devolution begin with the Government of Ireland Act 1920, which established the original parliament for Northern Ireland. More recently in 1998 (and more applicable to the discussion of overlap), the UK Parliament passed three acts which serve as the framework of each devolved government: the Government of Wales Act, the Northern Ireland Act and the Scotland Act. The Government of Wales Act 2006 was later passed to alter some of the institutions of Welsh government, notably their executive.

[608] Tomkins, "Constitutionalism," 249-250.

2006 Act). In contrast, the *Northern Ireland Act 1998* and the *Scotland Act 1998* stipulate the powers that are reserved to the UK and its Parliament, while devolving all other matters to the respective legislatures (see Schedule 5 of the *Scotland Act* and Schedule 3 of the *Northern Ireland Act* for specific lists of reserved matters). In spite of these different formats, however, the devolved administrations possess remarkably similar spheres of authority. A 1999 report from the House of Commons Library which listed the competencies of both the Welsh and Scottish governments demonstrates that the only major differences are in the Scottish Parliament's control of criminal and civil law and the Welsh Assembly's authority over the Welsh language.[609] Examining all three devolved administrations, Alan Trench found an "extensive" list of common devolved powers, including: education (all levels), healthcare, local government, housing, personal social services, the environment, agriculture and fisheries, public transport, roads and cultural matters.[610] This list does not even take into account other common areas, such as dealing with EU policies or managing intergovernmental relations, demonstrating a large body of common interests between the devolved administrations.

With a better understanding of the UK's division of powers, what degree of overlap exists? There are two answers to this question: one grounded in a strict reading of the Devolution Acts and another in the record of legislating and governing over the past eleven years. In the first case, a *prima facie* reading of the devolution acts of Scotland and Wales would indicate separate spheres of authority, with a low potential for

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[609] There are clearly smaller nuances between the different governments, especially when the different political institutions of each government is taken into account. From a general level, however, the similarity between the powers of the devolved governments is apparent. See: Oonagh Gay, "Devolution and Concordats," *House of Commons Research Paper*, 99(84), London: House of Commons Library, 1999.
[610] Alan Trench, "The framework of devolution: the formal structure of devolved power," in *Devolution and Power in the United Kingdom*, ed. Alan Trench, (Manchester and New York: Manchester University Press, 2007), 54.

overlap. This is made clear by formatting the division of powers into Watts' comparison of competencies in federations (see *Appendix H*).[611] The *Government of Wales* and *Scotland* Acts contain no explicitly concurrent areas and only a limited number of fields in which both the national and subnational governments have some authority. According to Watts' method, only 22% of policy fields exhibit some form of overlap between different governments. This is the lowest overlap total in this study, below countries such as Canada (46%) and Switzerland (43%) and far below Germany, the federation with the greatest amount of overlap (75%). Yet, if constitutional overlap is to be based on a strict reading of constitutional documents, the division of powers does not provide enough information. Such a limited reading would neglect Section 28(7) of the Scotland Act, which states in the section on the powers of the Scottish Parliament that: "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland".[612] Despite devolving powers to Scotland and Wales, as well as setting up independent legislatures and executives, the Government and Parliament of the United Kingdom have not relinquished final authority. Incorporating this into the earlier calculations on overlap would mean that all areas of subnational authority are technically areas of overlapping jurisdiction. This would effectively double the number of joint areas in the division of powers, as the nine areas of subnational authority would be included, putting the UK on par with other federations.

In practice, however, the UK is bound by the Sewel convention, which stipulates that the UK Parliament will not legislate on devolved matters unless given expressed

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[611] See Watts, *Comparing Federal Systems*, 3rd ed., 194-198 for the original tables. The United Kingdom's results were adapted primarily using Scotland and the division of powers in the *Scotland Act 1998* as the template for comparison. Where Wales differs from Scotland's results, the differences are noted.
[612] United Kingdom, *Scotland Act 1998*. (1998, c. 46), 28(7).

consent from a devolved legislature.[613] This permission is given via a "Legislative Consent Motion", and when passed by Parliament, it allows for Westminster to legislate on matters that are devolved to Scotland and Wales.[614] The data from Scotland indicate that these Motions (and thus, clear incidences of overlap) are not rare phenomena, with more than 102 having been passed since the beginning of devolution.[615] Moreover, these Motions have been spread over a number of policy areas, including (but certainly not limited to): energy, the environment, welfare, social services, crime and justice, municipal services, education and government institutions.[616] This seems to indicate that the limitations placed on the UK Parliament by devolution are not absolute and overlap occurs even in devolved jurisdictions. Keating effectively sums up the current status of overlap:

> On paper, the division of powers between Westminster and Holyrood looks fairly clear, with each tier free to act within its own competences. In practice, there is considerable overlap and mutual dependence, so that a great deal of policy must be made by cooperation between two levels.[617]

In Wales, these elements of constitutional overlap are further exacerbated by the role that the UK government, through the Secretary for Wales, plays in assisting with the implementation of legislation.[618] Moreover, until 2007 and the new Act, the Welsh Assembly could only produce secondary or implementing legislation, giving Westminster access to primary legislation, even in devolved jurisdiction.

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[613] Scottish Government, "The Sewel Convention: Key Features," May 2008, http://www.scotland.gov.uk/About/Sewel/KeyFacts (accessed May 31, 2010).
[614] Ibid.
[615] Scottish Parliament, "Legislative Consent Memorandums and Motions – Statistics by session," 2010, http://www.scottish.parliament.uk/business/legConMem/LCM-Stats.htm (accessed June 8, 2010).
[616] Scottish Parliament, "Legislative Consent Memorandums," 2010, http://www.scottish.parliament.uk/business/legConMem/index.htm (accessed, June 8, 2010).
[617] Michael Keating, *The Government of Scotland: Public Policy Making after Devolution*. (Edinburgh: Edinburgh University Press, 2005), 119.
[618] Until all the changes in the *Government of Wales Act 2006* are implemented, the National Assembly of Wales and its executive committee were to work with UK cabinet in order to implement policy.

The record of national intergovernmental agreement formation seems to reflect some of these trends. The large number (on a per year basis) would seem to indicate that overlap in devolution provides fertile ground for coordination and thus, agreements. Many of these agreements appear to be intended to create institutions and organization for devolution – a necessity for a situation in which overlapping jurisdictions are the norm. Yet despite the high yearly rate of agreements, the majority occurred in the early years of devolution and there are no national agreements on important issues such as criminal and civil law, education, and the environment, all of which have some degree of overlap (there is one healthcare agreement relating to soldiers and the Ministry of Defence).[619] There are three possible explanations for this pattern in the data. First, it may simply be that another variable, such as centralization, is influencing national intergovernmental agreement formation to a greater degree. It is too early to accurately confirm this possibility – we will return to this in the conclusion later in the chapter. Second, it may be that while overlap is extensive among all jurisdictions, the asymmetrical nature of devolution leads governments to address their concerns in different ways and not via a national concordat. While Scotland has formed a larger number of bilateral concordats with the UK government (in comparison to Wales), this explanation alone does not appear to be sufficient. Many of these additional concordats are meant to establish the relationships between Ministers for the UK and Scotland, something not possible in Wales given the different nature of their executive. These organizational concordats, however, do not replace agreements that might be created to address a specific policy issue. The third and most compelling explanation (at least until the other variables are discussed) is the role of Legislative Consent Memorandums and the "uploading" of

[619] Trench, "The framework of devolution," 56.

responsibility for certain national issues to Westminster. As one example, in 2007 when the governments of the UK were attempting to create a framework to address climate change, the issue was addressed at Westminster, with the devolved legislatures passing LCMs in order to allow the UK Parliament to act.[620] As the UK Parliament is still fully competent in all policy areas, issues of Union-wide importance can still be addressed there, provided the devolved governments give their consent. Such a mechanism is likely to decrease the number of concordats by providing a means of national coordination other than an intergovernmental agreement.

2. The Degree of Centralization in the Constitutional Division of Powers

The United Kingdom has existed for centuries as a unitary government, with power exercised by the central government in London. In contrast, devolution is barely more than a decade old and still not fully formed. It should come as no surprise then, that the UK exhibits a significant degree of centralization in its constitutional division of powers. In terms of the raw totals provided by Watts' comparison, the UK outpaces all federations in this study; with 27 areas exclusively in federal jurisdiction, only Switzerland comes close with 23. These powers are not trivial either, as they include virtually all economic powers, including full control over monetary policy, financial regulations, trade and transportation (both inter-regional and international). While we will return to financial issues in the discussion of the spending power, it is also worth mentioning that nearly all revenue raising powers are reserved solely to Westminster. Only South Africa limits the financial powers of its subnational governments to such a

[620] Scottish Parliament, "Legislative Consent Memorandum," November 2007, http://www.scottish.parliament.uk/business/legConMem/pdf/queensSpeech2007.pdf (accessed June 8, 2010).

degree. Unlike Switzerland however, the UK does not counterbalance this centralization by implementing anything resembling the administrative decentralization observed there; indeed, the Welsh Assembly is still attempting to acquire the ability to produce primary legislation.[621] Watts describes the UK Government as occupying a "dominant" position, especially in light of its limited constitutional restraints.[622]

Yet despite these numerous and important national powers, an official in Scotland or Wales might refer back to the list of common subnational competencies listed in the last section. This list included authority over important fields such as healthcare, education, agriculture and the environment – giving "extensive" policy room to the governments of Northern Ireland, Scotland and Wales.[623] If we were to weight the importance of a particular policy field based upon how much governments spend, then devolved governments have full authority over the two largest spending priorities (healthcare – the largest – and education), while also sharing control over welfare (another significant area of expenditure).[624] Although the UK technically retains jurisdiction over these matters as well, they are limited by the Sewel convention, reducing the possibility of unilateral intrusion. Should Westminster ever attempt to circumvent this convention (or simply extend its authority through existing legislation), there are further protections for devolved administrations. Unlike most federal systems, there is no established order of precedence in legislative authority, which usually favours the national government. Because of this, the UK Parliament is not able to easily crowd out

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[621] The *Government of Wales Act 1998* only provided the Welsh National Assembly with the right to make secondary legislation specified in particular areas by Westminster. The 2006 Act provided the ability for the Assembly to introduce primary legislation, but only if a future referendum approved it. See: Alan Trench, "Wales and the Westminster Model," *Parliamentary Affairs*, 63, no. 1 (2010): 128.
[622] Watts, "The UK as a Federalised or Regionalised Union," 257-58.
[623] Trench, "The framework of devolution," 54.
[624] United Kingdom, HM Treasury, "Spending Review, 2010," (London: National Archives, October 2010), 10 http://cdn.hm-treasury.gov.uk/sr2010_completereport.pdf (accessed, October 10, 2011).

devolved legislation, as occurs in South Africa and occasionally, the United States. [625] Likewise, although the courts can technically rule on whether devolved legislation is *ultra vires* – another potential means of centralization - though no cases have been brought before them.[626]

It would be a mistake, however, to assume this degree of autonomy makes the UK a decentralized system. Comparing the authority of the national and devolved governments, Trench observes that "their (devolved governments) powers are contingent, dependent on the passive restraint and non-opposition of the UK Government or its active cooperation."[627] Beyond the financial dependency, many of devolved powers depend on authority held by Westminster. Local economic development can easily be stymied by the national government should Whitehall decide to utilize its more powerful economic levers in a direction opposite to that of devolved administrations. Likewise, a new university supported by Scotland or Wales would encounter significant problems without the support of the Research Councils, a matter reserved to Westminster.[628] It would also be inaccurate to claim that the Sewel convention has established "watertight containers" for subnational powers and decentralization. Scotland has passed 102 Legislative Consent Motions between 1999 and the middle of 2010, an average of almost ten per year. This represents a 100% success rate for LCMs that have come to a vote in the Scottish Parliament; only five others failed to make it from the Memoranda stage to formal motions.[629] The device that is supposed to protect devolved jurisdictions from

[625] Trench, "The framework of devolution," 67.
[626] Keating, *The Government of Scotland*, 121.
[627] Trench, "Introduction: territory, devolution and power in the United Kingdom," 12.
[628] Trench, "The framework of devolution," 56.
[629] Scottish Parliament, "Legislative Consent Memorandums and Motions – Statistics by session."

intrusion by Westminster, the Sewel convention, seems to be more of a step in the legislative process than a guarantor of decentralization.

As the Parliament at Westminster is already capable of legislating in a large number of policy areas (the largest of all seven case studies), its ability to intervene in devolved jurisdictions leaves even less room for other forms of intergovernmental coordination. The relatively low number of national concordats that have been formed after the first year of devolution supports this reading of the UK's division of powers and level of centralization. As long as Westminster maintains the ability to legislate on cross-jurisdictional matters of national importance, the governments of the UK will be less likely to turn to national concordats to address these issues.

3. The Size and Status of the Federal Spending Power

When examining the size and status of Westminster's spending power in the UK, the devolution arrangements provide a useful starting point. The *Scotland Act* clearly reserves to London virtually all aspects of taxation, micro and macro-economic management and borrowing in Section II, Heading A of Schedule 5 (the division of powers section):

> Fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, government borrowing and lending, control over United Kingdom public expenditure, the exchange rate and the Bank of England.

The situation in Wales is no different than that in Scotland.[630] Whereas debate in federations such as Canada and the United States is concerned over which governments occupy the most "tax room", there is no such ambiguity in the UK – the national

[630] As the authority of the Welsh Assembly is based upon specifically devolving powers – as opposed to reserving powers to Westminster and leaving the remainder – it is enough to note that the *Government of Wales Acts* do not devolve taxation or excise powers.

government controls all of these revenues. Effectively, only two sources of revenues remain open to devolved governments: non-domestic rates, a property tax on businesses that is primarily allocated to local governments and specific grants from the European Union (such as Common Agricultural Policy subsidies).[631] Writing just after devolution, Travers found that in 2001, this division amounted to the UK collecting 96% of all taxes, leaving devolved and local authorities only 4%.[632]

Devolved governments are clearly dependent upon the UK government for funding, but how much is transferred and in what form? Unfortunately, the World Bank's data on the UK does not yet include a breakdown for devolved revenues, as it does for the other cases. Instead of this, budget documents have, on some occasions, clarified the source of government revenues. In the fiscal year 2001-02, approximately 90.2% of Scotland's funding came from the UK's transfers, with most of the remaining 9.8% derived from local business rates.[633] Non-UK revenues were also significant in 2006-07, when approximately 91% of Scotland's funding came from the UK's transfers, with 7% from local taxes and 2% from the EU.[634] These appear to have been the high points for sources other than transfers from London however, as by the next fiscal year (2007-08), UK Government spending made up 94% of Scotland's funding, with only 6% from

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[631] The Government of Scotland also has the option to increase income tax rates by as much as 3% on top of the UK rate every year to allow it an independent source of revenue. Perhaps unsurprisingly, the Scottish Government has elected to not raise taxes at any point since devolution. Scottish Government, *Scottish Budget Draft Budget 2010-11,* (Edinburgh: The Scottish Government, 2009), http://www.scotland.gov.uk/Resource/Doc/284860/0086518.pdf (accessed June 4, 2010).

[632] Iain McLean and Alistair McMillan, "The Distribution of Public Expenditure across the UK Regions," *Fiscal Studies* 24, no. 1, (2003): 46.

[633] Scottish Executive, *Scotland's Budget Documents 2001-02 - Budget (Scotland) (No 2) Bill for the year ending 31 March 2002*, (Edinburgh: The Scottish Executive, 2001), http://www.scotland.gov.uk/Resource/Doc/158580/0043006.pdf (accessed June 3, 2010).

[634] G Scottish Executive. *Scotland Draft Budget 2007-08*. Edinburgh: The Scottish Executive, 2006. http://www.scotland.gov.uk/Resource/Doc/146893/0038508.pdf (accessed, June 3, 2010).

business rates and a negligible amount from the EU.[635] In the most recent budget, 2010-11, these local taxes provided £2 billion in revenue, out of a total budget of £29.6 billion, or less than 7% of total revenue; EU sources were budgeted to provide zero revenue.[636] The situation in Wales appears to be similar, with local business rates making up 6.4% of revenues in 2001-02 as well as 2009-10.[637]

Whatever minor variations may occur over the years, devolved administrations consistently depend on the UK for more than 90% of their total government funds. Compared to the other countries in this study, only South African provinces depend more on the central government for their revenues than do devolved governments in the UK. The next-most dependent subnational governments are found in Australia, but their reliance is approximately half of what it is in the UK (48.67%).

Before suggesting that this financial dominance should lead to more intergovernmental agreements, it is worth examining the format of these transfers and how the UK's spending power is actually used. Funding is calculated based on the Barnett Formula, which begins by transferring the original funding for programs in all areas of the UK before devolution to the new administration (these were originally administered by the various cabinet offices, such as the Wales Office). From this point,

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[635] Scottish Government, *Scottish Budget Spending Review 2007,* (Edinburgh: The Scottish Government, 2007), http://www.scotland.gov.uk/Resource/Doc/203078/0054106.pdf (accessed June 3, 2010).
[636] Scottish Government, *Scottish Budget – Draft Budget 2010-11*.
[637] Determining the percentage of revenue derived from local rates is a bit more difficult in Wales as the taxes are actually collected for England and Wales by the UK, with the Wales portion redistributed via transfer payments for local government. In 2001 and the recent budgets however, the amount of revenue derived from this tax is specified separately. See Welsh Assembly Government, "Supplemental Budget for 2002-2003 to 2004-2005," under *National Assembly for Wales' Budget 2001,* (Cardiff: Welsh Assembly Government, 2001), http://wales.gov.uk/cisd/reports/finance/budgets/2001/2001supplementarybudgete.pdf?lang=en (accessed June 4, 2010) and Welsh Assembly Government, *Final Budget 2009-2010,* (Cardiff: Welsh Assembly Government, 2008), http://wales.gov.uk/docs/finance/report/081202noteenglish.pdf (accessed June 4, 2010).

any changes to program spending in England by the UK government will increase or decrease transfers to devolved governments by an amount proportional to their population. For example, if the budget for schools in England was increased by £100 million, then Scotland, with one-tenth the population would see its transfer payment increased by £10 million. This percentage is further augmented based on whether the matter is reserved, non-reserved or one that falls under both national and devolved jurisdictions. For example, education is completely devolved in all areas, so the full amount would be eligible (again, proportionate to population). However, in the case of a new transportation project, perhaps 50% might be deemed spending for devolved programs, while the other half would fall under reserved matters. This would mean only half of the amount would be eligible to be transferred to devolved governments, while the other half would be Whitehall's to spend.[638] Perhaps the most important element of these transfers – at least for the study of intergovernmental agreements – is that they are packaged as a single block grant, with no formal conditions on the distribution of the funds. This also holds true for any future changes: should the UK budget increase healthcare spending, the devolved governments are able to put this money into education, welfare or any other priority.[639]

Without the ability to make funds conditional, the UK has no means of compelling devolved governments into agreements, without completely changing the funding formula. The devolved governments, meanwhile, have no incentive to trade autonomy for increased funds - if it were even possible - due to the dual role of the UK Parliament

[638] David Bell and Alex Christie, "Funding devolution: the power of money." in *Devolution and Power in the United Kingdom*, ed. Alan Trench, (Manchester and New York: Manchester University Press, 2007), 74-76.
[639] Ibid.

in the intergovernmental system. Because Westminster is also responsible for government spending in England, the national cabinet is compelled by the Barnett Formula to increase spending everywhere. Moreover, in any circumstance where Westminster would want to dictate funding priorities, it can do this directly through national legislation and the fact that it controls virtually all government revenues. Thus, while the UK's national government wields a tremendous spending power, it is constrained in its application, making it unlikely to encourage the formation of national concordats.

4. The Size and Scope of the Welfare State

Because of the short history of devolution, examining the scope of the welfare state in the United Kingdom is a different process than with older federations. During the post-war decades, when the various parts of the welfare state were being constructed throughout the developed world, the UK was a unitary government, with the decisions about programming and spending coming solely from London. Thus, by the time devolution was established in 1999, the major pillars of the welfare state – the National Health Service, public schools, welfare programs and the State Pensions – were already well-established. While this potentially limits the ability to study the effects of changes in government spending on agreement formation, we can still examine the relationship between current spending and new concordats, especially through a comparison with other countries.

Table 9.1: UK Welfare Spending as a Percentage of GDP[640]

	1980	1985	1990	1995	2000	2005	AVG	Rank
United Kingdom	16.7	19.8	17.0	20.2	19.2	21.3	19.03	2

The United Kingdom immediately stands out, compared to the other countries in this study, as a state that devotes a relatively high percentage of its economy towards welfare spending. While still well behind first-place Germany (which averaged 24.60%), the UK's significant degree of spending should provide fertile ground for national agreements as governments attempt to address the cross-jurisdictional issues created by the welfare state. During the period affected by devolution, average spending was even higher, amounting to 20.2% of the UK's GDP.

Table 9.2: UK Welfare Spending as a Percentage of Total Federal Spending[641]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
UK	41.34	N/A	46.13	45.22	48.74	52.27	58.18	69.17	N/A	51.58	6

If we examine the IMF's data on welfare spending as a percentage of total federal spending a couple of commonalities with the previous data emerge. First, spending has generally increased over time, though it stalled and even retrenched slightly during the 1980s, which is consistent with the cutbacks of the Thatcher administration. Second, spending increased significantly during the late 1990s and early 2000s, hitting a high in 2005 at almost 70% of national government spending. Again, this indicates a substantial level of welfare spending during the period of devolution, increasing the opportunities for agreement formation, and ranking 2nd compared to other countries.

[640] Data collected from the OECD Social Expenditure Database.
[641] Data collected from the IMF World Financial Yearbook.

Finally, Derek Birrell has tracked welfare spending throughout the UK since devolution, providing data not only on spending at Westminster, but throughout the devolved administrations. He found that health spending per head in all regions of the UK more than doubled over the decade between 1998 and 2008, an increase dwarfed by increases in the budgets for housing and community services which increased by 3.5 times over the same period.[642] Other areas of the welfare state have also seen comparatively "modest" increases, as education spending increased by an average of 77%, while social protection rose by 57%.[643]

By any measurement, the British welfare state is not small and it has been growing, especially over the last decade. According to the original hypothesis, we would expect to find a greater number of national intergovernmental agreements to coincide with larger amounts of government spending in order to coordinate these programs across jurisdictions. The experience in the UK, however, is not consistent with this expectation. While the yearly average for agreements is relatively high, as has already been observed, the majority of these agreements occurred at the beginning of devolution. Perhaps more relevant to the relationship between government spending and agreement formation is examining the policy areas which these agreements fall under. If rising government spending is encouraging the formation of concordats between the UK's governments, there should be a number of them in fields such as education, healthcare and welfare. When examining the policy fields of the existing agreements however, there are no agreements concerning education or welfare and only one pertaining to healthcare (and

[642] Derek Birrell, *The Impact of Devolution on Social Policy*, (Bristol: The Policy Press, 2009), 162-163.
[643] Ibid., 163-164. It is also interesting that in all cases, welfare spending in England falls well behind that of other jurisdictions, something the Barnett formula was supposed to correct over time, but has not yet achieved.

that agreement also involved the Ministry of Defence). The vast majority of concordats, 7 of 11 or 63.6%, fall into the category of "Institutions and Governance". This is consistent with the earlier observation that the majority of national concordats in the UK are concerned with setting up the parameters of a nascent system of federalism and intergovernmental relations, but is also inconsistent with what might be expected from the hypothesis on welfare-state spending. At least in the case of the United Kingdom, it seems that the capacity of spending to encourage agreement formation is not powerful enough to overcome countervailing forces, such as substantial centralization.

5. The Existence of Lasting Forums for Intergovernmental Relations

During the early stages of devolution, it seems to have been understood by members of all governments that unforeseen circumstances and cross-jurisdictional issues would arise, which would require intergovernmental relations to address. The Memorandum of Understanding – the original intergovernmental agreement which set out the parameters of UK intergovernmental relations – introduced a dedicated forum for intergovernmental relations known as the Joint Ministerial Committee (JMC). The JMC was to have four roles: to consider reserved matters that impacted devolved ones and vice versa; to discuss devolved issues and their different treatment across the UK; to keep intergovernmental relationships between the UK and devolved administrations under review; and finally, to address disputes and conflicts between governments.[644] The JMC would meet as a plenary once a year (including the Prime Minister and devolved first ministers), as well as allowing for other meetings between ministers and officials. The body would also be used to coordinate policy in relation to Europe, through a permanent

[644] United Kingdom, "Memorandum of Understanding, 1999" 12.

subcommittee which would meet before major EU meetings (approximately four times a year). The early experience of the JMC appeared positive, as it quickly formed policy-oriented sub-committees in November, 1999, including ones focused on poverty, healthcare and the knowledge economy.[645] Between October 2001 and October 2002, the JMC and its various subcommittees met ten times, exemplifying early enthusiasm for the Committee as an effective means of intergovernmental coordination.[646]

Despite these early successes in creating formal structures for intergovernmental relations, this progress soon gave way to apathy and dysfunction. The JMC's subcommittees on the knowledge economy, health and poverty met inconsistently and often seemed to function at the whims of the UK minister atop the respective portfolio.[647] Moreover, meetings of the JMC and its various subcommittees seemed unable to fulfill their original functions. Even though a number of controversies and debates arose between Westminster and the devolved governments, Scotland, Wales and Northern Ireland generally preferred to address these disagreements through more informal and often bilateral channels.[648] The substantive policy roles for these meetings also seem to have been lacking, as press releases released limited and bland statements, while officials described meetings as "largely ceremonial".[649] The clearest evidence of the JMC's limitations came between 2002 and 2008, when the plenary body and the policy

[645] Scottish Parliament, "Joint Ministerial Committee Research Note," September,2000, http://www.scottish.parliament.uk/business/research/pdf_res_notes/rn00-70.pdf (accessed June 1, 2010).
[646] Alan Trench, "Intergovernmental Relations: Officialdom still in Control?" in *The State of the Nations 2003: The Third Year of Devolution in the United Kingdom*, ed. Robert Hazell, (Exeter: Imprint Academic, 2003), 144.
[647] Keating, *The Government of Scotland*, 122-123. See also: Trench, "Intergovernmental Relations and the Resolution of Disputes," 166-167.
[648] Ibid., 164.
[649] Trench, "Intergovernmental Relations: Officialdom Still in Control?" 145.

subcommittees did not meet at all.[650] The one exception to this trend was the JMC on Europe, which continued to meet regularly to discuss a common-UK position for EU meetings.[651]

Only recently has there been any indication that the JMC might one day establish itself as a lasting forum for intergovernmental relations. This was the first plenary meeting in six years, and the 2008 meeting benefitted from the initiative of the new Government in Scotland.[652] Perhaps learning from the troubles of having multiple bodies in the past, the new JMC was reorganized as the "JMC(Domestic)", to take its place besides the already successful JMC(Europe). The annual meetings have continued for the last three years, but for now, the prospect of the JMC encouraging more intergovernmental agreements appears slim. Meetings in 2008 and 2009 yielded no public schedules or concluding statements of any kind; the most recent in 2010 produced a summary that highlighted the business of the meeting (focused primarily on EU involvement and consultations concerning the new austerity package), but no formal accords.[653] Given the inconsistent track record of the JMC, at least domestically, it is unlikely that it will serve as a means of consistently encouraging the formation of national concordats, at least until it becomes a stable feature of intergovernmental relations in the UK.

6. The Number of Subnational Governments at the State/Provincial Level

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[650] Birrell, *The Impact of Devolution on Social Policy*, 140.
[651] The JMC Europe or JMC(E) has met approximately five times each year. See: Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, (Edinburgh: Scottish Devolution Commission, 2009), 123.
[652] Birrell, *The Impact of Devolution on Social Policy*, 140.
[653] See: Commission on Scottish Devolution, *Serving Scotland Better*, and Scottish Government, "News Release: Joint Ministerial Committee," June 8, 2010, http://www.scotland.gov.uk/News/Releases/2010/06/09081633 (accessed June 29, 2010).

The United Kingdom provides an interesting problem when trying to identify the number of subnational governments. Surely both Scotland and Wales should be counted, which makes two, but what about Northern Ireland? Given the lengthy suspension of devolution in Northern Ireland, its inclusion is problematic; as such, it was not included in the definition of a national concordat (though it is a signatory of most of them as many were negotiated before the lengthy suspension of 2002-2007). However, even if Northern Ireland could be definitively included – bringing the total to three – the issues concerning England are even more complicated.

If the UK were a classical federation, England would have a separate government that would count to the total for subnational governments. Because of the unique nature of devolution, however, all government business for England outside of the local sphere is addressed by Westminster. This dual role for Westminster has led to the difficulty known as the "West Lothian Question".[654] Various solutions have been advanced to deal with this problem, including the formation of an English-only committee of Parliament, the recusal of non-English MPs from votes affecting only England and even a new devolved government for England as a whole.

While none of these solutions have been implemented yet, the last (devolution) has been resisted, thus far, for two reasons. First, the English people seem to have no interest in an English legislature that would differ from Westminster, as opposed to the other devolved territories in which significant portions of the population were advocating for greater autonomy. Second, given the immense size of England in both population and

[654] The West Lothian Question is named for the constituency of Scottish MP Tam Dalyell, who during the original devolution debates in 1977 asked for how long would the English people tolerate their fate being decided by MPs from regions with devolved administrations while having no say in devolved affairs themselves. For example, why should Scottish MPs be allowed to vote on school placement in England, but English MPs be unable to do the same in Scotland as such matters would be decided by the devolved government?

resources (compared to the other devolved territories), it is feared that an English Parliament would dwarf all other institutions in importance, including Westminster.[655] A possible solution to this is devolution to regions within England, as opposed to treating it as a whole unit. The recently-created Greater London Authority (GLA) is an experiment in the sort of regional government that would address regional issues, while possessing greater authority and resources than local governments. Midway through 2010 however, the GLA still possessed less autonomy and authority than the devolved governments in Scotland and Wales and the campaign to produce other such organizations had stalled.[656] Thus, for the past ten years, as well as for the foreseeable future, England has had but one government, seated at the Palace of Westminster.

Returning to the question of how many subnational governments can be identified, even if Westminster is counted as a subnational government for England this would only bring the total to four. With only four constituent units, the UK would still rank last amongst the federations compared here. With so few governments, there is no reason that the number of subnational governments should impede agreements. This would seem to be somewhat consistent with the data, as a number of agreements have been formed, even if the distribution of these is inconsistent over time. It is possible, however, that the small number of governments may have the opposite effect, encouraging bilateral intergovernmental relations, as opposed to national business in a multilateral forum. With only three devolved governments (and from 2002 until 2007, only two), the UK can address them individually, forming something of a "hub and spoke" model with the

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[655] BBC News, "No English Parliament - Falconer," *BBC News*, March 10, 2006, http://news.bbc.co.uk/2/hi/uk_politics/4792120.stm (accessed July 10, 2011).
[656] Peter John, Steven Musson and Adam Tickell, "Coordinating governance in the South-East mega region: towards joined-up thinking?" in *Devolution, Regionalism and Regional Development: The UK Experience*, ed. Jonathan Bradbury, (New York: Routledge, 2008), 120-121.

national government at the centre. Evidence for this can be found when looking at the complete list of Scotland and Wales' concordats (both national and bilateral). Not including the original set of devolution concordats in 1999, Scotland lists twenty-two concordats while Wales records only nine.[657] Scotland in particular exhibits many more bilateral agreements between Westminster and Edinburgh than national ones including Wales, indicating both the power of asymmetry and bilateralism.[658]

7. The Existence of a Body for Intrastate Federalism

The Parliament of the United Kingdom is the oldest model of bicameralism found in this investigation - stretching back centuries to 1341, when the House of Commons and the House of Lords were separated into distinct chambers. Longevity aside, the House of Lords is perhaps the farthest removed from acting as a body for intrastate federalism. While the Lords still maintain some real authority and influence in Parliament, even after the limitations of the *Parliament Act 1911*, their membership has no representation for the devolved governments or regions.

Membership in the House of Lords is based upon one of two criteria: holding a hereditary peerage or the appointment to a lifetime peerage by the Queen.[659] The number of hereditary peers was greatly reduced by the Labour government of Tony Blair via the

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[657] This also includes national concordats between all the governments. See: Scottish Government, "Concordats between Scottish Ministers, United Kingdom Government and the Cabinet of the National Assembly of Wales," http://www.scotland.gov.uk/About/concordats (accessed October 4, 2010) and Welsh Assembly Government, "Concordats," http://wales.gov.uk/about/organisationexplained/intergovernmental/concordats/?lang=en (accessed October 4, 2010).

[658] Alan Trench, "Washing dirty linen in private: the processes of intergovernmental relations and the resolution of disputes," in *Devolution and Power in the United Kingdom*, ed. Alan Trench, (Manchester and New York: Manchester University Press, 2007), 163-164.

[659] There is technically a third group, known as the Lords Spiritual – twenty-six seats occupied by some of the most senior bishops of the Church of England, the established church of the country.

House of Lords Act 1999, making lifetime peers the largest component of the membership.[660] This rise in lifetime peers has not led to a rise in regional or subnational representation. Appointments are decided by the Prime Minister, who is free to select members based on any criteria he or she chooses.[661] While custom has led to the Prime Minister appointing leading citizens and members of other political parties (unlike in Canada, where government partisans dominate), it has not led to appointments by devolved governments.

Aside from its origins as a council of feudal nobles, the closest that the House of Lords has come to a body for intrastate federalism is in proposals for reform. The Wakeham Report of 2000 considered the possibility of having representatives of devolved governments sit in the upper chamber, but ultimately chose to recommend democratically elected representatives of regions and nations, as opposed to governments.[662] Even these representatives would be only a proportion of the members of the House – it would not be a completely federal chamber. In the more recent 2003 and 2007 debates and parliamentary votes on House of Lords reform, the option to include an elected element based on regional constituencies had strong support among MPs in the House of Commons, but none of these proposals has been put into force.[663]

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[660] The Labour party has had a long-standing grievance with the House of Lords, which it believes is dominated by Conservative-supporting hereditary peers. As such, one of the proposals during their successful 1997 campaign was a pledge to eliminate hereditary members and reform the Lords. After negotiations with the Lords, the Government agreed that rather than completely eliminate hereditary peerage, the number that would be allowed to sit in the House would be reduced to 92 (these members would be chosen in an election by all eligible hereditary peers). This was intended to be the first step in a transition to no hereditary Lords; however, the second step in this process has not yet occurred. See: Alexandra Kleso, "Parliament," in *The Oxford Handbook of British Politics*, ed. Matthew Flinders, Andrew Gamble, Colin Hay and Michael Kenny, (Oxford: Oxford University Press, 2009), 227-228.

[661] The Prime Minister is also advised by the Appointments Commission, which is a non-partisan body that vets all nominations to the Lords and suggests non-political appointees.

[662] United Kingdom, Royal Commission on the Reform of the House of Lords, *A House for the Future: Royal Commission on the Reform of the House of Lords*, (London: Royal Commission, 2000), 58-67.

[663] Kelso, "Parliament," 228.

For the purposes of this research, the House of Lords is the farthest a second chamber can be from intrastate federalism. It is a centrally-appointed body, with no representation from subnational governments. As such, there is no means to address intergovernmental issues in the upper chamber, which might reduce the number of national agreements. This leaves such matters to be addressed through other avenues, such as concordats or national legislation introduced through the House of Commons. The House of Lords, therefore, seems to have no impact on the formation of intergovernmental agreements and thus, other factors should be more salient.

Conclusion

In many ways, devolution has brought the United Kingdom "full circle" in respect to its political history. The government of these islands began a millennium ago with a collection of new, independent nation-states and over the course of centuries, became united under one banner through a long process combining conquest, dynastic marriage, politics and religion. In the last few decades however, this unity has been shaken somewhat as the constituent nations of the UK sought greater autonomy, culminating in the process of devolution in 1998-1999. Now, as a nascent federation, with a unique system of intergovernmental relations, the UK serves as an interesting, but complicated case study for the examination of intergovernmental agreements.

It should already be clear from the discussion in this chapter that the United Kingdom presents some difficulties when it comes to testing the hypotheses of this investigation. As a nascent federal system, the UK has only a limited record of agreements to analyze, making it difficult to discern whether patterns exist in the data or not. This process is further complicated by the fact that, unlike South Africa (the other

"young" federation), the UK`s record of agreements is not consistent or uniform. Of the eleven concordats developed since the beginning of devolution in 1999, six were made in the first year while the remaining five were created between 2000 and 2010. Thus, while the overall average is 0.92 agreements per year, the average of the last ten years is only 0.5. It is impossible to predict whether this average will continue to drop further or whether agreements will become a more frequent feature as devolution develops. However, this does not mean this case cannot be studied or included in this comparison. As the UK is the median case in terms of agreements per year and has a record of agreement formation that has been prolific at one point and scant at another, the combined effect of the variables should produce moderate potential for agreements. Even with a limited data set to work from, an extremely favourable or unfavourable environment for agreements would be expected to have produced much more definitive results, as was the case in South Africa.

It seems that this average position is reflected in the mixed results of the variables that affect the United Kingdom's factors which are conducive to coordination. Because devolution is a new and evolving system of federalism and although the UK is transitioning away from a unitary model of governance, it remains a highly centralized federation. Thus, there is little potential for agreements to be found in the degree of centralization or the spending power, which is both very large (like South Africa's), yet is also not conditional. Similarly, the institutions devoted to intergovernmental relations – the Joint Ministerial Committees – are still in relative infancy. At times, these have been active bodies, which may be contributing to coordination, but they have also been dormant for long periods as well, providing only an average contribution to overall likelihood of agreements. These weak to average conducive factors are weighted against

a notable degree of overlap and a large welfare state (although this latter has not yet made strong contributions to agreements). This balanced distribution of weak, average and strong conducive factors combine together for moderate potential for intergovernmental coordination.

Balanced against this are only moderate barriers to agreement formation. The UK has only a small number of subnational governments, though the asymmetric nature of devolution does provide at least some difficulties in forming a national consensus among so few actors. Additionally, while the UK's national government is still quite powerful, limited the likelihood of agreements, the House of Lords itself provides no element of intrastate federalism and thus, no direct competition for the normal processes of intergovernmental relations.

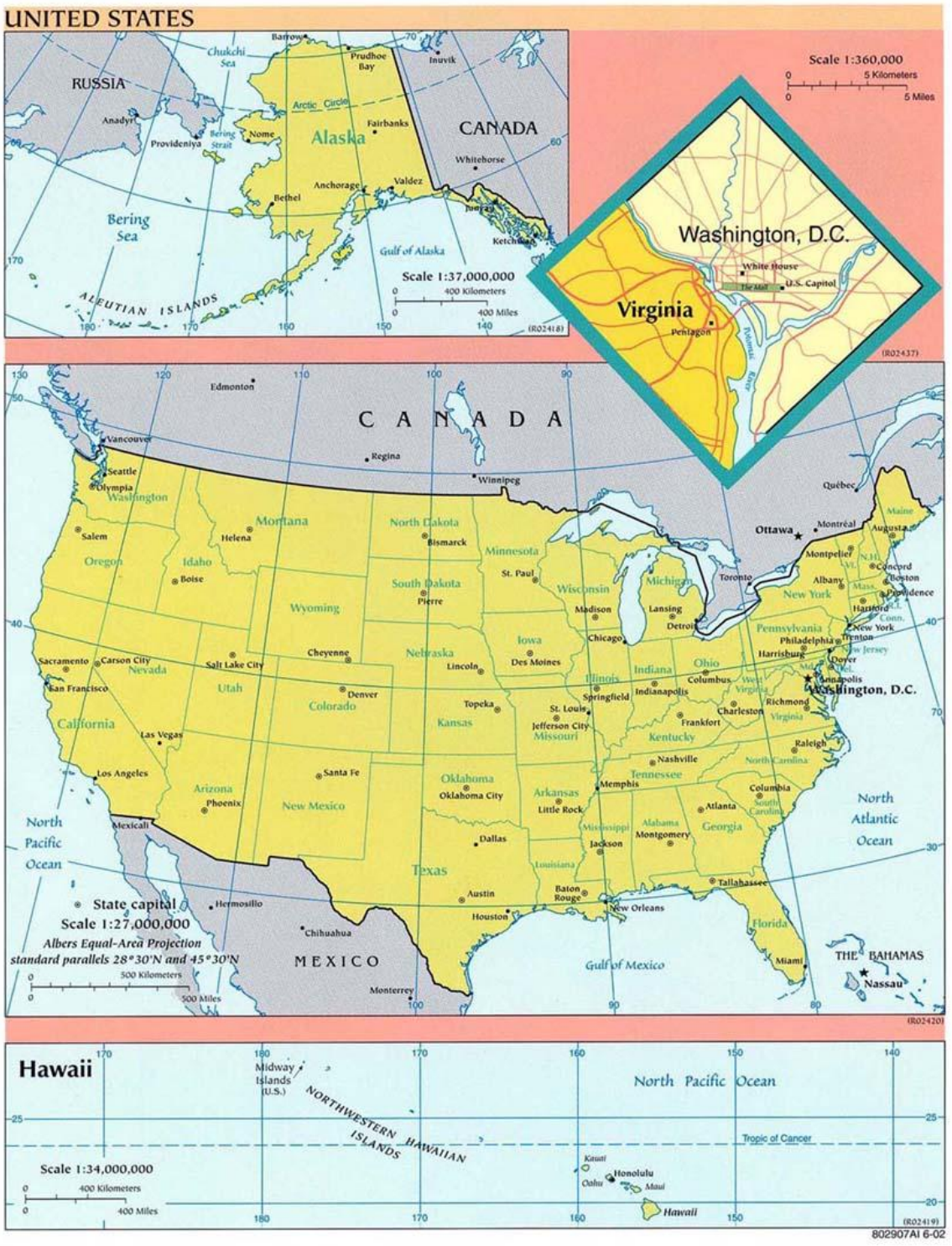
It seems that the UK's institutional environment, as it currently stands, is a reasonable fit for the record of agreement formation. With moderate conducive factors, limited inhibitors and a single potential alternative, the UK represents the closest thing to a median case:

CON (*Moderate*) – INH (*Weak-Moderate*) – ALT (*None*) = Moderate IGA Formation

The moderate institutional framework is consistent with the more recent trend of agreement formation. It must be emphasized however, that it is still too early to definitively state whether the UK will continue along this trajectory or whether it will see a significant change in its nascent federal system. The governments of Northern Ireland, Scotland and Wales are still exploring their capabilities and testing their boundaries. As the Right Honourable Ron Davies, a former Secretary of Wales, once stated: “devolution is a process, not an event”. Ten years from now, this nascent federation may have

changed dramatically, but we will have to wait to see what effect this might have on intergovernmental agreements.

Chapter Ten: United States of America



Source: CIA World Factbook

Formal Name: United States of America

Capital: Washington, District of Columbia

Subnational Governments: Known as states, there are 50 in total: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.[664] There is also a federal capital territory known as the District of Columbia.

Introduction:

The concept of multilevel governance may extend back millennia in forms such as empires, leagues and confederacies, but the first country to formally adopt a federal system was the United States of America. Following their formative revolution against Great Britain and a failed experiment with a confederal arrangement, the American states agreed to their famous Constitution of 1787 which, among other things, invested sovereignty in the people and divided jurisdiction between two orders of government. This novel form of political organization has proven to be remarkably durable, lasting more than two centuries and surviving a divisive civil war. Today, it serves as the foundation for the world's largest economy and third largest country by both area and population, and has remained an important and influential model for federalism.

[664] The United States also holds "administrative relations" with other territories (including those offshore and overseas) but these do not maintain the same rights as the states and some are now independent. Among these are two federacies (Puerto Rico, Northern Marianas) and three associated states (Republic of Palau, Federated States of Micronesia, Republic of the Marshall Islands). See: Sandford F. Schram, "United States of America," in *Handbook of Federal Countries, 2005*, ed. Ann L. Griffiths and Karl Nerenberg, (Montreal & Kingston: McGill-Queen's University Press, 2005).

History:

The history of the modern American state finds parallels in the histories of Australia and Canada in that they all proceeded in earnest with the arrival of European colonists. During the 16th and 17th centuries, these colonists began arriving throughout the Americas, with the British settling an area along the Atlantic coast that would become the eastern seaboard of the United States. British settlers – some officially commissioned by the Crown, others effectively refugees fleeing religious and social persecution – founded a number of colonies in this region, and by 1732 consolidated into the "Thirteen Colonies" that formed the initial foundation for the United States.[665]

The colonies were fast-growing and prosperous, developing diverse economies and robust political cultures.[666] This success, however, led to increasingly divergent interests between the colonies and the imperial government in London. A series of smaller conflicts built upon one another, culminating in the development of "irreconcilable differences" between Great Britain and the Thirteen Colonies, leading to the American War of Independence.[667] The Colonies' success in this war not only won their sovereignty from Britain, but it also provided a sense of unity and a common cause among them. This unity of purpose gave the colonies the impetus to form a single country following the war, rather than exist as a collection of thirteen independent states.

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[665] The colonies, by order of the date they were founded, were: Virginia (1607), Massachusetts (1620), New Hampshire (1623), Maryland (1634), Connecticut (1635), Rhode Island (1636), Delaware (1638), North Carolina (1653), South Carolina (1663), New Jersey (1664), New York (1664), Pennsylvania (1682), and Georgia (1732). It is important to note that the Thirteen Colonies were separately administered and united by their common culture, economies and experiences rather than a formal governing structure (other than the British Imperial administration).

[666] Theodore J. Lowi, and Benjamin Ginsberg, *American Government – Freedom and Power*, (New York and London: W.W. Norton & Company, 1990), 30.

[667] The War of Independence is also known as the American Revolution or the American Revolutionary War.

This unity was still nascent when the colonial leaders drafted the first American Constitution, the Articles of Confederation, during the heart of the revolution in 1776 and 1777.[668] As implied in the title, this was the framework for a confederate union akin to Switzerland or the Iroquois Confederacy, rather than a federal system. Article II guaranteed each state its "sovereignty, freedom and independence" while Article III defined the new union as a "firm league of friendship" rather than a single country or nation. The Congress of the United States was structured like the modern Senate, but the best comparison might be to an international institution such as the United Nations, with one vote allowed per delegation. This Congress had minimal powers to use on behalf of the states, primarily restricted to defence and foreign affairs.[669] Even these powers were largely constrained as Congress was entirely dependent upon the states for implementation of treaties and reliant on transfers for funding.[670]

With the hindsight of history, it seems that the confederal model of the fledgling country was doomed to failure. Zimmerman has identified five shortcomings of the confederation which would serve as the basis for the new federal system:

1) Congress was granted no ability to generate tax revenue and no powers to enforce the collection of dues from states, some of which did not contribute the required amounts.
2) Congress had no means to enforce national laws or international treaties.

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[668] The Articles were effectively in force in 1777, but given the war raging through America, they were not fully ratified and enforced until 1781, the same year in which British forces were expelled from the United States.
[669] G. Alan Tarr, "United States of America," in *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr, (Montreal & Kingston: McGill-Queen's University Press, 2005), 383.
[670] Robert P. Sutton, *Federalism*, (Westport: Greenwood Press, 2002), 3-4.

3) No provisions were made for the regulation of interstate commerce, leading to the development of mercantilist protectionism.
4) Congress' responsibilities for national defence were handicapped by the inability to finance any armed forces.
5) There was no effective arbiter to enforce the Articles of Confederation and the threat of dissolution of the United States mounted.[671]

As these failings became apparent to American political leaders, a constitutional convention was called for Philadelphia in September 1787. This convention produced the American Constitution that is still in effect today, making it one of the oldest in the world (and the senior example in this comparative study). The Constitution made several crucial and innovative contributions including a system for democratic government based on popular sovereignty, the division of political and legal power amongst separate branches of government and a federal system of sovereignty divided between two orders of government.

This new Constitution departed from the Articles by investing in the state and national administrations independent powers; that is, abilities that were not derived from or dependent upon the other order of government. In addition to its pre-existing defence and foreign policy competencies, the new federal government gained the authority to "tax, regulate interstate and foreign commerce... and subject people to federal laws" as well as the broader ability to make any law " 'necessary and proper' to the implementing of its expressly delegated powers".[672] While state powers were not enumerated, they

[671] Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements*, 5-6.
[672] Tarr, "United States of America," 384.

maintained the important residual power, which gave them jurisdiction over any matter not explicitly delegated to the national government.

While no longer a confederation, the new American federal system could still be considered decentralized, given the limited enumerated powers.[673] Since this beginning however, the overall balance of power between the federal government and the states has shifted towards Washington. The early rulings of the Supreme Court, notably *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824) from the Court under Chief Justice John Marshall helped to expand the scope of federal jurisdiction.[674] Yet, the influence of these rulings pales in comparison to the effects of the American Civil War (1861-65). In addition to the central issue of the abolition of slavery, the balance of power between the federal government and the states contributed to the conflict. With the victory of the Union forces and the defeat of the South, the balance swung decisively in favour of the federal government. The 13th, 14th and 15th amendments to the Constitution expanded federal jurisdiction in an effort to eliminate the last vestiges of slavery and allow for the Reconstruction of the southern states.[675] This trend continued in the 20th century, particularly through the federal response to the Great Depression. President Franklin Roosevelt, through his New Deal legislation, developed the welfare state and greatly expanded the role of Washington.[676]

Even with the rapid industrialization and globalization of the 20th century, federalism proved to be an important facet of American politics. The development of the

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[673] Joseph F. Zimmerman, *Interstate Relations – The Neglected Dimension of Federalism*, (Westport: Praeger Publishers, 1996), 4.
[674] Sutton, *Federalism*, 82-84.
[675] John Dinan, "United States of America," in *Legislative, Executive, and Judicial Governance in Federal Countries*, ed. Katy, Le Roy, Cheryl Saunders and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 318.
[676] Schram, "United States of America," 378.

welfare state in particular led to new dynamics between the orders of government and a competition over resources and authority.[677] The ever-shifting balance between the federal government and the states persists to this day: one need look no further than the debate over President Barack Obama's healthcare legislation, much of which is driven by competing conceptions of federalism.

Government and Political Structure:

American government is generally synonymous with a brand of republicanism that emphasizes divided government and a diffusion of power across multiple institutions. The foundation of government in the United States is a division between three branches: executive, legislative and judicial. The executive is embodied in the President or Governor, as well as the federal and state bureaucracies, the legislative power is found in Congress and state legislatures and the judiciary is made up of a system of federal and state courts, culminating in the Supreme Court, the highest body of appeal and final word on the judicial interpretation of the Constitution. What is often forgotten in this model, however, is that federalism is an equally important principle underpinning American political institutions.

For a country that gained its independence in a revolution against a "tyrant king" it is interesting that the Founding Fathers decided to invest significant authority and prestige in the President, opting not to create a parliamentary democracy. The President acts of the head of state and the chief of the executive branch, responsible for hundreds of senior appointments, the development of a budget and implementing legislation. The

[677] Jon C. Teaford, *The Rise of the States: Evolution of American State Government*, (Baltimore: The Johns Hopkins University Press, 2002), 1-10.

President is also the senior figure in foreign policy and national defence, serving as Commander-in-Chief of America's armed forces. While the separation of executive and legislative branches prevents the President from acting as a sole head of government, akin to the Prime Minister in parliamentary democracies, he still plays a significant role in lawmaking through the veto power. In order for a bill to become law in the United States, it must be signed by the President or passed by a two-thirds majority in both the House of Representatives and the Senate. Given the infrequent nature of such large majorities in both chambers, the President's veto allows for his involvement in the legislative process. In recent years, the growth of mass media has enhanced the prestige of the President as "leader of the nation", providing informal powers of agenda-setting to enhance his role in working with Congress.[678]

Voting for the President occurs every four years and all eligible citizens may cast a single vote. Rather than simply aggregate these and declare the most popular candidate the winner, however, these votes are used to select representatives from each state to vote in the Electoral College and these electors are the ones that actually choose the President and the Vice-President. The 538 electors are allocated along state lines with each state receiving a minimum of three votes and the remainder allocated in proportion to the population of each state.[679] This has two relevant consequences for federalism. First, by setting a floor for electoral votes, it over-represents smaller states, ensuring their importance in a national contest. Second, it forces political parties to organize their campaigns along state lines and address local issues. This is even apparent in the "primary" system by which parties nominate their presidential candidates through a series

[678] Dinan, "United States of America," 324-325.
[679] James Q. Wilson and John J, DiIulio, *American Government*, 11th ed., (Boston: Houghton Mifflin Co.), 367-368.

of state-by-state contests. Given the importance of the Presidency, it is notable that the Founding Fathers chose to select the candidate via the principle of federalism, rather than popular representation.[680]

Instead, direct representation of the people is found in one-half of Congress, the legislative branch of the federal government. Congress is a bicameral institution, divided between the House of Representatives and the Senate. The House of Representatives is the chamber organized around "representation by population" as its 435 seats are divided amongst the states strictly on this basis.[681] The members are elected to represent a single member constituency by a simple plurality of the vote. The whole House stands for election every two years, a uniquely short term.

The second chamber of Congress is the Senate which is organized around the principle of state representation. Based in part on the original model for Congress under the Articles of Confederation, the Senate ensures equal representation for all states by allotting to each two Senators. In another concession to the importance of state sovereignty, originally their governments were responsible for the selection of the Senators, allowing for direct state participation in the federal government. A wave of democratization at the turn of the 20th century culminated in 1911's 17th Amendment which made state-wide elections mandatory for Senators.[682] Senators serve six-year terms, with one third of the chamber up for re-election every two years.

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[680] Enshrining the state as the central political unit in America was admittedly, not the only goal of the Electoral College. The second purpose for having an indirect election was it allowed for a check on "popular sentiment" and the tyranny of the majority. Dinan, *American Government*, 11th ed., 323-324.
[681] There is a slight exception to this standard as each state is guaranteed at least one representative in the House, regardless of whether their population is large enough to qualify for a seat under an even distribution. Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming all have only a single representative. The allocation is reviewed after every decennial census and seats are reapportioned based on the relative population differences of the states.
[682] Lowi and Ginsberg, *American Government: Freedom and Power*, 791.

The powers of the House and the Senate are remarkably similar, at least where legislation is concerned. Both chambers must pass any bill before it becomes law, both have extensive committee systems for the review of policy matters and both are able to introduce amendments on legislation. Should the House and the Senate pass different versions of the same bill, they must enter "Conference" – a joint committee including representatives of both chambers – in order to produce an identical piece of legislation that must pass a vote again. This is not to suggest there are no differences between the powers of the House and the Senate. For example, all money bills, including the budget, must be introduced in the House of Representatives first as there can be no taxation without fair representation.[683] This, however, does not remove the requirement for these bills to be passed by the Senate before becoming law. Indeed, if either chamber can be said to have special or unique powers, it is the Senate. As another holdover from the Articles of Confederation, only the Senate's approval is required for the ratification of international treaties; these must be passed with a two-thirds majority. The Senate also has a special relationship with the executive branch as most senior appointments of the President must be approved by the chamber, including: Cabinet secretaries and undersecretaries, directors of independent and regulatory agencies and ambassadors.[684] The President's judicial nominations are also subject to Senate approval. These additional powers possessed by the chamber for federalism, rather than popular representation, is in contrast to other federations such as Australia, Canada and Switzerland where the chambers are either equal or the popular body possesses more authority.

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[683] White House, "The Legislative Branch," http://www.whitehouse.gov/our-government/legislative-branch (accessed May 16, 2011).
[684] This power is set out under Article II, Section 2, paragraph 2 of the Constitution of the United States.

Government in the states has evolved in a remarkably similar fashion to the federal government. State governments are founded on a separation of powers between the executive, the Governor, and the state legislatures, which are almost universally bicameral.[685] The key differences between the national government and state institutions can be generally summarized by the lack of federalism as a guiding principle. For instance, governors are elected directly, without the intermediary of the Electoral College. Similarly, while 49 states have a Senate, they are not structured along the lines of regional representation, but rather larger jurisdictions, relatively equal in population.[686]

The United States' system of republican government with an emphasis on the separation of powers would, by itself, distinguish it in this comparison. Upon further review however, the government of the United States is also founded around the principles of federalism, which infuses America's political institutions, making it notable among these seven countries.

Intergovernmental Agreements in the United States:

The United States has two main types of intergovernmental agreements: interstate compacts and administrative agreements. Interstate compacts are the more formal of these two instruments. They are established in the Constitution under Article I, Section 10, Clause 3 which stipulates that states may enter into "agreements or compacts" with other states. This clause also mentions that states require not only the approval of state

[685] Only the state of Nebraska has a unicameral legislature. The other 49 states have both a House of Representatives and a state upper house. Elazar, *Federal Systems of the World,* 2nd ed.. 282.
[686] Ibid.

legislatures and executives but also of Congress to enter into compacts.[687] These are essentially treaties between states and as such are legally enforceable. According to Zimmerman, one of their primary functions is to address interstate matters that Congress might otherwise legislate on. Because of their legal nature and the role of Congress, compacts are often used to address important and permanent matters, such as changing the boundaries of states or setting up commissions to regulate bodies of water which cross state lines.[688] A full database of American interstate compacts is kept by the Council of State Governments in their National Center for Interstate Compacts.[689]

Compared to interstate compacts, administrative agreements are a much more ambiguous type of intergovernmental instrument. Unlike compacts, they are not defined in the Constitution, but instead appear to have evolved through the process of intergovernmental relations. Administrative agreements cover a broad range of formats: they can be full, written accords between states formally signed by governors or memoranda of understanding or common practices or even verbal pacts between individuals.[690] Unlike compacts, they do not require the cooperation of all branches of state governments, only the relevant portion of the executive branch. Given such breadth, there are thousands of these agreements, in bilateral, multilateral, regional and, rarely, even in national form. While there has been some research done on administrative agreements, no definitive database or collection exists for them, even the formal, written

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[687] In practice, the Supreme Court established that congressional approval is not necessary for "agreements entered into by administrators of sister states". Approving a compact via a vote does not make the Federal Government a party to the compact: they are not required to fulfill the compact`s provision unless specifically mandated by the document. Zimmerman, *Interstate Cooperation*, 39-41.
[688] Patricia S. Florestano, "Past and Present Utilization of Interstate Compacts in the United States," *Publius* 24, no. 4, Interstate Relations (Autumn, 1994): 13-25.
[689] See: the National Center for Interstate Compacts. Their website is available from: http://www.csg.org/programs/policyprograms/NCIC/default.aspx (accessed September 20, 2011).
[690] Zimmerman, *Interstate Cooperation*, 163-164.

ones.[691] Information on agreements used in this analysis was primarily collected from the works of Zimmerman as well as mentions in documentation from intergovernmental bodies such as the Council of State Governments.

There is one other potential instrument for formal, intergovernmental coordination that must be mentioned: uniform state law. This is the process by which the states, working individually or collectively, pass the same version of a particular piece of legislation in order to harmonize their laws and regulations. This effort is coordinated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which brings together non-partisan legal representatives from each state in order to identify policy areas in which uniform laws would be beneficial.[692] While uniform law might seem to be a good candidate for inclusion in this study, as a third element of formal interstate coordination, it is dissimilar from compacts and administrative agreements in several important ways. First, uniform laws are often not the result of intergovernmental negotiation, but rather the proposal of third parties. The Commission itself was a creation of the American Bar Association and not of state governments.[693] Thus, the variables that affect uniform law might include a greater focus on interest groups than existing intergovernmental forums and institutions. Second, uniform laws are fully amendable and the definition of what is "uniform" is somewhat elastic. A uniform law may be anything from replicating a single piece of legislation to simply adopting the general tone

[691] Ibid., 164.
[692] The NCCUSL is sometimes known simply as the Uniform Law Commission. It was founded in 1892. More information is available from their website: http://www.nccusl.org/Default.aspx (accessed September 20, 2011).
[693] Kim Quaile Hill and Patricia A. Hurley, "Uniform State Law Adoptions in the American States: An Explanatory Analysis," *Publius*, 18, no. 1 (1988): 117.

or framework of a bill.[694] As a result, some laws have been sufficiently altered or amended by states so "as to impair their uniformity".[695] Finally, even if a case could be made for their inclusion, uniform laws conform to the pattern in the results for agreements: there are very few national examples. Between 1945 and 1985, only four new laws were adopted by forty-five or more states, and this does not account for whether or not the laws were actually uniform.[696] Thus, uniform laws are not only a poor fit with this study of intergovernmental agreements, but they would add little to the results even if they were adopted.

Given the data available, there appear to be very few formal, national intergovernmental agreements in the United States, even allowing for the 90% threshold (see *Appendix G*). Between 1945 and 2008, only 8 national agreements were formed - a rate of 0.13 agreements per year.[697] Of these, six were interstate compacts and two were administrative agreements. While this figure may slightly underestimate the number of national administrative agreements, even a tripling of this total would leave the United State with a small number, relative to most other cases. The remainder of this examination will be devoted to investigating what factors may be affecting the number of national intergovernmental agreements in the United States.

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[694] Rodney L. Mott, "Uniform Legislation in the United States," *Annals of the American Academy of Political and Social Science,* 207 (Jan. 1940): 79-92.
[695] Ibid., 85.
[696] Quaile Hill and Hurley, "Uniform State Law Adoptions in the American States," 120.
[697] While there are only a small number of agreements that reach the 90% threshold, there are a number of large multilateral agreements that indicate that cooperation between many states is possible, even if finding national consensus remains difficult. This includes, but is not limited to: Driver's License Compact (42 states, 1962), Agreement on Qualifications for Educational Personnel (35 states, 1968), Interstate Wildlife Violator Compact (36 states, 1989), Interstate Insurance Product Regulation Compact (32 states, 2003), and the Interstate Compact on Educational Opportunities for Military Children (35 states, 2008). The Interstate Compact on Adoption and Medical Assistance (1984) is also worth noting here, as the compact's website notes that 49 states are participating (http://aaicama.org/cms/index.php/state-information/members), though the NCIC's compact database lists only 10 states that have formally acceded to the compact.

1. The Degree of Overlap that Exists in the Constitution

A common interpretation of the initial federal structure in the United States was a clear separation of power between the national government and the states.[698] The first federation was also home to the first attempt to construct "water-tight compartments" in the division of powers. The Founding Fathers were quite economical in apportioning the competencies of the two orders of government: only the powers of the federal government were detailed while the states were granted a broad residual power and jurisdiction over all other matters. No concurrent powers were explicitly stipulated by the Constitution, further suggesting an avoidance of explicit overlap.

Yet, the lack of explicit concurrency does not guarantee that both the federal and state governments will occupy separate policy areas and avoid overlapping jurisdictions. Watts' comparison of federal constitutions and their divisions of powers provides at least some indication of how much the American constitutional framework provides. Of the 45 policy areas identified by Watts in the Constitution, 24 or 53% of these allowed for the involvement of both federal and state governments. This ranks the United States exactly in the middle (4th) of the cases considered in this study, behind third-place South Africa (60% overlap) and ahead of Canada (46%).[699] With both the federal and state governments possessing some authority in just over half of all policy areas, this presents something of an inconsistency when compared with the more "watertight ideal" of the initial Constitution. The solution to this inconsistency is found in a number of areas including: the differences in the treatment of federal powers between the Articles and the

[698] Schram, "United States of America," 374-376.
[699] As the highest amount of overlap is 75% (Germany) and the lowest is 22% (United Kingdom), the United States' 53% rating is the median in this range.

Constitution, the overall direction of judicial interpretation, and the role of constitutional amendments.

While separated by just over a decade, America's first attempt at a constitution – the Articles of Confederation – and the final Constitution of 1787 treat the powers of the federal government very differently. As Katz points out, the Articles put the enumerated powers of the federal government in a very restricted context and allowing for latitude in state residual powers.[700] Article II is indicative of this, stating:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.[701]

This clear and absolute restriction is in stark contrast to the permanent Constitution drafted in 1787, which included greater leeway for federal powers in Article I, Section 8, Clause 18:

> The Congress shall have Power – To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States , or in any Department or Officer thereof.

The flexibility provided to federal powers by this declaration, especially the "necessary and proper" provision, has given this passage the nickname of "the elastic clause".[702] It has continued to act as a blanket justification for the broadening of federal competencies outside of the explicit wording of the enumerated powers. It has proven to be more

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[700] Ellis Katz, "United States of America," in *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, Douglas M. Brown and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2006), 301.
[701] United States, Articles of Confederation, Article II.
[702] Devotion Garner and Cheryl Nyberg, "Popular Names of Constitutional Provisions," (Seattle: University of Washington School of Law, 2008), http://lib.law.washington.edu/ref/consticlauses.html (accessed October 5, 2011).

influential in judicial proceedings than the Tenth Amendment, which contains a less-stringently-worded version of the Articles' restriction on federal power.[703]

This movement from a restrictive to an expansive modifier of federal powers between the Articles and the final Constitution provided a crucial foundation for early judicial interpretation of the division of powers. The clause was cited by the Supreme Court led by Chief Justice John Marshall as a justification for a broader interpretation of federal powers, particularly in the landmark case of *McCulloch v. Maryland* (1819).[704] In addition to this "necessary and proper" clause, the Marshall Court also gave a wide scope to the so-called "commerce clause" (Article I, Section 8, Clause 3) which allows Congress "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes". In *Gibbons v. Ogden* (1824), the Court ruled that the national government had exclusive power to regulate interstate commerce. As a great deal of activity within a state can be said to have consequences for interstate commerce, this opened a broad avenue for the expansion of federal powers.[705] While more recent courts have had narrower interpretations of these clauses, they did allow for the expansion of federal jurisdiction into areas normally reserved to the states such as transportation, welfare, education and local economic development.[706]

Aside from these significant catalysts of constitutional overlap in the United States, the steady progression of constitutional amendments has also contributed to the

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[703] According to Katz, the Tenth Amendment was influential in a number of judicial decisions in the early 20th century, particularly those that impeded the expansion of the federal government's taxation and spending power. However, it was "abandoned" by the mid-1900s as the New Deal legislation began establishing the welfare state. Katz, "United States of America," 307-308.
[704] Sutton, *Federalism*, 82-83.
[705] Raymond C. Scheppach and Frank Shafroth, "Intergovernmental Finance in the New Global Economy: An Integrated Approach," in *Intergovernmental Management for the 21st Century,* ed. Timothy Conlan and Paul L. Posner, (Washington, D.C.: Brookings Institution Press, 2008), 46.
[706] Katz, "United States of America," 307-311.

erosion of watertight jurisdictions. Even if one were to allow that the original American Constitution created a clear division of powers with very minimal overlap (admittedly a controversial claim in light of judicial interpretation), the amendments generally moved the United States in the direction of greater centralization and overlap. Specifically, two groups of amendments have been responsible for broadening federal powers and increasing overlap: those following the Civil War and the amendment authorizing federal income tax. The Thirteenth, Fourteenth and Fifteenth Amendments were passed in the five years following the Civil War (1865-70) in order to provide constitutional protections for the abolition of slavery, civil rights and the ability of the federal government to reconstruct the country. The eventual effect of these amendments on federalism was to give Washington the authority to intervene in state jurisdiction in the name of civil rights.[707] The Sixteenth Amendment, enacted in 1913, allowed the federal government to collect income tax for the first time. This helped to lay the foundation for the expansion of the federal government and allowed the eventual funding of the welfare state in the 1930s.

Yet if these various factors have combined to increase constitutional overlap in the United States they seem to have had little effect on the formation of national intergovernmental agreements. With only eight national agreements since World War II, the opportunity afforded by increased overlap seems to have done little to encourage this type of intergovernmental institution. While it may be the case that the effect of constitutional overlap in the United States is less significant compared to other factors – such as the number of subnational governments – the way in which overlap developed may provide the answer. For the most part, the overlap found by Watts' comparison can

[707] Lowi and Ginsberg, *American Government: Freedom and Power*, 111-16.

be attributed to the steady expansion of the federal government, whether via judicial interpretation or constitutional amendment. This will be discussed in the next section, as changes to federal powers have led not only to overlap, but centralization. An increasingly-powerful federal government is likely to limit agreement formation as opposed to encourage it.

2. The Degree of Centralization in the Constitutional Division of Powers

There are few federations that can claim origins as decentralized as the United States. American states began as fully sovereign entities, bound together by a common revolutionary cause, a confederal constitution and a commitment to a "firm league of friendship". While the final American Constitution of 1787 moved in a more centralized direction, beginning from such a decentralized starting point might still suggest a relatively decentralized union. Looking purely at the division of powers and the relevant policy areas that each government occupies would seem to offer some evidence for this prediction. The previous section indicated that just over one-half of all policy areas involve a role for both the federal and state governments. The remainder is divided (roughly) equally between the national and subnational governments with the federal government occupying 10 areas (22%) exclusively while the states have jurisdiction over 11 (24%) areas. The figure for the states is significant since it is the highest of all seven federations in this analysis, five percent higher than second-place Canada or the United Kingdom.

If this was the end of the story, it might be safe to declare that the United States is a relatively decentralized federation, one that should allow for increased opportunities for the development of national intergovernmental agreements. However, it seems that a

broader reading of the Constitution – beyond simply the division of powers – as well as an understanding of American federalism in practice suggests the polar opposite to this conclusion. Instead of a decentralized federation where the states have significant autonomy, the United States has instead evolved a system of "regulatory federalism" where Congress wields significant powers to pre-empt and override subnational governments.[708]

The previous section detailed how overlap had been created in great part by the broadening of the federal enumerated powers through judicial interpretation and constitutional amendments. In particular, the "necessary and proper" as well as the "interstate commerce" clauses were identified as important points for the broad interpretation of federal powers. This overlap can have a centralizing effect through the usage of the "Supremacy clause", which is stated in article VI, paragraph 2 of the Constitution as:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Thus, the Supremacy clause allows for federal law to pre-empt or overrule state or local laws should they come into conflict. With the slow but steady expansion of the federal government's enumerated powers, this clause has not simply increased overlap but has also increased the areas that could be affected by federal pre-emption. This has provided

[708] Joseph F. Zimmerman, *Congressional Preemption - Regulatory Federalism*, (Albany: State University of New York Press, 2005).

more than enough opportunities for Congress to use its regulatory powers. Between 1790 and 2004 a total of 522 pre-emption statutes were enacted, an average of 2.44 per year. [709]

Aside from simply declaring national pre-emption over entire areas of legislation, Congress has several other tools to ensure the compliance of the states with federal policy which are listed in Table 10.1. These regulatory instruments draw upon the many advantages possessed by the national government in the American federal system including: broadly defined constitutional authority, the supremacy of federal laws, the spending power, federal and civil law enforcement and a well-developed bureaucracy. Combined into a set of regulatory instruments, these advantages work as override clauses which ensure federal pre-eminence across a large number of policy areas.

Table 10.1: American Intergovernmental Regulatory Instruments[710]

Program Type:	**Description:**	**Major Policy Areas:**
Direct Orders (Mandates)	Mandate state or local action under the threat of criminal or civil penalties.	Public employment, environmental protection
Cross-Cutting Regulations	Applies to all or many federal assistance programs.	Non-discrimination, environmental protection, public employment, assistance management
Cross-Over Sanctions	Threaten the reduction or termination of aid provided under one or more specified programs unless requirements of another program or satisfied.	Highway safety and beautification, environmental protection, health planning, handicapped education
Partial Preemptions	Establish federal standards but delegate administration to states if they adopt standards equivalent to national ones.	Environmental protection, natural resources, occupational safety and health, meat and poultry inspection

[709] The use of pre-emption statutes has grown rapidly since the Second World War. Before 1900, only 29 were passed by Congress. Beginning in the 1960s, however, their use increased quickly. Between 1965 and 1969, 36 were used, followed by 102 instances in the 1970s, 93 during the 1980, 83 in the 1990s and 41 in the period from 2000 to 2004. See: Zimmerman, *Congressional Preemption*, 4-11.

[710] Table originally from: G. Ross Stephens and Nelson Wikstrom, *American Intergovernmental Relations: A Fragmented Federal Polity*, (Oxford: Oxford University Press, 2007), 142.

The effects of federal regulatory instruments can apply nation-wide and as a result, there are significant implications for intergovernmental agreements. For a national agreement to be formed, there must be a common challenge as well as a common policy or plan of action chosen by virtually all governments. The existence of regulatory instruments in the United States changes this dynamic entirely. If Congress is able to identify a matter of pressing concern across the country, it can act unilaterally to attempt to impose a remedy, rather than seek to build consensus through negotiation. As an example, at the beginning of the 21st century, nineteen states had adopted laws establishing a blood-alcohol limit of 0.08, with the possibility of more states joining in. This type of situation has the potential to yield intergovernmental coordination and agreement in some circumstances. In this case, however, the federal government chose to use its power of pre-emption to pass a law legislating a national limit, forcing states to comply.[711] Since the 1960s this has been far from an isolated incident as direct orders, cross-cutting regulations, cross-over sanctions and partial pre-emptions were used a total of sixty times between 1961 and 1990.[712] In theory, that is as many as sixty opportunities for national intergovernmental agreements which were eliminated because of the power of the federal government in the United States.

These regulatory instruments effectively remove an entire avenue of national intergovernmental agreements. The federal government of the United States is under little to no obligation to negotiate with the states as it can simply impose its will nationally through some form of pre-emption. It is telling that the peak institutions for

[711] Ann Bowman, "American Federalism on the Horizon," *Publius* 32, no. 2 (Spring, 2002): 13.
[712] Timothy J. Conlan and David R. Beam, "Federal Mandates: The Record of Reform and Future Prospects," *Intergovernmental Perspective* 18 (Fall 1992): 7-10.

interstate cooperation such as the National Governors Association and the National Conference of State Legislatures take it upon themselves to lobby Congress to further their interests, rather than negotiate with the federal government as relative equals.

3. The Size and Status of the Federal Spending Power

Assessing the effect of the federal spending power on the formation of national intergovernmental agreements in the United States is one that requires both depth and context. Depth is needed because the initial numbers do not necessarily give an accurate impression of the state of American fiscal federalism. Context is required because the status and usage of the spending power is greatly affected by the unique role of the federal government and its ability to pursue regulation in intergovernmental relations.

Table 10.2: Percentage of Subnational Revenue from Federal Grants (United States)[713]

	1972	1975	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
USA	26.31	25.17	44.16	20.5	19.96	23.78	25.97	N/A	N/A	26.56	5

Looking solely at state reliance on federal transfers, it seems that American states are not especially dependent, at least compared to the other federations. Only about a quarter of state budgets are drawn from financial transfers from the federal government, less than any other federation aside from Canada and Germany. These numbers are confirmed by Watts' review of American federal-state financial relations: between 2000 and 2004, federal grants amounted to only 25.6% of state revenues, which ranked 12th

[713] Data was collected from the International Monetary Fund`s *World Financial Yearbook* series. No data was available for the United States in 2005 or 2007.

out of 16 federations.[714] This comparatively low level of financial dependence is based on a number of factors, but particularly the ability of the states to raise revenues from almost any source (with the exception of levies on interstate or international trade) and the lack of large federal-state welfare programs, such as the health systems of Australia and Canada.[715] Although even a small amount of transferred revenue between the two orders of government can be fertile ground for intergovernmental agreement formation, the record of agreements for the United States shows that this is not the case for this particular federation.

A better understanding of the relationship between the spending power and agreement formation in the United States can be found by examining other measurements of financial transfers. Notably, while overall transfers to states are relatively small compared to other federations, conditional transfers are another matter. A full 100% of all transfers from the federal government to the states are conditional, the highest of any federation. Moreover, since all payments and grants are conditional, the United States is near the top (4th of 14) in a comparison of conditional transfers as a portion of subnational revenues.[716] This high level of conditionality is justified on the basis of accountability – if the federal government is responsible for raising this revenue (and the political costs associated with taxation) then it is essential that it ensure the money is spent properly.[717] These conditions are realized, in part, through the regulatory instruments discussed earlier, such as cross-cutting sanctions. The effects of these conditions are further

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[714] Ronald Watts, *Comparing Federal Systems*, 3rd ed., 105.
[715] In these systems, administration is primarily a matter for the subnational governments but the federal government provides much needed funding as well as guidelines and regulations. William Fox, "United States of America," in *The Practice of Fiscal Federalism: Comparative Perspectives*, ed. Anwar Shah and John Kincaid, (Montreal & Kingston: McGill-Queen's University Press, 2007), 360.
[716] Watts, *Comparing Federal Systems*, 3rd ed., 107-108.
[717] Ibid.

enhanced by the amount of tax room occupied by the federal government. Since 1952, the federal government`s tax share has grown to approximately 20% of Gross National Product.[718] State revenues have grown over this same period, doubling in GNP value but have remained between one-quarter and one-half the size of the federal share. This change has been more in a response to rising costs and welfare commitments rather than increased fiscal independence, as the levels of grants remains high.[719]

When placed into the context of regulatory federalism and the instruments possessed by the President and Congress to establish nation-wide standards and policies, the federal spending power becomes more meaningful. Rather than act as an opportunity for intergovernmental coordination and potential agreements, the American spending power has the opposite effect. The high degree of conditionality ends up reinforcing the agreement-limiting effects of centralization as federal cash is joined to the national government`s legal and regulatory powers to coerce state action, rather than form national agreements. Thus, not only does the United States have a relatively small federal spending power, but what there is works in concert with other variables to reduce the opportunity for the formation of national intergovernmental agreements.

4. The Size and Scope of the Welfare State

One of the most persistent political stereotypes of the United States is that it is a land of small government and self-reliance, especially when compared to social-democratic European states. Such a stereotype would suggest that the size of government and the welfare state in America will provide only limited opportunities for

[718] Stephens and Wikstrom, *American Intergovernmental Relations*, 78.
[719] Fox, "United States of America," 359.

intergovernmental relations and ultimately, agreements. This raises the question: do the data confirm this? As a generalization, the answer seems to be yes, but with a few interesting nuances.

Two basic trends are apparent in the welfare spending data for the United States. First, as is the case with most advanced, industrialized democracies, welfare spending has been rising since the Second World War. Even in the United States, there has been a steady growth in government spending as a whole, fuelled by large expansions in the Entitlement programs: Medicare, Medicaid and Social Security.[720] Second, while spending has grown, America remains one of the lowest-spending federal systems in this study, whatever the measure used.

Table 10.3: American Welfare Spending as a Percentage of GDP[721]

	1980	1985	1990	1995	2000	2005	AVG	Rank
United States	13.1	13.1	13.4	15.3	14.5	15.9	14.22	6

These trends are evident in welfare spending data from the Organization for Economic Cooperation and Development (OECD). As a percentage of GDP, American welfare spending has remained the lowest of the six cases for which data are available; at an average of 14.22% of GDP it is almost half a percentage point less than fifth-place Australia.[722] This is clearly consistent with the lack of national intergovernmental agreements in the United States. Of the eight agreements identified, only one is related directly to welfare, pensions or healthcare (and this is a reciprocity and transfer

[720] Timothy J. Conlan and Paul L. Posner, "Introduction: Intergovernmental Management and the Challenges Ahead," in *Intergovernmental Management for the 21st Century*, ed. Timothy Conlan and Paul L. Posner, (Washington, D.C.: Brookings Institution Press, 2008), 2-5.
[721] Data collected from the OECD Social Expenditure Database.
[722] South Africa's level of spending was not available for this comparison, though other sources suggest it might still be lower than the United States'. See the South Africa section on welfare spending for more.

agreement), and only one to education spending.[723] Moreover, while the United States experienced a clear increase in spending, notably between 1990 and 1995, this does not seem to have had any effect on agreement formation.

Table 10.4: American Welfare Spending as a Percentage of Total Federal Spending[724]

	1972	1977	1980	1985	1990	1995	2000	2005	2007	AVG	Rank
USA	52.60	51.56	50.45	44.95	44.44	53.60	53.09	59.23	59.30	52.14	5

Even when examining welfare spending through a different lens (as a percentage of total federal spending) the same patterns seem to hold true. Although the United States ranks higher in terms of expenditure, it is still lower than the majority of other federations. Moreover, the United States' ranking falls if only recent data are considered, placing it ahead of only South Africa. In contrast, the country would have ranked third in federal spending in 1977, ahead of Australia, Canada and the United Kingdom. While America has seen spending increases like most other countries, these appear to have been smaller than in other federations. The clear result of this is fewer opportunities for intergovernmental agreement formation.

The heterogeneity of government programs in the United States may also contribute to the lack of national agreements pertaining to the welfare state. With the exception of the federal entitlement programs, many education, health and welfare programs are left up to each state. This contrasts with other federations which have large national programs – or at least some national consensus - for matters such as healthcare,

[723] The health agreement is the Interstate Compact on Mental Health. The Compact for Education sets out a national body for monitoring test scores and education. The NASDTEC Teacher Certification compact also pertains to education but is more about regulation and certification.
[724] Data collected from the IMF World Financial Yearbook.

income support and post-secondary education. The recent healthcare legislation championed by President Obama and the Democratic majority in Congress from 2009-10 contained numerous exemptions and qualifiers to account for the differences inherent in existing programs.[725] Massachusetts in particular already had a system of universal insurance that would make a federal plan redundant. Given the differences between state programs it makes finding common ground difficult – especially with fifty participants. These variations, combined with the comparatively low level of spending, provide fewer opportunities for intergovernmental agreement formation and are consistent with the overall number of national agreements.

5. The Existence of Lasting Forums for Intergovernmental Relations

The question of whether or not there are lasting and institutionalized forums for intergovernmental relations in the United States rests, in part, on the effects of the large number of states. While this will be discussed at greater length in the next section, the effectiveness of any forum devoted to intergovernmental relations in America faces a significant challenge in simply assembling representatives from each of the 50 states, let alone working together to form intergovernmental agreements.

Despite this barrier, the United States is still home to a number of intergovernmental bodies. Stephens and Wikstrom found that there are over 100 national associations of state and local officials, listing the most prominent as:

> (T)he Council of State Governments (1935), National Conference on Uniform State Laws (1892), National Governors' Association (1908), National Conference on State Legislatures (1948), Conference of Chief Justices (1949), National

[725] *Compilation of Patient Protection and Affordable Care Act of 2010*, 111th Cong., 2d sess. (May 1, 2010).

> Association of Attorneys General (1907), National Association of State Budget Officers (1945), and National Association of State Purchasing Officials (1947).[726]

Clearly, not all of these institutions are comparable to bodies for executive or inter-legislative federalism in other federations; indeed, some of them, such as the Conference of Chief Justices, are judicial bodies. It seems then, that there are intergovernmental forums that could, in theory, provide opportunities for national agreement development. In practice, however, these bodies seem to have had almost no impact on agreement formation.

There are a few potential explanations for the limited connection between America's network of institutions for intergovernmental relations and the formation, or lack thereof, of national agreements. First, there is no permanent or formal body for federal-state executive federalism. In all other federations in this study, save perhaps Switzerland, there is at least a semi-regular forum for the heads of government to meet. While the President may occasionally host the Governors at the White House, this appears as more of a political event instead of an opportunity for negotiation and intergovernmental relations. This may be a consequence of the immense advantage that Washington (both the President and Congress) has in dealing with the states, but whatever the origin, the lack of a permanent forum removes the possibility of a peak institution for intergovernmental relations that could contribute to national agreement formation.

Second, the level of centralization in American federalism has had a drastic impact on the organization of several of the most prominent national associations of state officials and legislators. Rather than act solely as forums for interstate coordination, organizations such as the National Governors Association, National Conference of State

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[726] Stephens and Wikstrom, *American Intergovernmental Relations*, 176.

Legislatures and Council of State Governments devote a substantial portion of their efforts to lobbying Congress and the executive branch in Washington.[727] The substantial powers of the federal government and the common causes they provide for the states mean that rather than focus efforts only on developing consensus amongst themselves, their cooperative efforts are directed elsewhere.

Third, as the next section will illustrate, the large number of states in America is itself a barrier to effective national intergovernmental relations. Even getting 90% of governors to participate in a single meeting is a relatively rare occurrence. While intergovernmental forums can still serve important functions without perfect attendance, notably for the discussion of common interests, the study of best practices and the aforementioned lobbying of the federal government, it is difficult to conceive of them as bodies which can address issues and form a formal, possibly binding, consensus for action when it is not clear which states will be represented at any one meeting.

Fourth, whether it is because of the three previous factors or simply in addition to them, intergovernmental forums in the United States seem to have evolved for specific purposes other than deliberate, collective action. For instance, the Council of State Governments declares itself "a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy".[728] The National Conference of State Legislatures "provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues" while also acting as representatives

[727] John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking*, (Norman: University of Oklahoma Press, 2009), 30-31.
[728] Council of State Governments, "About the Council of State Governments," (Washington, Council of State Governments, 2010), http://www.csg.org/about/default.aspx (accessed, March 5, 2011).

to Congress.[729] This focus on research, technical support and the exchange of ideas - as well as lobbying the federal government - stands in contrast to peak intergovernmental institutions in other countries such as Australia and Canada, where the role of institutions such as the Council of Australian Governments or the Council of the Federation (Canada) is to engage in policy development and implementation, build relationships amongst leaders, and provide national leadership.[730] In the case of the American institutions, the goal is directed more towards support and communication (as well as lobbying) while other federations place a higher priority on the meetings of the national and subnational leadership for policy development; clearly the latter is more likely to encourage agreement formation than the former.

The United States is certainly not lacking for forums for intergovernmental relations, but the ones that are present are not especially conducive to encouraging national intergovernmental agreement formation. American intergovernmental forums have focused more on research, lobbying and support as opposed to executive federalism. As long as the federal government remains dominant, the states remain numerous and the current intergovernmental political trends persist, the status quo in American intergovernmental relations will continue.

6. The Number of Subnational Governments at the State/Provincial Level

If these variables had been arranged by order of importance then it might have made sense to begin with a consideration of the number of subnational governments in

[729] National Conference of State Legislatures, "About the National Conference of State Legislatures," http://www.ncsl.org/Default.aspx?TabID=305&tabs=1027,77,544#1027 (February 27, 2011).
[730] See: http://www.coag.gov.au/about_coag/index.cfm for the COAG and http://www.councilofthefederation.ca/aboutcouncil/aboutcouncil.html for the Council of the Federation.

the United States. Compared to the other federations in this analysis, the United States has, by far, the greatest number of subnational governments, nearly double that of second-place Switzerland. This significant disparity is not the product of an unrepresentative selection of all federal systems, as the United States has more subnational governments than any federation in existence. America's 50 states are more numerous than the subnational governments of other large federal countries such as Nigeria (36), Mexico (31), and India (28).[731] Given such a large number of states, even the minimum threshold for an agreement to be considered national in scope in the United States (45 states), is higher than the number of all of the subnational governments in Australia, Canada, Germany, South Africa and the United Kingdom.

As the previous section previewed, with so many states, the simple act of gathering representatives from each government together to discuss common issues – and potentially intergovernmental agreements - becomes a difficult undertaking. The National Governors' Association (NGA) serves as a good example of this challenge. The NGA has acted as a forum for state executives to meet together since 1908 and is one of the more prominent forums for American interstate relations. It holds an annual meeting for all governors and since 1966 has added a second, winter meeting. Despite numerous opportunities, there has not been a single meeting that has included the governors from every state.[732] As *Table 10.5* at the end of this chapter demonstrates, only 38 governors (76%) on average participated at the annual meetings, while *Table 10.6* shows that winter meetings have seen only marginally higher attendance with an average of 40 governors

[731] Watts, *Comparing Federal System*, 3rd ed., 73. The only potential federation with more subnational governments is Russia with 86 states. However, this relies on seeing Russia as a federal state.
[732] As Hawaii and Alaska were not states in 1945, the total used to calculate attendance was 48 until 1959 and then 50 from 1960 until the present.

(80%).[733] These numbers are especially significant if meetings are to be an opportunity to produce national intergovernmental agreements. Only 15 of the 66 (22.7%) annual meetings involved more than 90% of the governors, and none since 1968. The winter meetings – which seem to have become the more well-attended forum in the last twenty years – have exceeded 90% participation only 14 of 45 times, or less than one-third.

While single meetings of all governors - to say nothing of legislative representatives – are not the only possible means of forming national agreements, they present a useful opportunity for discussion. Without the ability of all participants to meet together and reach the terms of an agreement, the process instead becomes gradual and piecemeal. A closer look at many of the agreements formed, specifically the compacts, provides further evidence of this. The range of dates given for some of these agreements is not due to inaccurate record-keeping, but rather the fact that there was a period of time over which states entered into the agreement. Unlike the other federations compared here, where most national agreements are negotiated during meetings involving all governments, American agreements seem to start with a smaller group, before gradually expanding to include others. This process may make it easier for individual state governments to choose not to opt-in to an agreement as there is less pressure than being the single intransigent in a room full of governors or representatives.

In a sense, the results speak for themselves. Not only are there only eight national intergovernmental agreements between 1945 and 2008, but only half of these actually include all 50 states. The difficulty of getting even 45 states, separated by a host of

[733] The term "participate" is used intentionally, instead of "attended". Unfortunately, the NGA does not have a complete attendance record for all meetings and certain ones only list the governors who participated in the plenary sessions or were chairing specific working groups. However, these records are still valuable as they indicate how many governors were actively participating in group discussions and the difficulty of including so many participants.

cleavages such as region, geography, economy and politics, to agree to a set of principles or practices is clearly one of the biggest reasons why the United States has a very small number of national agreements.

7. The Existence of a Body for Intrastate Federalism

The Senate of the United States provides only a *partial* measure of intrastate federalism. If this analysis was conducted a century earlier, the United States would be closer to full intrastate federalism, albeit in the midst of a transition. The Senate began as a close facsimile to the original Congress under the Articles of Confederation with equal representation for all the states and representatives chosen by the legislatures. The major difference brought by the Constitution of 1787 was to change the membership and voting rules from a single delegation vote to one where the two Senators each cast an independent vote.

This system, which would persist until the turn of the 20th century, came close to the model for full intrastate federalism: equally-represented subnational units with a role in the national legislative process. The only difficulty came from the fact that because of divided government, these representatives were selected by state legislatures and not governors and sometimes splits in the legislature led to Senators from different parties or ideologies being selected, undermining the coherence of the state's representation.[734] Controversies in some states over the selection of Senators – corruption allegations were rife – and growing populist movements convinced several state governments, beginning

[734] United States Senate. "Direct Election of Senators." http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (accessed February 28, 2011).

with Oregon, to allow direct elections in 1907.[735] This success finally forced the Senate to concede to the reformers and this culminated in the 17th Amendment to the Constitution which made direct elections for the Senate mandatory in all states.

Since 1913 – and over the period that is being considered in this study – the Senate has had elected representatives which has limited its ability to act as a means for intergovernmental relations within the federal government. This should have a neutral effect on national intergovernmental agreement formation. When compared to a federation like Australia however, there is some evidence that the American Senate may do a marginally better job in addressing matters of intergovernmental relations than comparable bodies. The United States and Australia have upper chambers which provide equal representation for all subnational governments, their rules allow these members to cast independent votes and both countries allow for the direct election of Senators by the citizenry. Yet vastly different party systems and political traditions alter the outcomes of these similar institutions. In Australia, party discipline is quite strong in the Senate, exacerbated by the system of proportional representation used to select members.[736] This leads to a body which is more focused on the competition between national political parties than subnational representation.[737] In contrast, party discipline is relatively weak in the American Senate, allowing members to make state representation one of their highest priorities. Indeed, United States Senators have been criticized for concentrating too much on the needs of their states, resulting in the development of "pork-barrel

[735] Ibid.
[736] Galligan and Wright, "Australian Federalism," 2002.
[737] Ibid. This is not to suggest that the Australian Senate is devoid of subnational representation, only that it is not the primary focus of the body.

politics" and a concern for local matters.[738] This is not to imply that party has no effect in the American Senate only that comparatively looser discipline may allow Senators to directly address the needs of their constituents – concerns that might otherwise have to be taken up within intergovernmental relations. When combined with the ability of the federal government to use regulatory instruments to address matters in state and concurrent jurisdiction, the Senate may be contributing to the lack of national intergovernmental agreements.

In summary, the United States Senate fulfills one of two roles in relation to intergovernmental agreement formation. It may be a standard example of partial intrastate federalism, in which it has little to no effect on potential intergovernmental business that might lead to agreements. Or, its role as a valid representative for state interests might help to funnel some interstate matters into the federal legislative process which may lead to regulatory federalism. In the former, this makes intrastate federalism a non-factor in agreement formation, meaning other variables are at play, and if it is the latter, it serves as a further restriction on national agreement creation. The answer would seem to lie somewhere in the middle and as such, the American Senate acts as a minor alternative to intergovernmental relations and the formation of agreements.

Conclusion

In many ways the United States of America today is completely different from its origins in 1777. It has evolved from a decentralized confederation of thirteen former

[738] Ronald Utt, "How Congressional Earmarks and Pork-Barrel Spending Undermine State and Local Decision-making," *The Heritage Foundation*, 1999, http://www.heritage.org/research/reports/1999/04/congressional-earmarks-and-spending-undermine-decisionmaking (accessed, March 3, 2011).

colonies on the eastern coast of North America to a continent-spanning, relatively-centralized federation of fifty states. These changes have had important implications for the study of federalism and specifically this analysis of intergovernmental agreements. While intergovernmental agreements are certainly not rare in American federalism, only eight could be found that met the minimum 90% threshold of subnational participation between 1945 and 2008 (0.13 per year). With only South Africa forming fewer agreements, the institutional environment in the United States should be amongst the most inhospitable to new intergovernmental institutions.

This expectation is certainly confirmed by the factors which encourage new agreements. These present a figurative cornucopia of weak and limited possibilities for intergovernmental coordination. America has the smallest welfare state of the six developed federations, ranking just ahead of South Africa, providing fewer areas of potential policy coordination between the orders of government. Overlap is also limited by the "watertight containers" model of the division of powers; while this has eroded somewhat over time, overlap in American federalism is not nearly as significant as in countries like Australia or Germany. Even intergovernmental forums provide fewer pressures for coordination than might otherwise be expected. While the US has several organizations devoted to intergovernmental relations, including potential peak institutions such as the National Governors' Association, attendance rarely reaches even 90%. Perhaps most surprising however, is the degree of centralization present in American federalism and intergovernmental relations. The spending power, though not exceptionally large, is supported by numerous coercive conditions and is complimented by a series of other override instruments, such as sanctions and direct orders. With such

limited features which are conducive to national intergovernmental coordination, it is not surprising that the US has formed so few agreements.

The weak pressures towards coordination might, by itself, be enough to stymie any agreement formation. This, however, is not the end of the factors working against national agreements as a substantial inhibitor exists to further reduce the potential for agreements in the United States. While the modern Senate provides only a partial degree of intrastate federalism and thus, a limited alternative, the difficulty caused by the large number of subnational governments may be the most significant barrier of any case in this comparison. With fifty states, America has just shy of double the number of constituent units as the next largest federation here (Switzerland). This presents an enormous coordination problem to any kind of national action as getting even 45 states to agree on a single measure presents great difficulties.

With so few conducive features and the presence of significant inhibitors and alternatives, it is not surprising that the US has formed only a handful of national agreements; perhaps the real question is how they managed to form so many. This is even more apparent when expressed as the summary formula:

CON (*Weak*) – INH (*Strong*) – ALT (*Few*) = Very Limited IGA Formation

With such an unfavourable institutional climate, the US provides a useful case that demonstrates the consistency of the hypotheses even in cases with limited agreement formation.

Table 10.5: State Governors' Participation at the Summer Meeting of the National Governors' Association (NGA), 1945-2010:

Year	No. Governors	Year	No. Governors
1945	43	1978	40
1946	27	1979	35
1947	43	1980	42
1948	37	1981	41
1949	42	1982	43
1950	43	1983	39
1951	45	1984	29
1952	45	1985	41
1953	42	1986	31
1954	42	1987	40
1955	45	1988	33
1956	46	1989	34
1957	45	1990	26
1958	44	1991	34
1959	42	1992	26
1960	45	1993	29
1961	44	1994	33
1962	44	1995	25
1963	48	1996	29
1964	48	1997	42
1965	49	1998	38
1966	47	1999	39
1967	40	2000	36
1968	45	2001	36
1969	43	2002	28
1970	42	2003	30
1971	44	2004	29
1972	43	2005	27
1973	43	2006	26
1974	44	2007	30
1975	43	2008	29
1976	41	2009	23
1977	39	2010	33
		Average	**38.2**

Table 10.6: State Governors' Participation at the Winter Meeting of the National Governors' Association (NGA), 1966-2010:

Year	No. Governors	Year	No. Governors
1966	36	1989	28
1967	No meeting	1990	36
1968	44	1991	42
1969	41	1992	34
1970	39	1993	47
1971	49	1994	48
1972	42	1995	25
1973	32	1996	28
1974	49	1997	44
1975	31	1998	45
1976	26	1999	48
1977	30	2000	47
1978	37	2001	46
1979	28	2002	46
1980	43	2003	44
1981	49	2004	45
1982	Data not available	2005	41
1983	46	2006	33
1984	49	2007	44
1985	42	2008	45
1986	33	2009	43
1987	31	2010	45
1988	31	**Average**	**39.8**

Chapter Eleven: Comparison and Analysis of the Results

Introduction

The individual country analyses have provided useful information regarding the formation of intergovernmental agreements and concerning federalism and intergovernmental relations in each of the federations. More than simply increasing our understanding of these federations, the case studies have served as a reasonable test for the seven factors that may affect a country's potential for agreement formation. Together, these cases supply a wealth of data and insight on agreements and the theories about their creation. This chapter will build upon the results provided by the individual country case studies and compare these results in three ways. First, each of the seven variables will be summarized and evaluated for its individual consistency with the results of intergovernmental agreement formation. This analysis will attempt to determine which variables had the largest individual effects in encouraging or discouraging agreement creation as well as which were the most consistent with their expected outcomes. Second, the seven variables will be examined together, summarizing the findings of the case studies and their respective summary formulas. The goal of this section is to evaluate whether these variables provide a complete explanation for the pattern of agreement formation across the cases or whether some federal systems cannot be adequately explained by this analytical framework. This will also provide the opportunity to comment generally about the seven countries included in this investigation and the effects of the institutional variables working in concert. Third, this chapter will conclude by

reviewing the findings of this study and the contributions it makes to the understanding of federalism, intergovernmental relations and comparative politics.

Evaluation and Summary of the Variables

In order to summarize each of the seven variables in this analysis there are two questions that must be answered. First, how strong are the perceived effects of a variable on the formation of intergovernmental agreements? In other words, how much does a particular variable encourage or discourage the creation of new agreements and is this effect consistent across federations? Second, is the observed effect consistent with the original hypothesis, inconsistent or simply inconclusive? For example, the presence of full intrastate federalism should, in theory, provide an alternative to agreement formation, but in practice, the findings may indicate otherwise. Together, these two questions will give some comparative context to each of the variables as well as determining whether or not each is consistent with the records of agreement formation. *Table 11.1* summarizes the answers to these questions based upon the country analyses of the preceding chapters.

The summary table makes clear a couple of interesting trends among the seven variables. Each of the factors that affect intergovernmental agreement formation is strongly present in at least two of the federations and weak-to-non-existent in at least two others. The diversity of the cases allows for all of the variables to be considered across the federations and any differences to be observed. As with the strength of the variables, not one of the seven is entirely consistent or inconsistent. Though certain hypotheses seem to be more accurate than others – for example, the number of subnational governments versus the degree of constitutional overlap – all of the variables operate as predicted in at least some of the federations studied. Each of the variables will be

Table 11.1: Summary Table of Findings and Results from the Case Studies

Country and Rank	Australia (3)	Canada (2)	Germany (1)	S. Africa (7)	Switzerland (5)	UK (4)	USA (6)	Totals
No. of Agreements	**76**	**92**	**40 (80)**	**0**	**15**	**11**	**8**	**40.29**
Average	**1.27**	**1.46**	**0.89 (1.77)**	**0**	**0.25**	**0.92**	**0.13**	**0.83 AVG**
1) Degree of Constitutional Overlap	**Strong Opportunity** (Consistent)	**Weak Opportunity** (Inconclusive)	**Very Strong Opportunity** (Consistent)	**Very Strong Opportunity** (Inconsistent)	**Weak Opportunity** (Inconclusive)	**Moderate Opportunity** (Inconclusive)	**Weak Opportunity** (Consistent)	**3 Consistent; 1 Inconsistent; 3 Inconclusive (+2 Consistent)**
2) Centralization in the Division of Powers	**Moderate Opportunity** (Inconclusive)	**Strong Opportunity** (Consistent)	**Moderate Opportunity** (Inconclusive)	**Very Weak Opportunity** (Consistent)	**Weak-Average Opportunity** (Consistent)	**Weak Opportunity** (Inconclusive)	**Very Weak Opportunity** (Consistent)	**4 Consistent; 3 Inconclusive (+4 Consistent)**
3) The Size and Status of the Federal Spending Power	**Strong Opportunity** (Consistent)	**Strong Opportunity** (Consistent)	**Very Weak Opportunity** (Inconsistent)	**Weak Opportunity** (Consistent - High)	**Weak Opportunity** (Consistent)	**Weak Opportunity** (Inconclusive - High)	**Weak to Moderate Opportunity** (Consistent)	**5 Consistent; 1 Inconsistent; 1 Inconclusive (+4 Consistent)**
4) The Size and Scope of the Welfare State	**Moderate Opportunity** (Inconclusive)	**Moderate Opportunity** (Inconclusive)	**Very Strong Opportunity** (Consistent)	**Weak Opportunity** (Consistent)	**Weak, then Strong Opportunity** (Inconsistent)	**Strong Opportunity** (Inconsistent)	**Very Weak Opportunity** (Consistent)	**3 Consistent; 2 Inconsistent; 2 Inconclusive (+1 Consistent)**
5) Forums for Intergovernmental Relations	**Very Strong Opportunity** (Consistent)	**Very Strong Opportunity** (Consistent)	**Very Strong Opportunity** (Consistent)	**Strong Opportunity** (Inconsistent)	**Weak, then Average Opportunity** (Consistent)	**Moderate Opportunity** (Consistent)	**Weak Opportunity** (Consistent)	**6 Consistent; 1 Inconsistent (+5 Consistent)**
6) No. of Sub-National Governments	**Weak Impediment** (Consistent)	**Weak Impediment** (Consistent)	**Weak Impediment** (Consistent)	**Weak Impediment** (Inconclusive)	**Strong Impediment** (Consistent)	**Moderate Impediment** (Consistent)	**Very Strong Impediment** (Consistent)	**6 Consistent; 1 Inconclusive (+6 Consistent)**
7) Intrastate Federalism	**Weak Impediment** (Consistent)	**Very Weak Impediment** (Consistent)	**Strong Impediment** (Inconsistent)	**Strong Impediment** (Consistent)	**Weak Impediment** (Inconclusive)	**Very Weak Impediment** (Consistent)	**Weak Impediment** (Inconclusive)	**4 Consistent; 1 Inconsistent; 2 Inconclusive (+3 Consistent)**
Alternatives to IGAs?	**No**	**No** (Defunct powers only)	**Yes** (Federal legislation)	**Yes** (Federal legislation & intra-party relations)	**Yes** (Federal legislation & regional IGAs)	**Yes** (Federal legislation)	**Yes** (Regulatory instruments)	**Some form in all but Canada & Australia**
Overall IGA Environment	**Very Strong Potential**	**Very Strong Potential**	**Moderate - Strong Potential**	**Very Weak Potential**	**Weak Potential**	**Moderate Potential**	**Weak Potential**	

examined individually in an effort to better understand their relative successes and failures in explaining the formation of intergovernmental agreements.[739]

1) The Degree of Constitutional Overlap that Exists

Constitutional overlap is an interesting variable to begin with as it was one of the least successful in terms of confirming the original hypothesis. While the hypothesis was clearly inconsistent with the record of agreement formation in only one of the federations (South Africa), it was inconclusive in three others. It would be premature, however to conclude that overlap provides a poor explanation for intergovernmental agreement formation. In two of the federations (Australia and Germany), a significant degree of overlap is an important element of the account of why both federations produce a large number of intergovernmental agreements. In the case of the United States, the lower degree of overlap is less conducive to coordination and is consistent with the small number of national agreements formed.

Even if overlap is an important part of understanding intergovernmental agreements in two federations and consistent with the outcomes in a third, there are still four other cases in which it has proven to be inconsistent or inconclusive. However, a brief review of these countries indicates that perhaps overlap is not quite as unsuccessful as the summary table might imply. In Canada, constitutional overlap as measured by the number of policy areas in which both orders of government have jurisdiction is comparatively low, yet those areas with some degree of overlap tend to produce a

[739] As with the summary formula, the summary table is meant to reiterate and repackage the basic findings of the country analyses in one place. It is not meant as a precise model or as a replacement for the preceding discussions.

significant number of agreements.[740] While other factors are much stronger in the Canadian case and seem more likely to be driving the formation of agreements, overlap appears to have a role to play and this case is certainly not inconsistent with the hypothesis.

With Switzerland, the difficulty in making definitive statements about overlap is due to the decentralized practice of administrative federalism there. Overlap exists in a number of fields, with the federal government possessing broader legislative powers while the cantons have administrative authority. Unlike other instances of administrative federalism – such as Germany – the cantons have great flexibility to interpret and implement federal legislation.[741] Thus, it is difficult to definitively ascertain whether Switzerland is a federation with a high degree of overlap and if not, whether this lack of overlap is contributing to a low number of national agreements. As such, it is more accurate to say that there is not enough evidence to claim that overlap has strong influence on Swiss results.

The inconclusive result for the United Kingdom is something of a reverse of the Swiss case. While the UK's framework for devolution possesses at least some potential overlap, it is not clear whether the record of agreement formation reflects this. While the UK's rate of agreement formation is quite high at 0.92 per year, most of the 11 agreements were formed at the beginning of devolution. As such, the UK's record of national agreements is divided between a very active period early in devolution and a much more subdued era since then.[742] Moreover, the very nature of overlap in the UK's

[740] See the section on Canadian overlap in Chapter 5 for the complete discussion.
[741] Linder and Vatter, "Institutions and Outcomes of Swiss Federalism," 105.
[742] The difficulty presented by the United Kingdom's record of agreement formation will be addressed in greater detail later in this chapter.

devolved "constitution" is still evolving, making it difficult to place this nascent federation at one extreme or the other. Given the uncertainty in the degree of overlap and the record of agreement formation, it seems prudent to regard the UK as an inconclusive case.

This leaves South Africa as the only truly inconsistent case. South Africa has, along with Germany, the largest degree of overlap of the seven federations studied. Yet, with no agreements to speak of, constitutional overlap seems to be insufficient (at least by itself) to precipitate even one agreement. As mentioned in the chapter on South Africa, however, this can be explained in part by the powerful role of the national government. Constitutional overlap is significant in South Africa, but the true story of the constitutional division of powers is the significant authority. Yet this cannot entirely mitigate or explain away the failure of overlap to encourage at least a small number of agreements in South Africa, perhaps indicating that this variable can be overwhelmed by the effects of others.

Taken together, the analysis of the seven cases suggests that the overlap hypothesis is as likely to offer little explanation for a federation`s record of agreement formation as it is to contribute to our understanding of it. Overlap cannot be completely dismissed though, as it is important in explaining agreements in Australia and Germany. Additionally, overlap records an "inconsistent" result only in South Africa. While there are other variables that are more consistent with the data, the degree of constitutional overlap remains an important element in understanding intergovernmental agreements in at least some federations.

2) The Degree of Centralization in the Constitutional Division of Powers

The relationship between centralization in the division of powers and the formation of intergovernmental agreements has proven to be one of the most fascinating and complicated of the seven variables. Initially, centralization was conceived of as a straightforward evaluation of constitutional jurisdiction – a centralized federation would be one in which the national government had exclusive jurisdiction over a large number of policy fields. When applied to the country case studies, it became clear that while it was quite possible to determine whether a federation was more or less decentralized, this assessment relied on a host of factors beyond the totals of jurisdictional powers.[743]

One of the greatest sources of difficulty and complexity in assessing centralization came from the European federations, Germany and Switzerland. Both practice a form of administrative federalism in which the national government is granted broad legislative powers but limited administrative or executive ones. Switzerland, in particular, looks very centralized when evaluated solely on the basis of how many policy areas are exclusive to the national government (49%) while Germany appears much more decentralized (21%). In practice, however, the situation is almost reversed. The Swiss national government generally passes broad framework legislation leaving the cantons with substantial freedom to implement policies, while in Germany, the national parliament possesses more tools to direct the länder. In both cases, it is difficult to precisely quantify or categorize the degree of centralization, especially when the goal is to study intergovernmental agreement formation. The autonomy of the Swiss cantons may classify it as a decentralized federation in other studies, yet in this application, even broad national legislation may replace agreements as instruments of coordination.

[743] Because determining how centralized a federation is requires more than the total policy areas possessed by the national and subnational governments, any measurement of this variable is, to some extent, relative.

The other interesting (and unforeseen) element of centralization came in the form of "override powers". In *Comparing Federal Systems*, Watts describes these as special powers which provide the national government with the means to "invade or curtail" normal subnational powers in certain circumstances (often emergencies).[744] In the study of intergovernmental agreements however, it may make sense to expand our understanding of these powers beyond crises and quasi-federal institutions. In this application, override powers or instruments allow for a federal government to impose a national decision upon subnational governments, even if this lies beyond its explicit jurisdiction. Depending on the federation, such powers can have a number of potential influences on the creation of intergovernmental agreements. In Canada, the override powers of reservation and disallowance are effectively defunct (though still present in the Constitution). Similarly in the United Kingdom, Westminster possesses something of an override power by virtue of the devolution arrangements being created by statute (and thus, they are amendable), though this has remained unused. In South Africa, the numerous override clauses further reinforce the already formidable powers of the national government.

The United States represents something of an alternative case in which the override powers are present and active, but run contrary to other elements in the division of powers. America's states have, in percentage terms, the largest number of exclusive policy areas of any of the federations in this comparison. However, the federal government possesses a number of intergovernmental regulatory instruments such as direct orders, sanctions and pre-emptions, which enable it to obtain national coordination without the potential difficulties of an intergovernmental agreement. In this way, the

[744] Watts, *Comparing Federal Systems*, 3rd ed., 90.

override powers in the United States act as a means of significant centralization and serve as an alternative to agreements – an important concept which will be reviewed in the next section.

The last "complication" of the centralization variable worth mentioning was the lack of truly decentralized federations to analyze. While there were good examples of very centralized federations (South Africa, United Kingdom) as well as ones which were neither strongly centralized or decentralized (Australia, Germany), only one case, Canada, could be said to be clearly on the decentralized end of the spectrum. When the cases were initially selected, it was hoped that Switzerland and/or the United States might also fulfill this role; however, upon review, both federations were found to be more centralized than anticipated – at least in relation to the study of intergovernmental agreements. Override powers in the United States represent a tremendous centralizing influence while Swiss administrative federalism allows for national legislation, however flexible, to serve as a means of intergovernmental coordination.

Despite these unexpected findings concerning centralization in these federations, this variable still proved to be relatively successful in explaining the formation of intergovernmental agreements. It is one of only two of the seven hypotheses that did not register a single "inconsistent" result. While there are three inconclusive results, none of these are particularly damaging to centralization's contribution towards the understanding of agreements. In the cases of Australia and Germany, neither federation is clearly centralized or decentralized to the extent that one could claim that the results are consistent or inconsistent with the prolific agreement formation found in both countries. As such, it is more accurate to simply acknowledge that centralization is not a critical ingredient in the understanding of these two cases. The other inconclusive result, the

United Kingdom, was more difficult to categorize based on its unique record of intergovernmental agreements. The division of powers under devolution is clearly centralized, but as was the case with the effects of overlap, it is still too early to tell whether the early flurry of agreements was a unique event. If centralization is indeed a dominant influence on the formation of concordats in the United Kingdom, then the recent paucity of agreements is likely to continue and the overall average will continue to fall. This may be the more probable outcome – and thus, one could make the case that the UK should be deemed consistent with the centralization hypothesis – but given the relatively short history of devolution, it is safer to deem it inconclusive for now.

Perhaps most importantly for the reliability of the centralization variable is that the hypothesis was confirmed in the most pronounced cases. The analysis of Canada, the most decentralized federation in this comparison, indicated that the wide powers possessed by the provinces created an excellent – and well-realized – impetus for agreement formation. Likewise, the most centralized country, South Africa, and the surprisingly centralized United States had the smallest number of agreements, consistent with what would be expected.

While centralization's effects are not always clear, it does seem to have a reliable effect on the potential for national agreement formation when it is present. The hypothesis that "as the powers of the national government are greater, the opportunities for intergovernmental coordination are fewer," may not be a linear relationship, but rather one in which more extreme manifestations are more likely to influence agreement creation.

3) The Size and Status of the Federal Spending Power

In virtually every federation – and certainly each of the seven in this study – the transfer of money is a significant issue in intergovernmental relations. Generally, though not exclusively, money is transferred from the national government to the subnational administrations, sometimes with certain conditions to ensure that the funds are spend on specific tasks. The hypothesis stated that this federal spending power, depending on its size and usage, could provide increased opportunities for intergovernmental agreements to form. As initially conceived, the relationship between the spending power and intergovernmental agreements was strictly numerical: as federal transfers increased in size, so would the potential for new agreements. This original notion would have proved to be a very poor understanding of both the spending power and its potential to encourage new intergovernmental agreements, but fortunately, two important refinements have been included in the final version of the theory.[745] One concerns the "status" of the spending power – that is, the way it is used, its constitutionality and its place in the federal system – while the other is a better understanding of the effect of federal financial powers at the extremes.

[745]If the consistency of the spending power hypothesis was tested strictly as a numerical measurement, then the final results would be: two consistent (Australia, Switzerland), three inconsistent (Canada, Germany, South Africa) and two inconclusive (United Kingdom, United States).

Table 11.2: The Percentage of Subnational Revenue Received Through Federal Grants[746]

Year	1972	1975	1980	1985	1990	1995	2000	2005	2007	Average	Rank
Australia	52.90	57.27	57.02	56.19	44.66	40.94	37.25	46.62	45.16	48.67	3
Canada	25.99	24.24	20.66	20.42	18.20	17.48	14.44	18.07	18.94	19.83	6
Germany	18.25	20.20	17.75	15.51	16.09	17.05	16.56	15.98	14.85	16.92	7
South Africa	83.51	N/A	86.23	85.65	83.63	94.38	96.08	96.63	95.96	90.26	2
Switzerland	30.81	28.10	27.11	25.64	30.22	28.95	30.97	28.94	28.76	28.83	4
UK	N/A	N/A	N/A	N/A	N/A	N/A	90.20	91.10	91.10	90.80	1
USA	26.31	44.16	44.16	20.54	19.96	23.78	25.97	N/A	N/A	29.27	5
Average	39.63	34.79	42.16	37.33	35.46	37.10	44.50	49.56	49.13	46.37	

[746] Data gathered from the IMF World Financial Yearbook series. Canadian and South African data for 1972 is from 1971 and 1973 respectively. Swiss data for 1990 is from 1991. United States data for 2000 is from 2001 (this was the last year for American data). UK data was gathered from the Scottish budgets of 2000-01 and 2006-07.

The status of the spending power, while not as neatly quantified as the size of it, is an important consideration in any federation. A national government may have substantial resources to transfer to the states or provinces or to spend in their jurisdiction, but if the constitution forbids such spending, then such financial capabilities are moot. Similarly, another federation might have limited national resources to spend on subnational matters, but complete freedom to allocate this money and a tradition of joint action between orders of government. This latter hypothetical is close to the situation in Canada. As *Table 11.2* indicates, Canada's provinces rely upon federal transfers for just under 20% of their revenues, the second lowest total of these seven federations. Yet, not only have governments in Canada formed a large number agreements, but any student of Canadian federalism knows that the federal spending power has been an active (and contentious) element of intergovernmental relations. In the Canadian case, the status and use of the spending power gives the relatively small spending power a disproportionate effect in creating opportunities for intergovernmental agreements. Australia has a similar tradition of the federal spending power contributing to agreements, but the percentage of federal transfers is much higher than in Canada.

The United States also presents an example of the status of the spending power affecting agreement outcomes. While American states are not as reliant upon federal money as their compatriots in Australia or even Switzerland, they still receive a larger percentage of their budgets from transfers than Canadian provinces. Unlike Canada or Australia however, the federal government of the United States makes use of various regulatory instruments such as cross-cutting regulations, cross-over sanctions and other conditions on grants, rather than negotiations, to transfer money to the states. In this way,

the federal spending power is important to American intergovernmental relations, but contributes next to nothing to the formation of intergovernmental agreements.

The realization that the status of the federal spending power was at least as important as numerical measurements of its size also paved the way to the second refinement of this hypothesis. In federations such as the United States, it is clear that the status and usage of the federal spending power prevents it from facilitating intergovernmental agreement formation. What also became clear from the individual country analyses was that the size of the spending power could reach a point where it would exhibit different properties. As *Table 11.2* demonstrates there are sizeable gaps between federations and the reliance of subnational governments on federal grants. Canada, Germany, Switzerland and the United States are all within a 12% range (using the average) between 16.92% and 28.83%. Australia occupies a tier of its own; at an average of 48.67% it is well behind the leaders, but significantly ahead of the four federations clustered among the lowest results. Towering above all of these are South Africa and the United Kingdom, where the subnational governments rely upon transfers from the centre for more than 90% of their revenue. This is more than five times the reliance of Germany, the lowest-ranked country in this comparison.

It became clear in the analyses of South Africa and the United Kingdom that such overwhelming financial dominance by the national government was bound to affect the relationship between the spending power and the formation of intergovernmental agreements. South Africa in particular, presented challenges as no national agreements have been formed there; if the potential for intergovernmental agreements simply increased in lockstep with the size of the spending power, surely 90% would produce at least one! A return to the original logic behind this variable presented the solution. The

federations that were compared. Five of the cases were consistent with the expected relationship between the spending power and agreements, with one case (Germany) inconsistent, and another (the United Kingdom) deemed inconclusive. Once again, the UK was labelled inconclusive not because it challenged the logic of the hypothesis, but because the limited results did not provide a clear enough indication one way or another. In the case of Germany however, the large number of agreements is not consistent with the small size of the spending power or its particular usage. Germany's system of fiscal federalism is a complicated web of transfers and payments that move between both orders of government, governed by the Basic Law, as well as other statutes passed by the national government's broad legislative reach. Other variables, such as legislative overlap and the size of the welfare state provide more convincing explanations for Germany's production of intergovernmental agreements.

Despite this one shortcoming, the size and status of the federal spending power is a useful hypothesis that is generally consistent with the pattern of agreement formation. Certainly, it is essential in understanding why Australia and Canada produce so many agreements and why South Africa and the United States produce so few.

4) The Size and Scope of the Welfare State

The uncomplicated nature and simple, but significant, logic of this variable should have made it one of the most successful of seven hypotheses presented. This hypothesis suggests that the larger the government – primarily measured in terms of spending on the welfare state – the more policies that will require some form of intergovernmental coordination. The expectation was that much as public sector employment increases with

Table 11.3: Welfare Spending as a Percentage of GDP[747]

Year	1980	1985	1990	1995	2000	2005	Average	Rank
Australia	10.6	12.5	13.6	16.6	17.8	17.1	14.70	5
Canada	13.7	17.0	18.1	18.9	16.5	16.5	16.78	3
Germany	22.7	23.2	22.3	26.5	26.2	26.7	24.60	1
South Africa	-	-	-	-	-	-	-	-
Switzerland	13.5	14.5	13.4	17.5	17.9	20.3	16.18	4
UK	16.7	19.8	17.0	20.2	19.2	21.3	19.03	2
USA	13.1	13.1	13.4	15.3	14.5	15.9	14.22	6
Average	15.05	16.68	16.30	19.17	18.68	19.63	17.56	

[747] Data collected from the OECD Social Expenditure Database. No data for South Africa is available. See Chapter Three for more details.

Table 11.4: Welfare Expenditures as a Percentage of Total Federal Spending[748]

Year	Early 1970s	Late 1970s	1980	1985	1990	1995	2000	2005	2007	Average	Rank
Australia	N/A	50.10	48.70	47.61	51.98	56.88	60.10	65.75	64.68	55.73	3
Canada	50.62	48.82	46.43	45.17	45.18	53.77	51.14	68.24	68.79	53.13	4
Germany	67.40	71.07	69.98	70.04	67.68	N/A	N/A	72.63	72.14	70.13	1
South Africa	N/A	N/A	N/A	5.62	N/A	N/A	N/A	N/A	49.49	27.56	7
Switzerland	61.18	65.22	64.63	67.06	67.06	71.98	71.49	65.21	75.41	67.69	2
UK	41.34	N/A	46.13	45.22	48.74	52.27	58.18	69.17	N/A	51.58	6
USA	52.60	51.56	50.45	44.95	44.44	53.60	53.09	59.23	59.30	52.14	5
Average	54.63	57.35	54.39	46.52	54.18	57.70	58.80	66.71	64.97	53.99	

[748] Data collected from the IMF World Financial Yearbook series. "Early 1970s" data is from 1970-74, as there was not a single uniform year to choose from. Similarly, the "Late 1970s" data is from 1976-1979.

government spending, so too would the number of intergovernmental agreements. Instead, the analyses of the seven countries in this investigation indicate that the scope of the welfare state is among the least successful of the variables in explaining a federation's potential for agreement formation.

As *Tables 11.3* and *11.4* indicate, the seven federations certainly provide a wide range of government spending outcomes, from developing South Africa to the expansive welfare state of Germany.[749] Perhaps it should not be surprising that the federations that were most consistent with the hypothesis were these extreme cases. While South Africa's economy and public sector may be substantial compared to other African nations, it clearly ranks below the larger welfare states of the six wealthier federations. With a much smaller welfare state, it is consistent that South Africa has formed no national intergovernmental agreements. In addition to the other limitations that have been discussed, the government is simply not as vast as in other countries. The polar opposite to South Africa is the Federal Republic of Germany, with a welfare state that is by far the largest when measured in terms of GDP and one of the clear leaders (along with Switzerland) when considered as a percentage of total government spending. The federal and länder governments are active in many aspects of society, an institutional feature conducive to further intergovernmental coordination.

The only other federation which had results that were consistent with the welfare state hypothesis was the United States. The American case further supports the observation that the welfare state variable seems to explain extreme cases better than average ones. The United States consistently ranks at or near the bottom of

[749] While the comparative tables lack much data for South Africa, that federation's welfare spending was examined in greater detail in its chapter where it was determined, using other available data, that South Africa was the lowest spending of all the countries. Please refer to pages 230-233 for more information.

measurements of welfare spending amongst industrialized nations. Additionally, American social programs in education, health and welfare are often left up to each state to legislate and administer, leading to a heterogeneity which may further limit the effect that spending has on national intergovernmental agreements.

Within these extremes, the hypothesis that increased spending should increase the potential for agreement formation cannot be easily reconciled with the evidence at hand. Part of the difficulty comes from the fact that this variable provides little explanation for two of the most prolific agreement producers, Australia and Canada. Both have created large numbers of agreements over the last sixty years, rivalled only by Germany. Both are also decidedly average when it comes to government spending. Australia and Canada, respectively, rank fifth and third in terms of spending as a percentage of GDP and third and fourth when spending is measured as a part of total government outlays. Nothing was identified in either of their chapters to indicate that welfare spending was in any way exceptional. The welfare state in both countries clearly provides the basis for many agreements, but there is no evidence that changes in the amount spent or the differences in spending with other federations help to explain the record of agreement formation. With such middling results, Australia and Canada can, at best, be deemed inconclusive evidence of the welfare state hypothesis.

The remaining federations, Switzerland and the United Kingdom, provide a direct challenge to the idea that as government spending increases, so do intergovernmental agreements. Switzerland is an especially interesting case, as its welfare state has grown from one of the smallest into the second largest of these federations. Despite the noticeable increase in the size and scope of the welfare state however, there was not a corresponding increase in the number of national agreements that were formed. As the

chapter on Switzerland argued, however, it is important to acknowledge that while there was no increase in the number of national agreements, a number of new regional agreements were formed on health and education. It could be argued, then, that the welfare state hypothesis is only inconsistent with the Swiss data at the national level, indicating that other variables, such as the number of subnational governments, are likely more important.

The relationship between the size of the welfare state and the formation of intergovernmental agreements is also challenged by the United Kingdom. During the relatively short history of devolution, welfare state spending the UK has been amongst the highest of the seven federations. With spending approaching German levels (at least as a percentage of government spending), it is somewhat surprising that there have been few recent intergovernmental agreements formed in the UK. Moreover, agreements that have been formed are primarily framework agreements or ones founding institutions and practices for intergovernmental relations. There are none of the specific policy accords that can be found in Germany, Australia and Canada. It is possible that this is a result of the slow, but steady transition of the United Kingdom from a unitary country to a nascent federation – until 1999, all elements of government spending were highly centralized and to this day, Westminster and Whitehall still play leading roles. At best though, this would make the UK's results inconclusive and this seems to be too charitable an interpretation.

Thus, what might have been a simple but effective explanation of the differences in intergovernmental agreement formation is instead a more flawed measurement. While there still seems to be some merit to the idea that large and small amounts of welfare state spending affect the potential for agreement creation at the extremes, it is less effective at explaining cases closer to the median. The existence of the welfare state does provide a

basis for agreements in Australia and Canada, however differences in size appear to be unimportant for agreement formation. While not entirely flawed, welfare spending seems to be a significant factor only in pronounced cases, while playing a secondary role in all others.

5) The Existence of Lasting Forums for Intergovernmental Relations

The last of the five variables which encourage agreements is in many ways the most successful of these. Although lacking the clarity of a numerical measurement, such as for the welfare state or even overlap, determining whether a federation possessed an established network of intergovernmental forums proved to be the least complicated and ambiguous. Additionally, the effect of intergovernmental forums on agreement formation functioned as predicted in six of seven cases, the most consistent of any the variables, save the one concerning the number of subnational governments.

The seven federations exhibited a wide range of institutionalized settings for the conduct of intergovernmental relations, from the decentralized and almost piecemeal situation found in the United States to the highly institutionalized and active environment of Germany. Germany in particular is part of a group of three federations – along with Australia and Canada – which possess a vast network of forums for the conduct of intergovernmental relations. All three have at least one "peak" institutions where first ministers meet, often more than once annually. Additionally, the three federations also have numerous policy-specific bodies where ministers and senior bureaucrats meet to discuss issues of common concern; the number of these meetings can be measured in the dozens and even hundreds. The level of institutionalization is also high, with many forums retaining a secretariat or relying on an intergovernmental bureaucracy that

supports intergovernmental relations.[750] Finally, in the analysis of Australia, Canada and Germany, there was evidence that these intergovernmental forums were the sites where at least some agreements are reached.

As these three federations are also, by far, the most prolific in the formation of national intergovernmental agreements, it appears that having regular meetings between senior members of national, provincial, state and länder governments will create greater opportunities for new accords. It is also notable, that among these three federations, only this variable is strongly manifested in all three cases and it is the only "conducive" hypothesis (i.e. not one of the inhibitors or alternatives) that was found to be consistent in each.

It would seem that the existence of a network of bodies devoted to intergovernmental relations is strongly related to a federation's propensity to form agreements, but is the reverse true as well? That would seem to be the case. The analysis of the United States indicated that while there are a number of intergovernmental bodies, even at the senior levels of state administrations, many of these focus more on research and coordinated lobbying than negotiating agreements. The effectiveness of most of these bodies is further undermined by the sheer difficulty of getting senior officials (to say nothing of governors) from all fifty states into the same place at the same time. It is indicative that of the few national agreements that were found in the United States, several of them were formed over a period of several years (as individual states agreed to a common wording) rather than negotiated in a single session. Something similar was observed in the United Kingdom with the Joint Ministerial Committees – a collection of on-again, off-again meetings between ministers of the devolved administrations and those

[750] An example of this would be the Canadian Intergovernmental Conference Secretariat.

of the national government. Meetings were most frequent soon after devolution as well as in negotiations leading up to the 1998 devolution acts.[751] This is in keeping with the UK's inconsistent record of agreement formation, and thus, conforms to the hypothesis.

Switzerland is the other case where there is only a weak or average opportunity for intergovernmental forums to contribute to the potential for agreement formation. This is not due to a lack of such bodies however; on the contrary, since independence there have been hundreds of formal and informal gatherings of Swiss cantonal officials. Like much in Switzerland though, the available evidence indicates that a large portion of these are regional bodies, often between common linguistic, cultural or religious communities. Of the bodies with a more national scope, there seems to limited potential for these to act as forums to negotiate new agreements. The recent development of a "peak" intergovernmental institution, the Conference of Cantonal Governments, may lead to more accords, but no significant increase in agreement formation has been observed thus far.[752] As such, this limited system of national forums is consistent with the record of national intergovernmental agreements that have been created in Switzerland.

The only inconsistent case in this otherwise successful variable appears to be South Africa. South Africa has a system of intergovernmental bodies at the first ministerial, ministerial and senior bureaucratic levels, known as MINMECs. Despite this, the country still has no national agreements to speak of. Yet, the analysis of South Africa indicated that these bodies generally functioned as part of the national legislative process, with the national government securing input from the provinces. Moreover, the overwhelming dominance of the African National Congress effectively makes these

[751] The *Government of Wales Act 1998* and the *Scotland Act 1998* specifically.
[752] The Conference was created in 1993 and has been active in intergovernmental relations, if not intergovernmental agreements – see the chapter on Switzerland for more information.

bodies an intra-party network with the occasional outsider. Thus, while South Africa is rightly labelled as inconsistent with this hypothesis, this inconsistency has more to do with the peculiarities of South African politics than with a clear flaw in the logic of this variable.

With only one inconsistent case – which has a reasonable explanation – the existence of a lasting forum for intergovernmental relations seems to have a significant influence on agreement formation. Those federations that have sophisticated systems of multiple institutions for the conduct of intergovernmental relations are much more likely to have formed a large number of national agreements. In contrast, federal countries with fewer intergovernmental forums, ones that are less-formal or those that focus more on regional institutions consistently create a smaller number of agreements. It appears that this is a case of institutions begetting institutions – the more institutionalized a federation's system of intergovernmental relations is, the more likely it is to form more intergovernmental agreements.

6) The Number of Sub-National Governments at the State/Provincial Level

The seven federations studied in this comparison represent a wide range: from the United Kingdom and its three devolved governments to the United States and its fifty states, along with several other territories.[753] Moreover, as the summary table (*Table 11.1*) indicates, this hypothesis is one of the most successful of this analysis.

[753] According to Watts, only Bosnia-Herzegovina and St. Kitts-Nevis had fewer subnational units than the United Kingdom and only the Russian Federation (if it can truly be deemed to be a federation) had more states than the United States.

Table 11.5: Subnational Governments in the Seven Federal Systems

Country	**Number of Subnational Units**
Australia	6 States
Canada	10 Provinces
Germany	16 Länder
South Africa	9 Provinces
Switzerland	26 Cantons
United Kingdom	3 Devolved Administrations
United States	50 States
Average	17 Constituent Units

This hypothesis began with the simplest of contentions: that forming national agreements becomes progressively more difficult with each additional participant. Seven people can more easily meet together, stay in contact with each other and find common ground than twenty-five or fifty. Yet, even such uncomplicated logic, when applied in practice, reveals unforeseen nuances that add to the original theory. Specifically, there are two points of interest that arose during the application of this variable. First, it was clear in several federations that not all states/provinces/cantons or devolved administrations could be considered in the same fashion. This is more than the obvious contention that "all states are different" – more specifically, it refers to the effect of linguistic and cultural minorities on the impediment created by the number of subnational governments. The presence of such minority groups exacerbates the coordination problem found in federations as it can lead to asymmetry among the constituent units.

Three countries, in particular, seemed to exhibit evidence of this phenomenon. In Canada, the role of the French-speaking province of Quebec has long been a contentious issue in the study of federalism. Its unique place in Canada extends to intergovernmental agreements as Quebec will sometimes withhold its consent to projects that would otherwise have unanimous approval. This effect is not reflected in the agreement totals

because of the 90% threshold set out at the beginning of this study; with ten provinces, Quebec's signature is not necessary to reach this benchmark. While Quebec's influence may not have a significant effect on the number of Canadian intergovernmental agreements counted here, it is evidence of a linguistic and cultural minority exacerbating the coordination problem caused by the number of subnational units.

Switzerland represents an even greater example of the effect of minority groups. With twenty-six cantons, Switzerland already has the second-most subnational governments in this comparison, a potentially significant barrier to coordination. This is further exacerbated by the large number of cleavages among the Swiss cantons – culture, language and religion. There is evidence of this because Switzerland possesses a relatively small number of national agreements, but a reasonably large body of multilateral and regional ones, especially amongst cantons sharing a language. While it is possible that most of this is due to the effect of the large number of cantons, the evidence from Switzerland indicates that some culturally and linguistically similar cantons form agreements together.

The United Kingdom presents an interesting case of a federation which has a small number of subnational units all of which can claim a differing cultural heritage. In great part because of these differences, the devolved governments of Scotland, Wales and Northern Ireland exhibit a high degree of asymmetry, with differing institutions and powers. While this does not preclude the formation of national agreements, it may limit the policy areas that are eligible for such institutions and make coordination amongst all governments more difficult, as evidenced by the larger number of agreements formed between the national government and Scotland than with the other devolved administrations.

This added layer of complexity contributed to the second interesting detail of the analysis of this impediment to intergovernmental agreements: the difficulty in determining if there is a threshold after which coordination becomes markedly more difficult, or whether it is some form of gradient. Given the data from these seven cases, it is safe to say that the 50 states found in the American federal system are certainly past any potential threshold – it is extraordinarily difficult to get senior representatives from all the states together in the same room, let alone to create an agreement. Likewise, the frequent meetings and conferences among representatives in Australia and Canada suggest that six states and ten provinces respectively are not a sizeable barrier to coordination, or at least not an insurmountable one. If these seven federations could be deemed a perfectly representative selection of all federal countries, then the threshold would probably lie somewhere between Germany (16 units) and Switzerland (26 units). Identifying a specific "tipping point" becomes even more difficult given the regional nature of Swiss federalism as well as the lack of cases with between 17 and 25 constituent units.[754] Yet, even with more data, it is unlikely that a single point could be determined; indeed, the much more likely explanation is that each additional subnational government that must be included makes such efforts progressively more difficult until such accords are prohibitively complicated in federations with the most constituent units.

Even with these two nuances, the effect of the number of constituent units on the formation of agreements remains one of the most straightforward and consistent of the seven variables considered. While it cannot contribute to the account of why Canada has dozens of intergovernmental agreements and South Africa has none, it provides a

[754] According to Watts' listing of constituent units in federations, only three federations could possibly fill this role: Spain (17), Argentina (23) and Venezuela (23).

reasonable explanation of why the Swiss and American federations seem to have difficulty forming national accords.

7) The Existence of Intrastate Federalism

Unlike some of the other variables, this hypothesis proved to be as straightforward as anticipated. The initial theory proposed that federations can be categorized in one of three groups based on the degree of intrastate federalism that is possible in their respective second chambers.[755] As *Table 11.6* indicates, the seven federations fit neatly into the three categories and are evenly distributed among them. Each category of intrastate federalism presents interesting findings regarding the relationship between federal second chambers and intergovernmental agreements.

Table 11.6: Intrastate Federalism in the Seven Federal Systems:

Country	**Degree of Intrastate Federalism**
Australia	Partial
Canada	None
Germany	Full
South Africa	Full
Switzerland	Partial
United Kingdom	None
United States	Partial

Both Canada and the United Kingdom unambiguously belong in the class of federations which exhibit no intrastate federalism whatsoever. In large part, this is due to the selection of members of the Senate and the House of Lords by the national

[755] As a reminder, the three criteria for full intrastate federalism are as follows: one, representation in the national second chamber must be chosen directly by state governments; two, the representation of subnational units in this chamber must be equal or at least, very disproportionate (i.e. not representation by population); three, the second chamber must have sufficient powers in the national government to influence matters that might otherwise be addressed through intergovernmental relations. A country exhibiting all three of these criteria can be considered to have a full degree of intrastate federalism while possessing a number (but not all) of these characteristics would constitute a partial degree.

government, allowing for limited opportunities for intergovernmental relations within these chambers. While regional balance is one of the many criteria for peerage in the UK, the Lords are not a body of regional representation. Canada`s Senate does allocate seats along the lines of rough regional equality, however actual provincial representation is unequal and inconsistent.[756] Combined with virtually no input from the provinces– governments or citizens – in the selection of Senators, this provides no potential for any kind of intrastate federalism.

With no intrastate federalism, the second chambers of Canada and the United Kingdom present no impediment to the formation of intergovernmental agreements. In the Canadian case, the large number of agreements is consistent with what the hypothesis predicts in cases with no intrastate federalism. The United Kingdom`s unique and brief experience with the development of intergovernmental agreements has made it difficult to fully discern what impact each of the variables has had. As intrastate federalism is an alternative to agreements, rather than a feature which is conducive to accords, however, it is easier to understand the relationship – or lack thereof – between this factor and the record of agreement formation. Despite being a very centralized, nascent federal system, the national and subnational governments in the UK have been able to form some agreements, including some concerning the practice of intergovernmental relations. While this is not the best test for the full effects of intrastate federalism, it is an outcome that is consistent with the hypothesis.

[756] Discounting the territories, the number of seats ranges from 24 for Ontario and Quebec, to 4 for Prince Edward Island. It is both closer to representation by population (Quebec has a quarter of the seats and approximately a quarter of the population) in some respects and committed to provincial equality in others (all four western provinces have 6 seats each).

The second group – Australia, Switzerland and the United States – are federations that exhibit a partial degree of intrastate federalism. Despite the "catch-all" nature of this category, the three examples here share a number of characteristics. The Australian and American Senates and the Swiss Council of States all allocate seats on the basis of equality between the subnational units.[757] All of these second chambers also possess substantial powers in the national legislature and thus have the ability to affect policies and the political agenda. They are also all elected bodies, with citizens choosing representatives as opposed to cantonal or state governments.[758] It is this last commonality which places these three federations in the "partial" category of intrastate federalism. Without the direct participation of subnational governments, it is impossible for these second chambers to serve as an alternative to executive federalism and other aspects of intergovernmental relations. As the original hypothesis speculated, however, there was the possibility that there might be some small impediment to agreements created by a partial degree of intrastate federalism. Specifically, second chambers with elected representatives might be responsive enough to local needs to be able to address issues of importance to subnational governments, despite not being direct representatives of those governments.

The evidence provided by Australia, Switzerland and the United States suggests that if an impediment does exist, it is weak at best. This is certainly consistent with the results in Australia as the Senate there is dominated by national partisan politics and does

[757] Switzerland's situation includes a slight caveat: each of the 23 original cantons of Switzerland each received two seats in the Council of States. Three of these cantons have since split into "half-cantons" which each receive one representative in the Council.

[758] Again there is a slight exception for Switzerland. The Swiss Constitution allows the cantons to determine how they will select representatives to the Council of States. Since the 1950s however, all but 4 have done this by popular election.

not seem to replicate, or substitute for, intergovernmental relations in any form.[759] The intrastate federalism hypothesis is somewhat more difficult to confirm in the Swiss and American cases as the number of agreements is quite low. While other factors better explain the small number of national agreements in both cases, it is possible that even a weak inhibitor like partial intrastate federalism is contributing. Without the means to truly discern the extent of such a small effect, it is safer to say that Switzerland and the United States provide inconclusive findings.

Germany and South Africa are the most interesting cases in the consideration of the effects of intrastate federalism on intergovernmental agreement formation. The German *Bundesrat* is often cited as the archetype for a second chamber that embodies cooperative and intrastate federalism, a model that inspired South Africa's National Council of Provinces. They most closely meet the criteria for intrastate federalism; most importantly, both chambers allow for the direct participation of subnational governments within the national legislatures. According to the hypothesis, a federation with full intrastate federalism will have an additional barrier to the formation of agreements. This seems to be the case in South Africa, where intrastate federalism combines with the overwhelming strength of the national government to create barriers for intergovernmental agreements. In contrast, Germany is one of the most prolific federations in the formation of agreements, a seeming contradiction given the significant impediment that, in theory, the *Bundesrat* should provide. There are two possible explanations for this German inconsistency. First, the original hypothesis might be mistaken; a full degree of intrastate federalism may not provide a significant impediment to agreement formation. Concluding this would be somewhat premature, as this variable

[759] Swenden, *Federalism and Second Chambers*, 200-201.

was consistent in four of the other federations, including South Africa. Even the inconclusive findings of Switzerland and the United States were more a matter of a lack of a definitive confirmation, as opposed to the possibility that they could be inconsistent with the hypothesis.

The second explanation provides another perspective: that the presence of intrastate federalism in Germany does provide an alternative to agreement formation, but this is not sufficient to eliminate or greatly reduce the opportunities provided by other factors such as the large welfare state. While the analysis of Germany did not supply the evidence necessary to conclusively demonstrate this, this second explanation is in keeping with the results in the other six federations. The seven countries studied here may have provided a wide variety of second chambers, but what is clearly needed is a few more federations with full intrastate federalism. In the absence of this, intrastate federalism remains a possible alternative to the formation of national intergovernmental agreements, though there is some question as to how large a barrier it truly is.

Variables in Concert: Returning to the Explanation of the Cases

Thus far, the focus of this chapter has been on the effectiveness of the individual variables and the consistency of their hypotheses with the intergovernmental agreement data. While no variables were found to be completely consistent or inconsistent, certain ones – particularly the number of subnational governments and the existence of lasting forums for intergovernmental relations – did appear to be applicable in more cases than others. It would be a mistake, however, to conclude that these two explanations, either separately or in concert, would provide a complete and compelling explanation for intergovernmental agreement formation in all federations. Consider two polar opposites

(at least in terms of national intergovernmental agreements): Germany and the United States. While Germany's robust system of institutions devoted to intergovernmental relations is certainly part of the explanation for why there are so many agreements formed, alone it does not differentiate Germany from the United States. Likewise, the impediment provided by the large number of subnational governments in the United States is a compelling reason for the relatively small number of agreements found there. However, unless constitutional centralization is considered, such an explanation would completely ignore the important role that federal regulatory instruments such as mandates and sanctions have on American intergovernmental relations. To provide the best understanding for each federation's ability to form intergovernmental agreements, the whole collection of variables provides better completeness.

This idea that the seven variables together can provide a single institutional explanation for agreement formation was first advanced back in Chapter Two. The theory chapter proposed that the variables could be grouped together, based on their common effects: whether they were conducive to agreement formation, whether they inhibited agreement formation. or whether they provided alternatives. This contention was expressed in a single summary formula:

CON – INH – ALT = IGA

This formula provides an orderly way to present the results of each country analysis as well as a means of reviewing the combined effects of the variables. This formula also helps to explain why some variables only seem to have effects on the extremes, as opposed to a more consistent relationship. For example, the effect that centralization has on intergovernmental agreements is more easily seen in cases where a federation is clearly centralized or decentralized, such as South Africa and Canada respectively. A

case like Australia, where the outcome is "average" makes it difficult to discern what effect the variable is really having. It is more likely, in these scenarios, that there may be small effects, but these are overwhelmed by the influences of more prominent variables. If the institutional explanation for potential agreement formation is to be confirmed, then this formula should produce a meaningful explanation for each of the cases. As was noted in Chapter Two, this is meant as a summary device and not a quantitative model.

Before reviewing the seven federations using this new lens, a further refinement is required. The "CON" value is deliberately defined as the "factors conducive to intergovernmental *coordination*" rather than those conducive to intergovernmental agreements. Recall from the theoretical discussion of Chapter Two that intergovernmental agreements are created so that governments may coordinate their actions with one another. In the analysis of several of the cases however, it became clear that while the potential for coordination might exist in a particular federation, intergovernmental agreements were not always the only instrument that could be used. In Germany and Switzerland, the style of administrative federalism found there provides the national governments with broad legislative powers to create frameworks for national coordination, a role that might otherwise be served by an intergovernmental agreement. Likewise, in the United States, intergovernmental regulatory instruments allow the federal government to impose its will upon the states and establish national standards. Because these alternatives are not identical, it would not be accurate to simply subsume them within one of the existing variables. To use the above examples, the alternatives found in Germany and Switzerland are founded upon those countries' political institutions as well as the constitutional division of powers, whereas in the United States, they are based upon the national government's centralized power. In five of the seven federations studied (all

but Australia and Canada) there was at least one of these types of alternative to agreements; these are listed in the bottom row of the summary table at the beginning of this chapter.

The inclusion of these various means of coordination expands the existing understanding of the Alternatives (ALT) category of the summary formula. In addition to the Existence of Intrastate Federalism, this category must now account for elements such as override instruments and national legislation (where appropriate) as alternatives to agreements which would reduce a federal system's overall likelihood of creating formal, national agreements. Using this refinement of the theory, a return to the summary formulas is necessary in order to determine if this enhances the explanation for any of the cases. This review of the findings from each of the cases will also demonstrate whether or not the theory performs as expected in all of the federal systems studied here.

Australia

Australia was one of the most prolific federations when it comes to creating national agreements, with 76 formed between 1945 and 2009 a rate of 1.27 per year.[760] This places Australia in the group of the most active agreement-forming federations, along with Canada and Germany, all of which average at least one national accord per year. As the chapter on Australia illustrated, this record of agreement formation is consistent with an institutional environment that is quite favourable to the development of national accords. The strong factors conducive to coordination, such as the overlap, the widespread use of the spending power and the institutionalized network of intergovernmental bodies, create an environment with a high likelihood of

[760] Reliable data was not available between 1987 and 1989.

intergovernmental agreements. With no significant inhibitors or alternatives, there are no factors which would limit this potential for a relatively large number of agreements, as expressed in the summary formula:

CON (*Strong*) – INH (*None*) – ALT (*Weak-none*) = High IGA Formation

The refinements to the Alternatives category made in this chapter have no noticeable effect on Australia as there are no common override instruments nor can national legislation easily replace agreements. With no changes to the analysis of Australia, this federation remains a case where the institutional approach provides a sound explanation for the patterns observed in intergovernmental agreement formation.

Canada

Much like its Commonwealth cousin, Canada is no stranger to intergovernmental agreements, forming 92 national accords between 1945 and 2009, an average of 1.46 per year.–This places Canada as the second-most prolific in terms of the formation of national agreements, just behind Germany. As was the case with Australia, this relatively high level of agreement creation is supported by the findings concerning Canada's institutional environment. The institutional features which are conducive to intergovernmental coordination are among the strongest of all seven cases, with a decentralized division of powers, an active spending power and an established and institutionalized system of forums devoted to intergovernmental relations. There are also virtually no inhibitors or alternatives to agreements as an avenue for formal intergovernmental coordination either, as evidenced by the summary formula:

CON (*Strong*) – INH (*Weak-none*) – ALT (*None*) = High IGA Formation

Much as with Australia, this formula needs no updating to account for an expanded Alternatives category. While the powers of reservation and disallowance remain in the Constitution - and thus, could be potential alternatives - they have not been used since 1961 and 1943 respectively and are defunct politically. Thus, Canada remains a good example of a federation with a large number of intergovernmental agreements that is consistent with an institutional environment that is conducive to their creation.

Germany

In one sense – the formation of national agreements – Germany is similar to both Australia and Canada. Between 1950 and 1995, the governments of the Federal Republic formed approximately 80 national agreements or 1.77 per year.[761] Despite a similar number of agreements, Germany is a very different federation from the two previously discussed, founded on the principles of cooperative and administrative federalism, as opposed to a classic separation of powers. This makes Germany an interesting contrast to Australia and Canada – a federation with institutional differences but a similar number of agreements.

This contrast is clear in a number of areas. While Germany possesses a number of institutional features which are conducive to intergovernmental collaboration, this is primarily driven by three factors which are especially strong: overlap, the welfare state and the existence of intergovernmental forums (centralization and the spending power have almost no observable effects). Additionally, Germany's system of intrastate federalism through the Bundesrat provides a clear alternative to agreements - something

[761] This is using the estimated figure of total formal German agreements based on the doubling of the total number of staatsverträge that were identified. Please refer to the chapter on Germany for more details on this estimate.

not found in either of the previous cases. This analysis resulted in the following summary formula:

CON (*Strong*) – INH (*Weak-none*) – ALT (*Some*) = High IGA Formation

As noted in the conclusion to the German case study, this result does not fit perfectly with the data. Given that Germany has more agreements than any other case, this is a divergent result from the findings of Australia and Canada which have fewer agreements, but have institutional frameworks which should be more conducive to agreements.

This distinction becomes even more pronounced once the expanded Alternatives category is included. Germany's system of administrative federalism allows national legislation to serve as an alternate means of intergovernmental coordination. With broad legislative powers and the added legitimacy of länder participation through the Bundesrat, the federal government is able to establish national programs, standards and legal frameworks without a formal agreement. Although it is impossible to know how many potential agreements may have been replaced by federal law, it is clearly a possible alternative to a national agreement. This leads to an amended summary formula:

CON (*Strong*) – INH (*Weak-none*) – ALT (*Many*) = Moderate – High IGA Formation

In the original formula, the Bundesrat along provided only one alternative method of intergovernmental coordination, however, this more refined formula acknowledges the important role of national framework legislation. This formula is clearly not fully consistent with the agreement data. Moreover, there is a degree of ambiguity, as indicated in the above formula, as to what Germany's true potential for agreements is.

There are a couple possible explanations for this. First, Germany may simply be a case that is not well explained by this institutional approach. This would seem to be an overreaction however, as the institutional theory is not contradicted by Germany's record

of agreement formation; rather, it is a case where there are more agreements than what might be expected. This possibility can be more fully explored following the review of all seven federations. Second, it may be that the strength of Germany's factors that are conducive to coordination far outweighs any potential impediments or alternatives. Whether this would be true only for Germany or in all cases is unclear, but it is possible that the ample pressures towards coordination represent a high potential for agreements, even after the effects of the impediments and alternatives are considered.

What is clear is that Germany does not fit quite so neatly with the theory as Australia or Canada. While by no means contradictory, the German case raises some questions and potential limitations to understanding intergovernmental agreements through institutional theory.

South Africa

In this comparison, Australia, Canada and Germany occupy one extreme: federations with a consistent and prolific record of agreement formation. South Africa serves the opposite purpose as it is a federal state with no agreements whatsoever. Given this, the institutional environment should appear to be the opposite of the previous federations with weaker elements which encourage coordination as well as sizeable impediments and alternatives.

This expectation was confirmed by the analysis of South Africa's institutional features. South Africa is a very centralized federation, both in constitutional and financial terms, drastically limiting the available opportunities for intergovernmental coordination. Additionally, South Africa's welfare state is the smallest of all seven federal systems studied here and possesses a system of intergovernmental forums that plays a secondary

role at best. While the number of subnational governments is not a serious impediment, the National Council of Provinces is a body for full intrastate federalism, providing a potential alternative to agreements:

CON (*Weak*) – INH (*Weak-none*) – ALT (*Some*) = Limited IGA Formation

Expanding the Alternatives category only reinforces the original findings. As in Germany, national legislation can play a role in coordinating the actions of the subnational government without an agreement. Moreover, the primacy of the African National Congress can also allow intra-party institutions to replace some functions of intergovernmental relations and agreements. These additions lead to a new summary formula, but one that has effectively the same conclusion:

CON (*Weak*) – INH (*Weak-none*) – ALT (*Many*) = Very Limited IGA Formation

The limited likelihood for agreement formation predicted by the institutional framework is fully consistent with the results from South Africa. This makes this developing federation a useful case in testing this theory as it demonstrates that an institutional approach to the study of agreements can explain not only those cases where many agreements are present, but also those in which there are very few, or even none.

Switzerland

The Swiss federation presents another example of a case in which there has been a limited number of national agreements formed. Between 1945 and 2005, only 15 agreements were developed that included more than 90% of the cantonal governments, an average of only 0.25 per year. Unlike South Africa, a relatively young, highly centralized federation, Switzerland is an old country with a tradition of relatively independent cantons and a competitive political system. Switzerland, therefore, provides a very

different institutional environment to South Africa, yet produces relatively few agreements as well, making it an interesting, contrasting case.

The Swiss institutional environment is more convoluted than some of the previously discussed cases. While the factors conducive to coordination are not especially strong, they are also not uniformly weak as in South Africa, or even the United States. Moreover, this institutional setting has changed over time with the growth of the welfare state and the development of a new forum for intergovernmental relations: the Conference of Cantonal Governments. Taken together, however, these features cannot provide more than a moderate opportunity for new agreements. These limited prospects are balanced against a significant inhibitor: the coordination difficulty provided by 26 subnational governments. This leads to an initial summary formula which is consistent with Switzerland's limited national agreement formation:

CON (*Moderate*) – INH (*Strong*) – ALT (*Few*) = Limited IGA Formation

The predicted likelihood of Switzerland creating formal, national agreements is further reduced once the Alternatives category is broadened. In the case of the Swiss federation, two additions can be incorporated: first, the role of national framework legislation and second, the proliferation of smaller, regional agreements. This further limits the likelihood that national agreements will be created:

CON (*Moderate*) – INH (*Strong*) – ALT (*Many*) = Limited IGA Formation

This revised summary formula provides a reasonable explanation for the lack of national agreements in Switzerland. Despite the existence of features which might encourage the formation of agreements, there are powerful impediments and alternatives to the creation of new national accords. Again, it should be stressed that part of this is due to the focus on only national agreements, as there are many more regional accords.

Thus, Switzerland provides an interesting case of an established federation that produces few national agreements, but one that can still be explained through institutionalism.

United Kingdom

The chapter concerning the United Kingdom already discussed that there are some difficulties when it comes to considering the data from this case. As a nascent federal system, the UK has a limited record of agreements, with just over a decade of devolution. Moreover, unlike South Africa (the other "young" federation), the UK's record of agreement formation does not have an easily generalizable pattern that allows simple classification. Since the beginning of devolution (1999), 11 concordats have been be created between the UK, Scotland and Wales. Alone, this would present an overall average of 0.92 agreements per year: fourth place in this study, but closer to Australia than to Switzerland. However, a closer examination of these numbers indicates that 6 of these concordats were made in the first year of devolution, while only 5 were formed between 2000 and 2010 - resulting in a more modest yearly average of 0.5. With only this sample of data, it is impossible to predict whether this average will continue to drop or whether agreements will be concluded more frequently.

While this lack of clear patterns creates difficulties, it does not make analysis of this case impossible. As explained in Chapter Nine concerning the United Kingdom, no matter how the number of agreements are calculated (as a per year average), the UK is the median case in this study. Thus, the institutional framework should be neither overly conducive to, or overly prohibitive of, the creation of formal, national agreements.

This contention is confirmed by the analysis of the UK's institutional features. The factors which are conducive to agreement formation are neither very weak or very

strong, when taken in concert. While centralization constitutionally and financially is still substantial, numerous areas of overlap and a large welfare state present some opportunities. The Joint Ministerial Committees are a good representation of the split in the UK's record of agreement formation: early on, they were much more active before virtually disappearing between 2002 and 2008, only to make a comeback since then. While these factors are not especially strong, neither are the impediments or alternatives. The House of Lords cannot be mistaken for a body of intrastate federalism in any way. The number of subnational governments is small, however, the asymmetry that is central to devolution can make national consensus difficult and should be acknowledged. Together, these institutional features do indeed reflect the median nature of the UK's record of agreement formation:

CON (*Moderate*) – INH (*Weak-Moderate*) – ALT (*None*) = Moderate IGA Formation

This formula needs only a minor refinement based on the changes discussed in this chapter. In the UK, national legislation still has the capacity to address a large number of areas, some of which concern the devolved administrations. Incorporating this change leads to the final formula for the UK:

CON (*Moderate*) – INH (*Weak-Moderate*) – ALT (*Some*) = Moderate IGA Formation

This framework is consistent with the record of agreement formation observed more recently. As previously mentioned, discounting the earliest agreements, the UK has formed new concordats at a rate of 0.5 per year, which would place it below the three highly active federations (Australia, Canada and Germany) but ahead of federations that seem to produce few national accords, such as Switzerland or the United States. This analysis also demonstrates an advantage of looking at the variables in aggregate: it is easier to make generalizations about the institutional environment in the UK than it is to

identify the effects of specific variables. It must be emphasized however, that it is still too early to definitively state whether the UK will continue along this trajectory or whether it will see a significant change in its nascent federal system. This could not only change the rate of agreement formation, but also the institutional factors that affect it. Given this, the United Kingdom can best be seen as a case that is consistent with the institutional theory presented here, though this may change in the future as new data becomes available.

United States

The final case to summarize and compare to the institutional theory is, like Switzerland and South Africa, a federation that has had limited experience in forming national agreements. While intergovernmental agreements are certainly not rare in American federalism, only eight could be found that met the minimum 90% threshold of subnational participation between 1945 and 2008 (0.13 per year). With only South Africa forming fewer agreements, the institutional environment in the United States should be among the most inhospitable to new intergovernmental institutions.

The analysis of the institutional variables in the United States certainly confirms this supposition. America has very few institutional features which are conducive to agreement formation, with one of the smallest welfare states, a limited system of intergovernmental forums (at least where agreements are concerned) and a surprising degree of centralization. These weak pressures towards coordination might, by itself, be enough to stymie any agreement formation. The US, however, also has a significant inhibitor to national agreements: the coordination problem presented by its fifty states. This is a substantial barrier to new agreements and is reflected in the summary formula:

CON (*Weak*) – INH (*Strong*) – ALT (*Few*) = Very Limited IGA Formation

With no further changes, this analysis of America's institutional environment would already be fully consistent with the very small number of national agreements found there. However, if the various override clauses and instruments, such as sanctions and pre-emptions are included, the new formula suggests an environment even more unlikely to produce new agreements:

CON (*Weak*) – INH (*Strong*) – ALT (*Many*) = Very Limited IGA Formation

With such an unfavourable institutional climate, the United States provides a useful case that demonstrates the consistency of the hypotheses even in cases with limited agreement formation.

Summary of the Cases

In five of the seven cases – Australia, Canada, South Africa, Switzerland and the United States – the combined effect of the seven institutional variables provided explanations that were entirely consistent with the patterns of agreement formation. This group consists of federations of all types – large and small, poor and rich, new and old – but most importantly, it includes cases that have formed a large number of agreements and those that have created far fewer. Of the two remaining countries, Germany and the United Kingdom, it should be stressed that neither exhibited contradictions between the theory and the data; they simply produced some form of caveat or reservation that was not found in the other cases. For the UK, this is due to the limited data available for this nascent federation. While the results appear to be consistent with the expectations thus far, it is too early to be as definitive with the UK as with the other cases.

This leaves Germany as the only case that provides any real challenge to our understanding of intergovernmental agreements. Again, this is not the challenge of contradictory data, but rather a case of the evidence not quite fitting with the hypothesized outcome. Germany has been among the most prolific in the creation of intergovernmental agreements, yet, if the variables and their interactions are correctly understood (as exemplified by the summary formula), then Germany should at least rank behind the more favourable institutional settings of Australia and Canada. That it does not requires some explanation.

The earlier discussion on Germany suggested two potential explanations for the difference between the expectations produced by the hypothesis and the actual results. One, Germany and its record of agreement formation cannot be adequately explained by a theory that focuses solely on institutions, or at least, not the institutional factors identified here. Two, the strength of the factors conducive to coordination in Germany are so great that they overwhelm the potential effects of the impediments and alternatives. It is worth returning to these potential explanations now, given the analysis of the other cases as well as each of the variables individually.

In light of the consistent results found in the other six cases, the argument that the institutional theory does not adequately explain Germany appears more tenuous. The evidence from the German case is itself not a contradiction, but rather a shortcoming, meaning that it might be more accurate to argue that the institutional theory cannot *fully* explain Germany's potential for intergovernmental agreements. This is something of a fall-back position as it offers no understanding of why the theory had a shortcoming here and is only worth considering should the other explanation prove inadequate.

The other potential explanation – that the strength of the factors conducive to coordination in Germany outweighs the effects of the impediments and alternatives – provides an interesting contention to the initial understanding of the variables. This account would still preserve the original argument that institutional factors can best explain a federation's record of forming national intergovernmental agreements, but would alter the balance of the summary formula and the understanding of how the variables interact with each other. This explanation requires that, at least in the German case, either the factors conducive to coordination must be stronger than anticipated or the inhibitors and alternatives must be weaker. If either of these were found to be true, it would explain the shortcoming between the summary formula's expected outcome and the actual results.

For the first, it is difficult to identify whether Germany's conducive features are stronger than expected. The five variables are intensely polarized with three manifesting very strongly and two quite weakly. It is always possible that the size of Germany's state is sufficiently larger and more complex than in the other cases and that this is enough to overwhelm the effects of the impediments and alternatives. The high degree of overlap may simply be so great as to require a number of avenues of intergovernmental coordination, including both intergovernmental agreements and national legislation. Unfortunately, it is not possible to precisely measure the strength of each variable and the need for agreements (or other coordination mechanisms) that it might create. As such, this remains informed speculation, rather than testable hypothesis.

The other possibility is that the inhibitors and alternatives are weaker than anticipated. Given Germany's system of cooperative federalism and the copious amount of overlapping jurisdictions, there seem to be no grounds to discount the possibility of

federal legislation acting as a real alternative to intergovernmental agreements. There is some reason, however, to doubt the effects of the other alternative: the full degree of intrastate federalism provided by the Bundesrat. The earlier discussion of this variable observed that only two of the seven federal second chambers were deemed to exhibit full intrastate federalism, leaving a limited sample to test this aspect of the hypothesis. While it was consistent with the results in South Africa, it was not in Germany. It may be that intrastate federalism is not much of a barrier, perhaps only serving to exacerbate other factors such as the substantial powers of South Africa's national government. If this is true, and intrastate federalism could be deemed a marginal impediment at best, then Germany's new summary formula would appear as such:

CON (*Strong*) – INH (*Weak-none*) – ALT (*Some*) = Moderate – High IGA Formation

This formulation would make it much easier to reconcile the explanation provided by the institutional environment and the record of agreements than the previous iteration. As mentioned earlier, however, more cases with full intrastate federalism are needed before this variable can be discarded or minimized conclusively.

Unfortunately, it is not possible to definitively select one of these explanations as the data of this study are not sufficient to provide an answer. Based on the information that does exist however, the institutional explanation provided by the second possibility previously discussed would be consistent with earlier findings regarding not only the specific variables but the other six cases. While this cannot be confirmed, it is at least as likely as supplementing the institutional theory with an entirely new factor such as political culture.

In summary, the combined contribution of the seven variables does a remarkable job of explaining the potential for intergovernmental agreements in the federations chosen

for this investigation. In five of the seven cases, the summary formula of these variables is fully consistent with the records of agreements formed. In a sixth case, the UK, the results were again fully consistent, though the data were not sufficient to make it as conclusive a case as the other five. Finally, in the seventh case, Germany, initial results were found to be partially consistent, but a reasonable explanation could be found for the differences between the formula and the data that is in keeping with the overall theme of institutionalism. The success of this approach throughout the cases (in whole or in part) is a credit to the contention that intergovernmental agreements are an observable and predictable element in the study of comparative federalism.

Intergovernmental Agreements and Institutional Theory

This investigation began by adopting an institutionalist perspective for the study of intergovernmental agreements. This approach manifested itself in two important ways throughout this analysis. First, agreements were defined as "intergovernmental institutions", thus framing the central questions of this study in terms of institutional formation and the factors that are most likely to affect it. This definition is consistent with the existing literature on agreements and compatible with Peters' four criteria for the study of institutions. Second, and more contentiously, seven hypotheses were proposed as explanations for differences in agreement formation, all of which concerned institutional variables. Thus, the overall theoretical argument of this study is that agreements are institutions and the likelihood of their formation is best explained by these institutional features of federations.

Although this institutional approach has provided a compelling explanation of agreement formation in these seven federations, it is by no means a perfect account.

Because there is potential room for improvement to our understanding of agreements, it is worth considering other alternatives to the institutional hypotheses advanced by this investigation. These can be divided into two categories: additional institutional variables and different theoretical approaches to the study of federalism, such as a sociological understanding. Both of these potential alternatives will be discussed with reference to the patterns of agreement formation observed in the seven federations.

The seven institutional variables considered in this study were selected based on the contention that they were the features most likely to affect the formation of intergovernmental agreements. Clearly, these seven institutional factors are not the only ones which might have been considered. In Chapter Two, three other possible variables were identified as alternatives or additions to the original seven hypotheses: the degree of centralization in the party system, the differences between the constituent units, and the level of power-sharing in the governing institutions. While the addition of these factors does not exhaust the possible institutional features which might have an effect on agreement creation, it does address three alternatives which are referenced by existing literature on federalism and intergovernmental relations.

The first additional institutional variable is the degree of centralization found in the party system. Inspired by William Riker's work on federalism, a hypothesis based on this variable would suggest that a more centralized party system might increase or decrease the likelihood of intergovernmental agreement formation. The uncertainty in this variable's effect is deliberate because it is not at all clear whether a more centralized or decentralized party system is likely to be conducive to the creation of agreement. This was the principle reason why this variable was rejected in Chapter Two: it does not have the clear causal logic of the seven factors that were included. For argument's sake

however, it is worth considering whether the party system might help explain the patterns of agreement formation if a single, working hypothesis could be determined. Since a decentralized party system diffuses power away from national leaders, it could be assumed that this might have a similar effect to constitutional decentralization. Whereas an integrated party system might be able to address some intergovernmental matters within the party, a decentralized system would need to resort to normal intergovernmental relations.

Even with this tentative hypothesis, a brief examination of the data suggests that this variable does not improve our understanding of intergovernmental agreements. Although it might add to the explanation of why South Africa and its unified party structure produce so few agreements, there are contradictory results with the rest of the cases. Both Germany and Switzerland have integrated party systems, but very different records of agreement formation. The same is true of Canada and the United States: both have decentralized systems, yet Canada forms a large number of agreements while America does not. A closer examination of the results might reveal some mitigating factors, but such clear inconsistencies between the hypothesis and the data confirm the unsuitability of this institutional feature for this analysis.

The second alternative institutional variable concerns the effect of differences in size between the constituent units. Vast differences between the states or provinces may reduce the commonalities between them, potentially impeding national agreements. Additionally, the governments of larger states may be able to "go it alone" and opt out of

national schemes.[762] Similar to the hypothesis concerning the number of subnational governments, greater diversity between the states could provide barriers to coordination.

While this variable may produce a clearer hypothesis than the one concerning the party system, it also fails to find much empirical confirmation. In terms of population disparity, the largest difference is found among the provinces of Canada as Ontario is home to 38% of the population while tiny Prince Edward Island contains only 0.5%.[763] Significant diversity in size is found in most federations: all of the cases in this study except Australia have at least one constituent unit with more than 10% of the population and one with less than 1%.[764] This provides no basis for contrasting these countries and explaining why certain federations form more agreements than others. Where clear differences can be found, they run contrary to the patterns of agreements. For instance, of the largest subnational territories (as a percentage of a federation's total population), California is the "smallest", containing only 12% of America's population, while Ontario is the biggest. If the ability of large governments to act independently affected agreement formation, this effect should be apparent in Canada instead of the United States.

Similar patterns can be found in the economic diversity between the constituent units. Most federations have significant differences in the economies of their provinces and states, similar to the differences in population.[765] Once again, the difference in GDP per capita between the richest Canadian province (Alberta) and the least wealthy (Prince Edward Island) is greater than that found in the American states.[766] This is the opposite

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[762] Bolleyer, *Intergovernmental Cooperation*, 48.
[763] Watts, *Comparing Federal Systems*, 3rd ed., 73.
[764] Ibid. Australia's smallest subnational unit has 2.4% of the population, while its largest possesses 33.6% - still a significant disparity.
[765] Bolleyer, *Intergovernmental Cooperation,* 48.
[766] In 2008 figures, Alberta's per capita GDP was$81,188 while PEI's was $33,333. In 2010, the richest American state (Alaska) had a per capita GDP of $63.090 while the smallest economy (Mississippi)

of what would be expected given the patterns of agreement formation. Much like the degree of centralization in the party system, the differences between the constituent units variable does not provide the foundation for a useful approach to understanding agreement formation.

The last alternative institutional hypothesis argues that the degree of power-sharing required by government institutions will affect the likelihood of agreement formation.[767] Because this variable has already been used by Bolleyer to study the degree of institutionalization in intergovernmental arrangements, it possesses the clarity and causal logic not found in the previous two factors. Although the Theory Chapter argued that this was not the most appropriate variable for this particular investigation, it is worth briefly considering whether it helps to explain the differences in agreement formation between federations.

Unlike the other two alternative institutional hypotheses, the power-sharing variable is not immediately contradicted by the data. At first glance, it seems to help explain the small number of national agreements found in Switzerland and the United States, two federations with separate legislative and executive branches. Because of the increased difficulty in accommodating the interests of factions in both branches, this could help explain why agreements in these federations are more infrequent than in pure parliamentary systems such as Australia and Canada. Unfortunately, this analysis, and the usefulness of this hypothesis, is much less compelling upon further consideration. There are three reasons for this failing. First, while the power-sharing hypothesis might

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produced $29,318 per person. Data retrieved from: Statistics Canada, "Gross domestic product, expenditure-based, by province and territory," November 4, 2010, http://www40.statcan.ca/l01/cst01/econ15-eng.htm (accessed July, 22, 2011) and the United States Department of Commerce, Bureau of Economic Analysis, "Gross Domestic Product by State," http://www.bea.gov/iTable/iTable.cfm?reqid=70&step=1&isuri=1&acrdn=1 (accessed July 22, 2011).

[767] Bolleyer, *Intergovernmental Cooperation*, 180-182.

provide an explanation for the small number of agreements in Switzerland and the United States, it does not offer much explanation for the differences between the five other parliamentary systems. Yet if the definition of power-sharing was expanded to include elements such as a strong upper chamber or the frequency of coalition governments, it would then fail to correctly interpret the results. This variable could not effectively explain why Germany, with its history of coalition governments and influential Bundesrat forms dozens of agreements while South Africa -which used Germany as a model for certain government institutions - has created none. Second, the power-sharing hypothesis only provides a reasonable explanation for agreements which involve both the executive and the legislative arms of government. This is acceptable in the Swiss case, but not for the American one as there are two types of formal agreements in the United States. Governments in America can either form interstate compacts, which are passed like laws, or administrative agreements, which involve only members of the executive. While power-sharing can provide an understanding of why there are few national compacts, it is not helpful in explaining why there are also so few national administrative agreements. Third, and perhaps most importantly, the presence of this variable should not only restrict the formation of national agreements, but all agreements. However, as was discussed in Chapter Eight, Switzerland forms a significant number of regional agreements. If power-sharing were a significant obstacle, there should be fewer of these as well. Instead, it is more likely that a factor such as the number of subnational governments is the key variable for Switzerland and the United States. The large number of governments is consistent in explaining why there are so few national agreements, while still allowing for a number of regional or multilateral ones.

Given the flaws with each of the three alternative variables, it seems that the seven hypotheses advanced by this study do a good job of creating a sound institutional understanding of intergovernmental agreement formation. Yet, even if this investigation provides a good example of an institutionalist approach, this is not the only perspective for the study of federalism. At the beginning of this investigation, two other common approaches to federalism were identified: a rational-choice model and a sociological understanding. Before concluding this comparative analysis, it is worth briefly returning to these two perspectives and considering how either of these might improve our understanding of intergovernmental agreement formation in these seven federations.

As was noted in Chapter Two, rational-choice theory does not present a direct challenge to the institutional analysis of this study. Instead, these two approaches act as complements to one another as institutions provide the rules, incentives and constraints which influence actors in a rational-choice model. [768] When examining individual agreements, where it is possible to consider the individual actors and their choices, rational-choice theory becomes a useful tool. This is reflected in the six hypothesis concerning why individual agreements are created, summarized briefly in the theory chapter. However, when considering a federation`s record of agreements, it becomes impossible to consider the rationality, motivations and specific goals of the thousands of officials and politicians across several national and subnational governments. The best that can be considered is how these actors would respond to the common features which would shape their preferences and incentives in all circumstances or, in other words, the institutional opportunity structure. Thus, for an investigation into patterns in agreement formation, the institutional approach used here is a more appropriate choice.

[768] Elster, "Introduction," 8-10 and Weingast, "Second Generation Fiscal Federalism," 280-282.

This leaves the sociological understanding of federalism as the principle alternative paradigm to institutionalism for the study of intergovernmental agreements. The sociological approach argues that federalism is an institutional response to economic, social, political and cultural forces.[769] This approach would argue that underlying social, political and economic factors are much more likely to explain the creation of agreements than institutional variables. This might include factors such as ideological divisions between political parties, or the number and distribution of languages spoken, or whether the federation`s political culture encourages consensus in intergovernmental relations.

Short of a completely new study of agreements using the sociological approach to analyze intergovernmental agreements, it is not possible to determine which potential social forces might have the greatest effect of agreement formation. Although determining the precise factors may not be feasible, the sociological perspective can still be used to briefly interpret the results found by this investigation. This is especially important when considering Germany, the one federation of the seven which was not (initially, at least) fully explained by the institutional hypotheses. Germany has often been described as a system of "cooperative federalism" in which the federal government and the länder work together through a system of overlapping responsibilities. More than just an institutional arrangement however, this cooperative system has been described as a cultural, as well as institutional phenomenon as government officials have collaborated to "maintain a 'uniformity of living conditions' across the Federal Republic".[770] This cooperative political culture in intergovernmental relations could explain why Germany has produced such a large number of agreements even though its institutional

[769] Livingston, *Federalism and Constitutional Change*, 1-2.
[770] Charlie Jeffery, "German Federalism from Cooperation to Competition," in *German Federalism: Past, Present, Future*, ed. Maiken Umbach, (Houndmills & New York: Palgrave, 2002), 172.

environment does not seem to have as much potential as Australia's or Canada's. German politicians and officials may simply be more likely to form agreements than their counterparts in other federations.

While the sociological perspective seems to provide a reasonable understanding of the German data, this does not demonstrate that such an approach is clearly more effective than the institutional theory espoused by this analysis. Although the institutional explanation for Germany is not perfect, the earlier discussion in this chapter argued that these results can be reconciled with institutional theory. A simple alteration to the initial hypotheses - specifically, the possible removal of the intrastate federalism variable - provides a better explanation for Germany's record of agreement formation, while remaining consistent with the other cases. Yet, even if one is unconvinced by this attempt to fully resolve the inconsistencies between intergovernmental agreements in Germany and institutionalism, this does not prove the superiority of a sociological approach. As this chapter has demonstrated, the institutional variables included in this comparative analysis provide convincing explanations for the differences in agreement formation in all seven federal systems. While a sociological perspective on federalism might - and this is by no means certain - provide a better understanding of Germany, can the same be said for other cases? While Germany's political culture might provide a cooperative atmosphere that is conducive to the formation of national agreements, can the same be said of Canada, which has experienced periods of divisive and contentious intergovernmental relations yet has created an equally large number of agreements?[771] On the other hand, the sociological approach might allow for a different, but equally

[771] David R. Cameron and Richard Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism," *Publius,* 32, no. 2 (2002): 50-53.

useful, explanation of Switzerland and its propensity for regional intergovernmental agreements. Although a good understanding of this federation can be found through institutional theory, this does not preclude a sociological study from providing useful insights.

Ultimately, it is impossible to definitively conclude that agreements are better explained by institutions than by social forces, without doing a complete analysis of intergovernmental agreement from a sociological perspective. What this study does do, however, is provide significant evidence that intergovernmental agreements are thoroughly understood by examining them through an institutionalist paradigm, demonstrating the usefulness of this approach.

This comparative investigation has attempted to provide a greater understanding of intergovernmental agreements and the factors that influence the likelihood of their formation. Beyond this goal, it has also attempted to serve as an example of the usefulness of an institutional approach to comparative politics. The fact that the institutional hypotheses provide compelling explanations for six of the cases - and a reasonably complete understanding of the seventh - serve as a confirmation of this theoretical paradigm. The lack of an obviously superior alternative approach provides further reinforcement to the choice of institutionalism as an effective means of studying comparative federalism and intergovernmental relations.

Chapter Twelve: Conclusion

At the beginning of this study, a theoretical framework was proposed for the comparative analysis of intergovernmental agreements in federal systems. Throughout the previous chapters, this institutional approach was applied to seven federations in an effort to understand why some appear to create more agreements than others. The preceding chapter provided a comparative evaluation of these results and demonstrated that the institutional hypotheses could supply a reasonable explanation for the differences in the likelihood of agreement formation in federal systems. This final chapter will summarize and review these findings and explain their significance and limitations before suggesting further avenues for future research.

The Results and Their Significance:

Given the lack of scholarly attention that has been paid to the topic of intergovernmental agreements, there were several areas in which this study had the potential to improve our understanding of these accords. In addition to the contributions made by the theoretical framework, the individual country analyses and the comparative investigation of the results, the data sets are interesting in and of themselves as there has not been a similar attempt to collect and compare records of intergovernmental agreements from so many federations. The findings from each of these four areas will be briefly reviewed, with emphasis on the significance and limitations of these results.

Findings Concerning the Number and Type of Agreements

To begin with, there are some simple, but interesting observations that can be made concerning intergovernmental agreements, particularly regarding their format and their frequency. First, in all seven federations, there was a recognizable, formal type of intergovernmental agreement. While complete databases and registries could not be found for Australia, India, Mexico, and Spain, there was also evidence of formal intergovernmental agreements in these federations as well. Even South Africa, which has created no formal agreements, has gone to great lengths to provide a format, procedure and resources for creating these institutions. This point may be taken for granted, especially in federations in which intergovernmental agreements serve a prominent role, but this study serves as a confirmation that agreements do serve as a means of coordination in many federal systems.

Second, some federations allow for not only one type of formal agreement, but two. Of the seven federal systems considered by this study, two had a pair of distinct categories of formal, written accords. In Germany, there are interstate treaties known as *intraföderale staatsverträge*, as well as administrative or executive agreements known as *verwaltungsabkommen.* In the United States, the two types of agreements are interstate compacts and administrative or interstate agreements. In both cases, the first sort of agreement serves as a form of interstate law and must be passed through the legislatures of the signatories, while the second is an arrangement between the executive branches. It is interesting that both federations developed similar formats for agreements despite possessing different federal and political institutions.

Third, while there were sizeable differences in the number of national agreements found in these federations, the available evidence suggests that agreements serve an important role in all but South Africa. For Australia, Canada and Germany, this

conclusion is obvious given the large number of national agreements that have been created in each of these federations. It may be too early to make definitive conclusions regarding the United Kingdom, but there is evidence of the ubiquity of concordats there. Switzerland and the United States would seem to belong in a group with South Africa as federations in which intergovernmental agreements play a much smaller role. Such a conclusion would be mistaken, as both these cases have lower numbers of *national* agreements only. From the incomplete data available, both of these federations have hundreds of agreements that are bilateral, multilateral and regional in scope, demonstrating the widespread use of these accords in intergovernmental relations. While it may not be possible to gather the data required to do a comparative analysis of agreements that include fewer participants, it is necessary to reiterate the distinction here. Intergovernmental agreements are an important part of most of the federations in this study and are not simply an arrangement featured in a small number of federal systems.

Contributions Made by the Theoretical Analysis

This investigation is more than simply a heretofore unassembled collection of intergovernmental agreements. It also provides a theoretical framework for the study of these institutions. Seven institutional features were identified as variables which might affect the formation of intergovernmental agreements. As the analysis in Chapter Eleven explained, individually, these hypotheses had mixed results. There is no single hypothesis that was fully consistent with the data in every federation and two of the variables (overlap and the welfare state) were consistent in only three cases. With the possible exception of the seventh hypothesis (the presence of intrastate federalism), however, all of these variables are integral to the understanding of at least two

federations. Removing a variable such as constitutional overlap from this analysis would limit the understanding of federations such as Australia and Germany, where overlap appears to be a key impetus for agreement formation. What this suggests is that there is no single institutional variable that can adequately explain why some federations are more likely to create agreements than others. This reflects the complex relationships between the many institutional factors that are present in every federation; hence, it should not be surprising that it is not possible to identify a single factor which, alone, explains agreements.

While the institutional hypotheses have some weaknesses individually, they are much more effective when considered in aggregate. When combined into a single summary formula, which reflects the collective effects of the seven variables, a more complete explanation of intergovernmental agreement formation emerges. This combination also allows the variables to be categorized based on their effects, a consideration that was implied at the outset of this study but only made clear by the individual country analyses. Of the seven institutional features, five generally act as features conducive to the formation of new agreements: the degree of overlap, the level of centralization, the size and scope of the federal spending power, the size and scope of the welfare state and the presence of established bodies for intergovernmental relations.[772] The remaining two factors - the number of subnational governments and the presence of intrastate federalism - serve as an inhibitor and alternative to the creation of national agreements, respectively. Moreover, the formula also recognizes an unexpected development of this analysis: the role of other alternatives to intergovernmental

[772] As the analysis in Chapter Eleven clarified, in some cases, the size of the spending power can grow to the point where it no longer encourages agreement formation and may even become a barrier.

agreements. This is an acknowledgement that intergovernmental agreements do not exist in a vacuum. If there is a need for governments in federal systems to collaborate, they may have other means of doing so, particularly through federal law or regulatory instruments (such as pre-emptions and sanctions in the United States). The presence of these alternatives may further reduce the likelihood of agreements and the inclusion of this factor is an important concession to the complicated nature of intergovernmental relations.

Through the combination of these features into a single, coherent formula, the institutional theory argued by this study provides a strong explanation for the record of agreement formation of six of the seven federations. In Australia, the strong, institutionalized system of intergovernmental relations, combined with an active spending power and a high degree of overlap, creates fertile ground for intergovernmental agreements. With virtually no impediments or alternatives - Australia has only six states and a partial degree of intrastate federalism - institutional theory offers a good explanation of Australia and its large number of national accords.

Institutional theory also provides an effective account for Canada's substantial record of agreement formation. As with Australia, Canadian federalism offers few impediments and no alternatives to the formation of agreements. There are, however, a number of factors which encourage their creation, including a small, but active spending power and a number of established and lasting forums for intergovernmental relations. Most importantly, Canada is one of the most decentralized federations in this study making agreements a necessary tool for intergovernmental collaboration.

The case of South Africa proves that an institutional approach to the study of agreements can also provide an understanding of federations that create few, or even no,

national accords. South Africa represents almost a "perfect storm" of institutional features that are unlikely to encourage agreements. This African federation is highly centralized, in its constitutional and financial arrangements, enabling national legislation to serve as a powerful alternative to agreements. The strength of the national government is enhanced further by National Council of Provinces, which serves as forum for intrastate federalism. With weak intergovernmental bodies and the smallest welfare state of these seven cases, the institutional environment in South Africa is not favourable to the creation of agreements.

Switzerland is a bit more of a nuanced case than the previous three, but still one that can be understood through the institutionalist perspective. The Swiss example lies somewhere between the more extreme cases in this comparison, as the factors which encourage and discourage agreement formation can best be described as average or moderate. Switzerland's division of powers provides for broad federal legislative authority while also allowing the cantons a great deal of latitude in administering government programs. This allows for federal legislation to serve as an alternative to agreements. Another feature of Swiss federalism is the limited effect of the federal spending power, again reducing the likelihood that agreements will be formed. Finally, Switzerland's twenty-six cantons make national coordination difficult and allow for governments to form regional agreements along linguistic and cultural lines. This creates both an impediment and an alternative to national intergovernmental agreements.

Although not formally a federation, the institutions of the United Kingdom and its system of devolution proved to be compatible with this institutional approach. The United Kingdom's institutional environment can be said to be "moderate" in terms of its effect on encouraging the creation of intergovernmental agreements. Although still very

centralized, the division of powers found in the country has created a notable degree of overlap. Moreover, a large welfare state and a developing system of intergovernmental relations provide additional forces which may encourage agreements. Balanced against these moderate opportunities for agreement formation are relatively minimal impediments and alternatives, the most notable being that the asymmetrical nature of British devolution may impede agreements between all the devolved governments. Together these institutional features produce a system which has moderate potential for agreement formation, a finding that is consistent with the data. As devolution is an ongoing and developing process, however, these conclusions are subject to change.

The United States, like South Africa, provides another good example of a federation with an institutional framework that is not conducive to the formation of national intergovernmental agreements. The American federal system is surprisingly centralized, given its origins, and its system of fiscal transfers tends to be a source of federal power instead of intergovernmental collaboration. With a comparatively small welfare state and a set of intergovernmental forums which provide few opportunities for coordination, the likelihood of agreements is reduced further. Yet the most influential forces in the American example are the large number of subnational governments and the alternatives to national agreements. With fifty states, achieving the agreement of ninety percent of the state governments is very difficult. Moreover, the federal government has several intergovernmental regulatory instruments, such as pre-emptions and cross-cutting sanctions, which allow it to force a national consensus upon the states, fulfilling the same purpose as an agreement. With an institutional structure that makes national agreements difficult to create, these variables provide a good explanation for the small number of these accords in the United States.

While the institutional approach taken by this study explains six of the seven cases very effectively, it encounters some difficulties when applied to the German federation because it is a case where there are more agreements than the institutional hypotheses might predict. There are several variables which strongly encourage the creation of agreements, including a large number of institutionalized intergovernmental bodies, as well as the highest degree of constitutional overlap and welfare spending in this study. This is balanced by the potential alternative of the *Bundesrat* and its role as a body for intrastate federalism. Additionally, Germany's system of administrative federalism allows federal legislation to coordinate national policy across a large number of areas, even ones in which the länder have a prominent role. Thus, Germany has a number of institutional features which encourage agreements, but the Federal Republic also has a couple of strong alternatives to collaborating through agreements. All other things being equal, this should mean that Germany should have fewer accords than Australia and Canada, which both have virtually no impediments or alternatives to agreements.

Chapter Eleven discussed, at length, the potential explanations for the shortcomings of the institutional approach in the German case. First, Germany may be a case that an institutional approach has difficulty explaining. It may be that another paradigm, such as a sociological understanding of federalism, would offer a more compelling explanation of the German record of intergovernmental agreements. Second, the factors that encourage agreement formation in Germany may simply be strong enough to overcome any effects of intrastate federalism or federal legislation (an alternative to agreements). Third, it is possible that intrastate federalism has only a limited effect in reducing the likelihood that agreements will be created. Given the success of the institutional approach in other cases, both the second and the third alternatives seem

plausible, but there is no way to determine which of these three possibilities best accounts the German case.

Conclusions From the Comparative Analysis: Their Limitations and Importance

These difficulties in the analysis of Germany highlight some of the limitations of this study which must be acknowledged. First, these variables seem to do a good job of explaining why certain federations form more intergovernmental agreements than others. It is not possible, however, to conclude definitively that these factors are the primary forces behind these intergovernmental institutions. Another approach might yield better results, especially for a case such as Germany which is not fully explained by the institutional approach as currently constructed here. Yet, even if these institutional hypotheses are the best approach to the study of agreements, this investigation is also limited in its ability to discern which individual variables are the most important for agreement formation. The qualitative method of this analysis and the complicated network of institutional features in federations make it difficult to conclusively demonstrate which variables are the most influential in any particular case. This is especially true in cases where the effects of institutions may be both conducive to and inhibitors of agreement formation, such as the dynamic between constitutional overlap and intrastate federalism in Germany. This problem is unavoidable, as the number of cases and the types of variables being studied are not well-suited to a statistical analysis. The best that can be done is to identify the features which seem to have the greatest influence and compare these with the data.

The issue with the number of the cases leads to the second general limitation of this study. Although this investigation compares, by far, the largest number of federal

systems in a study of intergovernmental agreements, there are still only seven cases in total. This limits the diversity in some of the institutional variables, making it difficult to draw definitive conclusions. To return to an earlier example, the case selection does not provide enough information to determine whether intrastate federalism has a clear effect on agreement creation. Only two of the seven federations have a full degree of intrastate federalism. In South Africa, this is consistent with the data, however the powerful effects of centralization in that country may make intrastate federalism redundant there. In Germany, intrastate federalism seems to have little to no effect, as a large number of agreements have been created. In an ideal sample, there would be at least one more federation with full intrastate federalism that could be compared to these two cases, potentially allowing for a better understanding of this variable. In addition to such problems with the diversity of the institutional variables, the cases used in this study are also less varied than a truly representative sample of federations would ideally be. Specifically, the cases are heavily weighted towards English-speaking and economically developed federations. As the methodology discussion in Chapter Three indicated, this was not due to a deliberate choice to exclude other federations; rather, it was the consequence of being unable to find sufficient data to include more countries. Given that South Africa was something of an outlying case - very centralized, no agreements - more work must be done with newer, economically developing federations and the role that agreements play in those countries.

While these limitations are important to consider, they do not overshadow the important contributions of this study. In addition to the benefits of assembling a great deal of data on intergovernmental agreements, this analysis makes several novel contributions to the understanding of agreements and the study of federalism as a whole.

To begin with, this is one of the few attempts to discern why federations create intergovernmental agreements and what factors might help or hinder their formation. Agreements are an important but understudied feature of federal systems, and until this analysis, there were virtually no attempts to create a dedicated theoretical framework to explain them across multiple cases. By developing a set of testable hypotheses that could be applied to several federations, this study provided a deeper and more detailed analysis of these institutions than was previously available. Moreover, no previous study has attempted an investigation into intergovernmental agreements in so many federations. The few existing works on agreements are generally single country case-studies or else they focus on comparing no more than two or three federations. This analysis provides data for seven federations and by including so many cases, it allows for more generalizable conclusions and a better understanding of agreements. More generally, this study of intergovernmental agreements furthers our understanding of federal institutions, how federations operate and provides an institutional explanation for both constitutional and non-constitutional change in federal systems. By examining intergovernmental agreements, this investigation sheds light on an understudied, yet important element of the institutional environment in federal systems. Through the consideration of variables which may affect the formation of agreements, this study also adds to our understanding of how federations function and why these operations differ between countries. Additionally, this research provides an institutional explanation for change in federal systems. Finally, this project provides a useful example of an institutional approach to the study of federalism and intergovernmental agreements. The institutional hypotheses have, on the whole, supplied a compelling understanding of why certain federations seem more predisposed than others to create agreements. This not only dramatically increases

our knowledge concerning intergovernmental agreements, but also our understanding of federalism and intergovernmental relations.

Avenues for Future Research:

This study attempted to begin filling a significant gap in the literature on federalism and intergovernmental relations by exploring the topic of intergovernmental agreements. Despite the contributions made by this investigation, this is only a start and there is much more research that can be done in this important field. Aside from extending this analysis to other federations or potentially examining new institutional variables, two major avenues for future research are worth highlighting here.

First, future scholarship on the topic of intergovernmental agreements could investigate the "micro" aspects of their creation. In the theoretical review of Chapter Two, a rational-choice model was proposed as a means of understanding why governments might seek to form specific agreements. Six factors were suggested as reasons for collaboration through agreements, but this is not necessarily an exhaustive list. Because these hypotheses were not the emphasis of this study, they were not analyzed or tested further. Much like the "macro" factors which affect a federation's propensity to form agreements, there is a significant dearth of comparative research concerning why individual agreements are created. Such an investigation would be very different than this institutional analysis, but would provide a great deal of useful information regarding why particular agreements are created in federal systems.

A second potential direction for future research would be to study intergovernmental agreements through a different perspective, specifically a sociological approach. In the theory and comparative analysis chapters, a sociological understanding

of federalism, such as that advanced by Livingston, was suggested as a possible alternative to institutionalism in the study of agreements. While the institutional approach used here provides a powerful explanation for why certain federations form more agreements than others, there remains the possibility that a sociological method might provide a reasonable alternative. For some cases, such as the oft-discussed Germany, this approach to the study of agreements might provide better explanations.

While this is not an exhaustive list of possible future projects, these are two major areas where the understanding of intergovernmental agreements might be improved. Even with the addition of this investigation, agreements remain a topic that warrant greater scholarly attention and inquiry.

Intergovernmental agreements are an important part of federal systems and a useful institution within intergovernmental relations. They can serve many purposes, including the exchange of information, the establishment of new government programs and even constitutional change. This comparative investigation into agreements has demonstrated that while these arrangements may be understudied, they are not incomprehensible. Although there are differences between federations, agreements seem to play an important role in most of them. Moreover, these federations can be effectively compared and analyzed by studying the institutional features of federal systems because variations in these structures can account for much of the differences in agreement formation. While there are some limitations to this analysis, this project represents the deepest and most comparative approach to the study of intergovernmental agreements. Hopefully it can serve as a foundation for increasing scholarship on this important topic.

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Appendix A

Australian Intergovernmental Agreements 1945 - 1987, 1990 - 2008

Year	Australian Agreement Title	Participants	Policy Field
1953	Blood Transfusion Services	All	Health
1955	Exotic Diseases Cost Sharing Agreement	All	Health
1969	Fishing Industry Research Agreement	All	Agriculture and Food
1972	States Grants (Fruit-Growing Reconstruction) Agreements	All	Agriculture and Food
1972	Softwood Forestry Agreements	All	Energy and Natural Resources
1973	National Plan to Combat Pollution of the Sea by Oil	All	Environment
1973	Sewerage Agreements	All	Environment
1976	Agreement as to the Responsibility between the Commonwealth of Australia and State Authorities for Marine Search and Rescue Operations	All	National Security and Emergency Response
1978	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation	All	Economic Development and Regulation
1979	Offshore Constitutional Settlement	All	Energy and Natural Resources
1981	Commonwealth-State Policy on Financial Assistance to Group Apprenticeship Schemes	All	Education
1981	National Air Monitoring Program	All	Environment
1982	National Police Research Unit	All	Justice and Law
1983	Commonwealth-State Medicare Hospital Agreements	All	Health
1984	Agreements on the Eradication of Brucellosis and Tuberculuosis in Cattle	All	Agriculture and Food
1984	National Sports Facilities Program	All	Arts, Culture and Sport

Year	Australian Agreement Title	Participants	Policy Field
1984	Agreement for the Establishment of the National Crime Authority Intergovernmental Committee	All	Justice and Law
1984	Commonwealth-State Housing Agreement	All	Welfare and Income Support
1985	Community Employment Agreement	All	Economic Development and Regulation
1985	States Grants (Rural Adjustment) Agreement	All	Government Finance
1985	Home and Community Care Agreement	All	Health
1986	National Preference Agreement	All	Economic Development and Regulation
1986	Australian Traineeship System	All	Education
***	**** Gap in data between 1987 - 1989 ****	***	***
1990	Agreement on the Adoption of Uniform Trade Measurement Legislation and Administration	All except WA	Economic Development and Regulation
1991	Uniform Presentation Agreement	All	Government Finance
1992	Mutual Recognition Agreement	All	Economic Development and Regulation
1992	Intergovernmental Agreement on the Environment	All	Environment
1993	Commonwealth-State-Territory Agreement on the Rural Adjustment Scheme	All	Economic Development and Regulation
1994	Conduct Code Agreement	All	Economic Development and Regulation
1994	Agreement to Establish the Australian Building Codes Board	All	Economic Development and Regulation
1994	Financial Agreement 1994	All	Government Finance
1995	National Registration Scheme for the Control of Agricultural and Vetrinary Chemical Products	All	Agriculture and Food

Year	Australian Agreement Title	Participants	Policy Field
1995	Memorandum of Understanding on Animal and Plant Quarantine Matters betweeen the Commonwealth of Australia and the States and Territories	All	Agriculture and Food
1995	Agreement to Implement the National Competition Policy and Related Reforms	All	Economic Development and Regulation
1995	Competition Principles Agreement	All	Economic Development and Regulation
1995	Censorship Agreement between the Commonwealth, States and Territories of Australia	All	Justice and Law
1996	Head of Government Agreement on Public Secton Superannuation Schemes	All	Government Finance
1997	Natural Gas Pipeline Access Agreement	All	Energy and Natural Resources
1997	Intergovernmental Agreement for a National Marine Safety Regulatory Regime	All	National Security and Emergency Response
1999	Intergovernmental Agreement on the Reform of Commonwealth-State Fiscal Relations	All	Government Finance
2000	Food Regulation Agreement	All	Agriculture and Food
2000	Operational Guidelines for Commonwealth, States and Territories on Investment, Promotion, Attraction and Facilitation	All	Economic Development and Regulation
2000	National Action Plan for Salinity and Water Quality	All	Environment
2000	Intergovernmental Agreement for the Establishment and Operation of "CrimTrac"	All	Justice and Law
2001	National Tax Equivalence Regime (NTER)	All	Government Finance
2001	Gene Technology Agreement	All	Science and Technology
2002	Memorandum of Understanding: National Response to a Foot and Mouth Disease (FMD) Outbreak	All	Agriculture and Food

Year	Australian Agreement Title	Participants	Policy Field
2002	Corportations Agreement	All	Economic Development and Regulation
2002	Intergovernmental Agreement on the National Plan to Combat Pollution of the Sea by Oil and other Noxious and Hazardous Substances	All	Environment
2002	Commonwealth Places (Mirror Taxes) Agreement	All	Government Finance
2002	GST Administration Performance Agreement	All	Government Finance
2002	Intergovernmental Agreement on Terrorism and Multijurisdictional Crime	All	National Security and Emergency Response
2003	National Blood Agreement	All	Health
2003	An Agreement Concerning the Accountability and Administrative Procedures for the Handgun Buyback	All	Justice and Law
2003	Memorandum of Understand for the Establishment and Funding of the National Research Program	All	Science and Technology
2004	Intergovernmental Agreement for Regulatory Reform in Road, Rail and Intermodel Transport	All	Transportation
2004	Australian Energy Market Agreement	All	Energy and Natural Resources
2004	Australia Immunisation Agreement	All	Health
2004	Intergovernmental Agreement on National Search and Rescue Response Arrangements	All	National Security and Emergency Response
2004	Intergovernmental Agreement on Reserach Involving Human Embryos and Prohibition of Human Cloning	All	Science and Technology
2005	Professional Standards Agreement	All	Economic Development and Regulation
2005	Tourism Collaboration Intergovernmental Agreement	All	Economic Development and Regulation
2005	An Agreement on Surface Transport Security	All	National Security and Emergency Response

Year	Australian Agreement Title	Participants	Policy Field
2006	Competition and Infrastructure Reform Agreement	All	Economic Development and Regulation
2006	Intergovernmental Agreement in Relation to a National Liquid Fuel Emergency	All	Energy and Natural Resources
2006	National Health Call Centre Network (NHCCN) Agreement	All	Health
2006	Intergovernmental Agreement Establishing Principles Guiding Intergovernmental Relations on Local Government Matters	All	Institutions and Governance
2007	Intergovernmental Agreement for a National Registration and Accreditation Scheme for Health Professionals	All	Health
2007	National Identity Security Strategy Agreement	All	Justice and Law
2008	Food Regulation Agreement	All	Agriculture and Food
2008	Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety	All	Health
2008	National Health Security Agreement	All	Health
2008	Personal Property Securities Law Agreement	All	Justice and Law
2008	An Agreement on Australia's National Arrangements for the Management of Security Risks Associated with Chemicals	All	National Security and Emergency Response
2008	National Partnership Agreement Regarding Indiginous Early Childhood Development	All	Welfare and Income Support
2008-09	Intergovernmental Agreement on Federal Financial Relations	All	Government Finance

Total National Agreements: 76 **Average Agreements Per Year: 1.27**

Appendix B
Canadian Intergovernmental Agreements 1945 - 2008

Year	Canadian Agreement Title	Participants	Policy Field
1952	Blind Person's Allowance	All	Welfare and Income Support
1955	Disabled Persons' Allowance	All	Welfare and Income Support
1958	Hospital Insurance and Diagnostic Act Agreement	All	Health
1958	Disabled Person's Pension	All	Welfare and Income Support
1962	Vocational Rehabilitation – Disabled Persons	All	Welfare and Income Support
1962	Agriculture and Rural Development Act Agreement (ARDA)	All	Agriculture and Food
1963	Citizenship Instruction – Language Textbook Agreement	All	Education
1964	Crop Insurance Program	All	Agriculture and Food
1966	CPP Investment Fund	All but QC	Welfare and Income Support
1967	Canada Assistance Plan Agreement	All	Welfare and Income Support
1967	Adult Occupational Training Act Agreement	All	Education
1971	Summer Language Bursary Program	All	Education
1971	Federal-Provincial Assistance to Minority Language Instruction	All	Education
1971	Native Courtworker Program	All	Welfare and Income Support
1972	Small Farm Development Agreement	All	Agriculture and Food
1972	Comprehensive Egg Marketing Program Agreement	All	Agriculture and Food
1973	Comprehensive Turkey Marketing Program Agreement	All	Agriculture and Food
1974	General Development Agreements (DREE)	All	Government Finance
1975	Hydrometric Agreement	All	Agriculture and Food
1975	Milk Marketing Plan	All	Agriculture and Food
1976	Agreement on the Compensation to Victims of Crime	All	Justice and Law
1976	Anti-Inflation Agreement	All	Economic Development and Regulation

Year	Canadian Agreement Title	Participants	Policy Field
1977	Established Program Financing Agreement	All but QC	Government Finance
1977	Rent Supplement Program	All	Welfare and Income Support
1977	Federal-Provincial Agreement on the Establishment of a National Chicken Marketing Program	All	Agriculture and Food
1978	Urban Transportation Program Agreement	All	Transportation
1979	Community Services Program	All	Welfare and Income Support
1979	Agreement Respecting Lotteries	All	Economic Development and Regulation
1980	Energy Bus Program	All	Energy and Natural Resources
1980	Gun Control Agreement	All	Justice and Law
1984	Memorandum of Understanding Concerning Tourism Development Strategy	All	Economic Development and Regulation
1984	Interagency Forest Fire Centre Agreement	All	Energy and Natural Resources
1984	Agreement for Minority Language Education	All	Education
1985	Memorandum of Understanding on the Task Force on Deregulation and Paper Burden	All	Instutions and Governance
1985	Federal-Provincial Lottery and Sports Funding Agreement	All	Arts, Culture and Sport
1985	Memorandum of Understanding with Respect to Science and Technology	All	Education
1987	Meech Lake Accord	All	Instutions and Governance
1987	Memorandum of Understanding Respecting a Federal-Provincial-Territorial Agreement on the Adoption of a National Safety Code for Motor Carriers	All	Transportation
1988	Agreement Concerning the Collection and Sharing of Information on Human Resources Training Development	All	Education
1988	National Tripartite Stabilization Agreement for Honey	All	Agriculture and Food
1989	Alcohol and Drug Treatment Rehabilitation Agreement	All	Health

Year	Canadian Agreement Title	Participants	Policy Field
1989	Intergovernmental Agreement on the Exchange of Information on Financial Institutions	All	Economic Development and Regulation
1989	Farm Management Training Program	All	Agriculture and Food
1989	National Tripartite Program for the Price of Pork	All	Agriculture and Food
1990	Crop Drought Assistance Agreement	All	Agriculture and Food
1990	Farm Income Assistance Agreement	All	Agriculture and Food
1991	Agreement regarding the implementation of remedial measures at orphan high risk contaminated sites	All	Environment
1991	Interprovincial Agreement on Beef Marketing	All	Agriculture and Food
1992	Central Registry of Divorce Proceeding Agreement	All	Justice and Law
1992	Environmentally Sustainable Agriculture Agreement	All	Agriculture and Food
1994	Agreement Respecting Administration of the Transportation of Dangerous Goods Act, 1992	All	National Security and Emergency Response
1994	Agreement on Internal Trade	All	Economic Development and Regulation
1994	Infrastructure Program Agreement	All	Economic Development and Regulation
1994	Exchange of Services Agreement regarding the provision of services to federal offenders in provincial correctional centres	All	Justice and Law
1995	Agreement Regarding the North American Agreement of Labour Cooperation	All	Instutions and Governance
1995	Federal-Provincial Cooperation Agreement on the Underground Economy, Tax Evasion and Smuggling	All	Justice and Law
1995	Master Agreement on the National Blood Supply Program	All	Health
1996	Labour Market Development Agreement	All	Economic Development and Regulation

Year	Canadian Agreement Title	Participants	Policy Field
1996	Federal-Provincial Agreement on the Promotion of Official Languages	All	Arts, Culture and Sport
1998	Canada-wide Accord on Environmental Harmonization	All	Environment
1998	Memorandum of Agreement for Federal Funding to Implement Child Support Guidelines	All	Welfare and Income Support
1998	Framework Agreement on cost-sharing for the Implementation of Community Justice Programs for Aboriginals	All	Justice and Law
1998	Federal-Provincial Immigration Agreements	All	Instutions and Governance
1999	Memorandum of Agreement Respecting Basic Federal Contributions to Juvenile Justice Services under the Young Offenders Act	All	Justice and Law
1999	Framework to Improve the Social Union for Canadians	All but QC	Government Finance
1999	Agreement on Interjurisdictional Cooperation with Respect to Fisheries and Aquaculture	All	Agriculture and Food
1999	Railway Safety Inspection Services Agreement	All	Transportation
2000	Memorandum of Agreement for the Canadian Real-Time GPS Correction Distribution Service	All	Transportation
2000	Canadian Council of Ministers of the Environment (CCME) Canada-wide Standards for Particulate Matter (PM) and Ozone with Provincial-Territorial Governments and the Federal Government	All but QC	Environment
2000	Canadian Council of Ministers of the Environment (CCME) Canada-wide Standards for Benzine, Phase 1 With Provincial-Territorial Governments, and the Federal Government	All but QC	Environment
2000	Federal-Provincial Framework Agreement on Agricultural Risk Management	All	Agriculture and Food
2001	Primary Health Care Transition Fund Contribution Agreement	All	Health
2002	Provincial-Territorial Protocol on Children and Families Moving Between Provinces and Territories	All but QC	Welfare and Income Support

Year	Canadian Agreement Title	Participants	Policy Field
2002	Federal-Provincial Framework Agreement on Agricultural and Agri-Food Policy for the Twenty-First Century	All	Agriculture and Food
2003	Federal-Provincial-Territorial Multilateral Framework on Early Learning and Child Care	All but QC	Education
2003	Agricultural Policy Framework Implementation Agreement	All	Agriculture and Food
2003	Agreement Establishing the BSE Recovery Program	All	Agriculture and Food
2003	Council of the Federation Founding Agreement	All	Instutions and Governance
2003	Federal-Provincial Contribution Agreements Concerning the Historic Places Initiative	All	Arts, Culture and Sport
2004	Canada's National Forest Inventory Data Sharing Agreement	All	Energy and Natural Resources
2004	Contribution Agreement: Deployment and Integration of Intelligent Transportation Systems:	All	Transportation
2004	A 10 Year Plan to Strengthen Healthcare	All	Health
2005	Canadian Wildland Fire Strategy Declaration	All	Energy and Natural Resources
2005	Federal-Provincial Agreements National Water Supply Expansion Program	All	Energy and Natural Resources
2005	Gas Tax Fund Agreements	All	Government Finance
2006	Canadian Council of Forest Ministers International Forestry Partnership Program Specified Purpose Accound Agreement 2006-2010	All	Energy and Natural Resources
2006	Memorandum of Understanding for the Canadian Network of Centres for Food and Bio-Products	All	Agriculture and Food
2006	Canada-Wide Standards for Mercury Emissions from Coal-Fired Electric Power Generation Plants	All but QC	Environment
2006	Fabry Disease Therapy Agreement	All	Health

Year	Canadian Agreement Title	Participants	Policy Field
2007	Provincial-Territorial Building Canada Infrastructure Framework Agreement	All	Economic Development and Regulation
2008	National Public Service Pension Transfer Agreement	All	Government Finance
2008	Memorandum of Understanding on Mutual Aid in Relation to Health Resources During a Public Health Emergency	All but QC	Health

Total National Agreements: 92 **Average Agreements Per Year: 1.46**

Appendix C

German Intergovernmental Agreements (Intraföderale Staatsverträge) 1950 - 1995

Year	German Agreement Title	Participants	Policy Field
1950	State Agreement by the Länder of the Federal Republic regarding the financing of scientific research institutions	All	Education
1950	Agreement between the Länder concerning the allocation of the fire brigade tax	All	National Security and Emergency Response
1955	Agreement between the Länder of the FRG concerning the standardization of the school system	All	Education
1955	Agreement about the tasks and the financing of the Coast-Guard School	All except one	National Security and Emergency Response
1958	Agreement between the Länder of the FRG, including Berlin regarding permission to hold academic titles issued by foreign universities	All	Education
1959	Agreement concerning the coordination of the first television channel (ARD)	All	Arts, Culture and Sport
1959	Agreement regarding financial equalization between the broadcasting channels	All	Arts, Culture and Sport
1959	Agreement regarding the Office of the Permanent Conference of Culture Ministers of the Länder in the FRG	All	Arts, Culture and Sport
1961	Agreement concerning the establishment of the second German television station (Public TV)	All	Arts, Culture and Sport
1962	Agreement about the tasks and financing of the Hiltrup Police Institute	All	National Security and Emergency Response
1962	Agreement about financial aid to cover the expenses of the coastal Länder because of catastrophic storm tides	All	National Security and Emergency Response
1964	Agreement regarding the financing of new universities	All	Education

Year	German Agreement Title	Participants	Policy Field
1965	Agreement concerning the establishment of a German Education Council	All	Education
1968	Agreement for the establishment and financing of the Institute of Structural Engineering	All	Education
1968	Agreement concerning the regulation of broadcasting tariff rates	All	Economic Development and Regulation
1969	Agreement about the amount of broadcasting rates	All	Economic Development and Regulation
1969	Agreement for the establishment and financing of the central office for distance learning	All	Education
1969	Agreement regarding the extended jurisdiction of the police of the Länder during prosecutions	All	Justice and Law
1970	Agreement for the establishment and financing of the Institute for Medical Examination	All	Health
1972	Agreement regarding the distribution of university places	All	Education
1972	Agreement concerning the jurisdiction of the Local Court of Hamburg for the allocation of lawsuits in accordance with the Sea Law	All	Justice and Law
1974	Agreement regarding the joint financing of the foundation for "Prussian Cultural Heritage"	All	Arts, Culture and Sport
1975	Framework Agreement between the Bund and the Länder about the joint financing of research according to Article 91 of the Basic Law	All	Education
1976	Agreement about the extended jurisdiction of civil servants of the Länder who are assigned with tasks of criminal prosecution	All	Justice and Law
1979	Agreement for the establishment of a school for the protection of the constitution	All	Justice and Law

Year	German Agreement Title	Participants	Policy Field
1983	Agreement concerning videotext	All	Arts, Culture and Sport
1987	Agreement regarding the reorganization of broadcasting	All	Economic Development and Regulation
1987	Agreement to establish the Culture Foundation of the Länder and agreement about the participation of the Bund in the Culture Foundation of the Länder	All	Arts, Culture and Sport
1990	Agreement to make modifications to broadcasting (television reporting)	All	Arts, Culture and Sport
1990	Agreement about the release and labeling of films, video tapes, and similar media	All	Economic Development and Regulation
1990	Treaty amongst the Lander and with the French Republic concerning European Television Culture Channel	All except two	Arts, Culture and Sport
1991	Agreement concerning the standardized instruction of candidates for higher police service and concerning the Police Leadership Academy	All	National Security and Emergency Response
1992	Agreement between the Länder of the FRG regarding the regulation of the competence to assess the equivalence of educational achievements to university degrees in accordance to Art. 37 Abs.1 p.3 of the unification treaty	All	Education
1993	Agreement for the establishment of a Central Police Investigation Office for the persecution of members of the former SED-led GDR governments and the persecution of criminal offences in connection with reunification	All	Justice and Law
1993	Agreement between the Federal Republic and the Länder regarding the transfer of rights and obligations of the Deutschland-Funk and Rias Berlin to the public corporation "Deutschlandradio" - Hörfunk-Überleitungsstaatsvertrag (radio broadcasting transfer)	All	Arts, Culture and Sport
1993	Agreement between the Federal Republic and the Länder concerning the financing of the Criminal Investigation Department's Prevention Program of the Bund and the Länder	All	Justice and Law

Year	German Agreement Title	Participants	Policy Field
1993	Agreement for the regulation of the competence to assess the equivalence of educational achievements in the former GDR in technical schools	All	Education
1993	Agreement concerning the Central Office of the Länder for Safety Engineering and concerning the Accreditation Office of the Länder for measure and examination offices to execute the Hazardous Substance Law	All	National Security and Emergency Response
1993	Agreement between the Federal Republic and the Länder concerning the financing of the Criminal Investigation Department's Prevention Program of the Bund and the Länder	All	Justice and Law
1993	Agreement for the regulation of the competence to assess the equivalence of educational achievements in the former GDR in technical schools	All	Education
1993	Agreement concerning the Central Office of the Länder for Safety Engineering and concerning the Accreditation Office of the Länder for measure and examination offices to execute the Hazardous Substance Law	All	National Security and Emergency Response
1994	Agreement regarding the Central Office of the Länder for health protection in connection with medical devices	All	Health
1995	Agreement concerning the appointment of oversight Länder in accordance with Art. 87, Abs. 2 Satz 2 GG	All	Institutions and Governance

Total National Agreements: 40 (80) **Average Agreements Per Year: 0.89 (1.78)**

The bracketed number is an estimate of both *intraföderale staatsverträge* and *verwaltungsabkommen.* This listing of agreements includes only the *staatsverträge.* See Chapter Six (Germany) for more details on this estimate).

Appendix D
South African Intergovernmental Agreements 1994 - 2008

Year	South African Agreement Title	Participants	Policy Field
N/A	No formal, national agreements have been made to date.	N/A	N/A

Total National Agreements: 0

Average Agreements Per Year: 0

Appendix E
Swiss Intergovernmental Agreements 1945 - 2005

Year	Swiss Agreement Title	Participants	Policy Field
1948	Concordat between the Cantons of the Swiss Confederation on the exclusion of tax treaties	All	Government Finance
1964	Concordat on the Swiss Engineering School for Agriculture	All	Agriculture and Food
1969	Concordat on arbitration	All	Justice and Law
1970	Concordat on school coordination	All but TI	Education
1971	Inter-cantonal convention on the control of medicine	All	Health
1971	Concordat on the granting of mutual legal assistance to enforce public law claims	All	Justice and Law
1973	Inter-cantonal agreement on the sale of salt in Switzerland	All but VD, JU	Economic Development and Regulation
1974	Concordat on the granting of mutual legal assistance on civil matters	All	Justice and Law
1992	Concordat on mutual judicial cooperation on intercantonal criminal matters	All	Justice and Law
1993	Intercantonal agreement on the recognition of diplomas	All	Education
1993	Agreement on the Conference of Cantonal Governments	All	Institutions and Governance
1994	Intercantonal agreement on government procurement (IVöB)	All	Government Finance
1997	Intercantonal university agreement	All	Education
1998	Intercantonal agreement to reduce technical barriers to trade	All but JU, VD	Economic Development and Regulation
2005	Agreement on the oversight and approval, and income from intercantonal lotteries and betting transactions throughout Switzerland	All but AG, TG, TI	Economic Development and Regulation

Total National Agreements: 15 **Average Agreements Per Year: 0.25**

Appendix F

United Kingdom Intergovernmental Agreements 1999 - 2010

Year	Agreement Title	Participants	Policy Field
1999	Memorandum of Understanding - Devolution	All	Institutions and Governance
1999	Agreement on Joint Ministerial Committee	All	Institutions and Governance
1999	Concordat on Coordination of European Union Policy Issues	All	Institutions and Governance
1999	Concordat on Financial Assistance to Industry	All	Economic Development and Regulation
1999	Concordat on International Relations	All	Institutions and Governance
1999	Concordat on Statistics	All	Institutions and Governance
2004	Delivering Our Armed Forces' Healthcare Needs: A Concordat Between the UK Depts. of Heatlh and the Ministry of Defence	All	Health
2005	Concordats Between HM Treasury and Devolved Governments (Bilateral)	All	Government Finance
2006	Concordat on Inquries Act 2005	All	Institutions and Governance
2010	Concordat with the Ministry of Defence	All	National Security and Emergency Response
2010	Concordat with the Home Office	All	Institutions and Governance

Total National Agreements: 11 **Average Agreements Per Year: 0.92**

Appendix G
American Intergovernmental Agreements 1945 - 2008

Year	American Agreement Title	Participants	Policy Field
1947-81	Agreement on Detainers (Compact)	48 States	Justice and Law
1955-89	Compact on Mental Health	46 States	Health
1957 - 66	Interstate Compact on Juveniles	All	Justice and Law
1961-92	Compact on the Placement of Children	All	Justice and Law
1965 - 80	Compact for Education	47 States	Education
1980	Commercial Vehicle Safety Alliance	All	Transportation
1995 - 2002	Emergency Management Assistance Compact	All	National Security and Emergency Response
2000	NASDTEC Teacher Certification	48 States	Education

Total National Agreements: 8 **Average Agreements Per Year: 0.13**

*****Both the Agreement on Detainers and the Interstate Compact for Juveniles were initially passed by Congress in 1934 but as no states began to enter into either compact until after 1945 they are both included in this study.

Appendix H

Summary Table of the Division of Powers Based on Watts' *Comparing Federal Systems*[773]

Legend
F = Federal Power
S = State (also provincial, cantonal, länder or devolved) Power
C = Concurrent Power
CF or CS = A concurrent power with primary or lead authority for one order of government or another.
Italicized entries are "de facto" powers identified by Watts. For the purposes of categorization, the primary, constitutional authority is counted and not the de facto power.

	Australia	Canada	Germany	S. Africa	Switzerland	UK	USA
Basic Features							
Residual Powers	**S**	**F**	**S**	**F**	**S**	**S (F in Wales)**	**S**
Enumeration of State Power	**No**	**Yes**	**No**	**Yes**	**Some**	**No**	**No**
Delegation of Legislative Authority	**Yes**	**No**	**Yes**	**Yes**	**Yes**	**Yes**	**No**
Finance & Fiscal Relations							
Taxation	-	-	-	-	-	-	-
-Customs/Excise	**F**	**F**	**F**	**F**	**F**	**F**	**F/C**
-Corporate	**C**	**FS**	**C**	**F**	**F**	**F**	**C**
-Personal Income	**C**	**FS**	**C**	**F**	**FS**	**F**	**C**
-Sales	**C**	**FS**	**C**	**F**	**F**	**F**	**C**
-Other	-	-	-	**S**	**FS**	**S**	-
Equalization	-	**F**	**FS**	**F**	**F**	**F**	-

[773] This table is based on "Appendix A - The Distribution of Powers and Functions in Selected Federations: A Comparative Overview" from Ronald Watts' *Comparing Federal Systems*, 2nd edition (193-198). Data for Australia, Canada, Germany, Switzerland and the United States is taken directly from this source. Data for South Africa and the United Kingdom was assembled from each country's division of powers.

	Australia	Canada	Germany	S. Africa	Switzerland	UK	USA
Debt and Borrowing	-	-	-	-	-	-	-
-Public Debt of the Federation	F	F	F	F	F	F	F
-Foreign Borrowing	C	FS	FS	FS	FS	-	FS
-Domestic Borrowing	C	FS	FS	FS	FS	-	FS
International Relations			F	F	F		
Defence	FS	F	F	F	F	F	FS
Treaty Implementation	F	F(1)	FS	F	FS	F	F
Citizenship	F	F	F	F	F	F	F
Immigration (into federation)	C	C	F	F	C	F	C
Immigration (between regions)	-	-	C	-	-	-	-
Functioning of Economic Union							
"Trade and Commerce"	F	F	C	F	F	F	F
External Trade	C	F	F	C	F	F	F
Inter-state Trade	C	F	C	C	F	F	F
Intra-state Trade	S	S	C	C	-	-	S
Currency	F	F	F	F	F	F	F
Banking	C	FS(2)	C	F	F	F	C
Bankruptcy	C	F	-	-	-	F	FS
Insurance	C	FS	C	-	FS	F	FS

(1) Requires provincial consent or implementing legislation.
(2) Savings and credit unions are provincial.

	Australia	Canada	Germany	S. Africa	Switzerland	UK	USA
Transportation & Communications			**FC**				
Roads and Bridges	**FS**	**S**	**C**	**CS**	**FS**	**FS**	**FS**
Railways	**FS**	**FS**	**FC**	**C**	**F**	**FS**	**FS**
Air	**FS**	**FS**	**F**	**FC**	**F**	**F**	**FS**
Telecommunications	**C**	**FS**	**F**	**C**	**F**	**F**	**FS**
Postal Service	**C**	**F**	**F**	**-**	**F**	**F**	**F**
Broadcasting	**C**	**F**	**SC**	**C**	**F**	**F**	**F**
Agriculture & Resources							
Agriculture	**S*C***	**C**	**C**	**C**	**F**	**S**	**S**
Fisheries	**FS**	**FS**	**C**	**-**	**F**	**FS**	**S**
Mineral Resources	**S**	**FS**	**C**	**-**	**-**	**F**	**S**
Nuclear Energy	**C**	**F**	**C**	**-**	**F**	**F**	**FS**
Social Affairs							
Education and Research	**-**	**-**	**-**	**-**	**-**	**-**	**-**
-Primary and Secondary Education	**S**	**S**	**S**	**C**	**CS**	**S**	**S**
-Postsecondary Education	**FS**	**S**	**C**	**C**	**FC/S**	**S**	**FS**
-Research and Development	**FS**	**-**	**SC**	**-**	**F**	**F**	**FS**
Health Services	**-**	**-**	**-**	**C**	**-**	**-**	**-**
-Hospitals	**FS**	**S*F***	**C**	**C**	**S**	**S*C***	**S*F***
-Public Health and Sanitation	**S**	**S**	**C**	**FS**	**C**	**S*C***	**S**
Labour and Social Services	**-**	**-**	**C**	**C**	**FS**	**-**	**-**
-Unemployment Insurance	**C**	**F**	**C**	**C**	**C**	**F**	**FS**
-Income Security	**C**	**FS**	**C**	**C**	**FC**	**F**	**-**
-Social Services	**C**	**S*F***	**C**	**C**	**C**	**FS**	**S*F***
-Pensions	**C**	**CS(3)**	**CS**	**C**	**C**	**F**	**C**

(3) Indicates provincial supremacy.

	Australia	Canada	Germany	S. Africa	Switzerland	UK	USA
Law & Security							
Civil Law	**FS**	**S**	**C**	**F**	**F**	**FS**	**S**
Criminal Law	**S**	**F**	**C**	**F**	**F**	**FS**	**S**
Organization of Courts	**FS**	**FS**	**C**	**F**	**S**	**FS**	**FS**
Internal Security (police)	**SF**	**FS**	**CS**	**FS**	**C**	**FS**	**FS**
Prisons	**S**	**FS**	**C**	**F**	**S**	**S**	**FS**
Other Matters							
Language	**-**	**FS**	**-**	**C**	**FS**	**FS**	**-**
Culture	**-**	**FS**	**-**	**CS**	**C**	**S**	**-**
Aboriginal Affairs	**C**	**F**	**-**	**C**	**-**	**-**	**F**
Environment	**FS**	**FS**	**C**	**C**	**FS**	**FS**	**FS**
Municipal Affairs	**S**	**S**	**S**	**FS**	**S**	**S**	**S**
Federal Totals	**6**	**17**	**10**	**17**	**23**	**27**	**10**
State Totals	**8**	**9**	**2**	**1**	**4**	**9**	**11**
Concurrent Totals	**20**	**3**	**26**	**19**	**7**	**0**	**6**
Federal and State (Shared) Totals	**12**	**19**	**4**	**5**	**10**	**10**	**17**
Other Overlap (Primacy F or S)	**0**	**0**	**5**	**3**	**3**	**0**	**1**
Total	**46**	**48**	**47**	**45**	**47**	**46**	**45**
Federal Totals	**13%**	**35%**	**21%**	**38%**	**49%**	**59%**	**22%**
State Totals	**17%**	**19%**	**4%**	**2%**	**9%**	**19%**	**24%**
Overlap Totals	**70%**	**46%**	**75%**	**60%**	**43%**	**22%**	**53%**

JEFFREY PARKER

EDUCATION

- *Ph.D, Political Science, University of Western Ontario, 2006 – 2011*
  - Dissertation: "An Institutional Explanation of the Formation of Intergovernmental Agreements in Federal Systems."
  - Successful completion of comprehensive exams in the fields of Canadian Politics and International Relations
- *M.A., Political Science, Queen's University, 2005 – 2006*
  - Thesis: "Federalism and Energy in Canada: Intergovernmental Conflict in Periods of High Energy Prices"
- *B.A.H., Political Science, Queen's University, 2001 - 2005*

TEACHING EXPERIENCE

- *Lecturer, University of Western Ontario, 2010*
  - The Provinces in the Canadian Federation
- *Teaching Assistant, University of Western Ontario, 2009 – 2010*
  - American Government and Politics for Professor Laura Stephenson
- *Teaching Assistant, University of Western Ontario, 2008 – 2009*
  - Business and Government for Professor Adam Harmes
- *Teaching Assistant, University of Western Ontario, 2006 – 2008*
  - Canadian Politics for Professor Caroline Dick
- *Instructor and Seminar Leader, Royal Military College, 2006*
  - Canadian Politics for Professor Christian Leuprecht
- *Teaching Assistant, Queen's University, 2005 – 2006*
  - Introductory Political Science for Professor Kim Nossal

PAPERS AND PRESENTATIONS

- "Constructing a Theory of Intergovernmental Agreements: An Institutional Approach", to be presented at the Annual Conference of the Canadian Political Science Association, Montreal, Quebec, 2010.
- "Exploring Riding-level Volatility in Canadian Federal Elections" with Michael McGregor, presented at the Annual Conference of the Canadian Political Science Association, Ottawa, Ontario, 2009.
- "An Investigation into the Formation of Intergovernmental Agreements in Federations", presented at the Annual Conference of the Canadian Political Science Association, Ottawa, Ontario, 2009.

- "Who Supports the NDP?" with Laura Stephenson, paper presented at the Annual Conference of the Canadian Political Science Association, Vancouver, British Columbia, 2008.

RESEARCH ASSISTANTSHIPS

- *With Professor Robert Young, 2008 – Present* (In Progress). The project concerned the continuation of my research into comparative federalism and multilevel government.
- *With Professor Christian Leuprecht, 2004 – 2006.* The project focused on constitutional law and minority rights in a selection of Eastern European countries. It included a review of the literature, research into constitutions and the presentation of the results in a paper.

AWARDS

- Award for Excellence in Teaching, 2011
- Graduate Research Scholarship, University of Western Ontario, 2006 – 2010
- Graduate Award, Queen's University, 2005 – 2006
- Fairfax Financial Holdings Scholarship, Queen's University, 2002 – 2005
- Entrance Award, Queen's University, 2001