An Investigation into the Formation of Intergovernmental Agreements in Federations

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Paper prepared for presentation at the annual meeting of the Canadian Political Science Association, Ottawa ON, May 27-29, 2009

Intergovernmental agreements are an important part of the intergovernmental framework of a federal country. They allow for the creation of new institutions beyond those defined by the constitution. They can serve many purposes, including the entrenchment of cooperation, the initiation of new government programs, the regulation of government funds and even constitutional change (Painter 1996, 118).

Despite the potential importance to federal systems, intergovernmental agreements remain understudied. Research has been done on the issue, but much of it pertains to domestic studies, often concerning the legality of agreements (see: Saunders 1995, Poirier 2003 and Ridgeway 1971). Further comparative research is needed to investigate the factors that may help or hinder the formation of agreements.

This study attempts to fulfill this task by asking the question: how does the constitutional framework of a federal country influence the creation of intergovernmental agreements?[1] It is expected that the constitution will have a noticeable effect on the formation of intergovernmental agreements, causing some federations to exhibit a higher level of these institutions than others. Specifically, four constitutional features will be examined based on the expectation that each may have an effect on the formation of agreements: the degree of overlap that exists in a constitution, the degree of centralization of power, the existence of a forum for intrastate federalism and the number of subnational governments at the state/provincial level. In order to observe these variables in practice, four case studies will be considered: Australia, South Africa, the United Kingdom and the United States. By identifying the constitutional variables in each, examining the record of agreement formation and comparing this with the other cases, patterns may emerge that will help to illustrate the significance – or lack thereof – of these variables.

Variables:

While there are many social, economic and political features that affect intergovernmental relations and the propensity of governments to sign agreements with each other, constitutional factors are a good starting point. Four variables have been selected for their potential significance to the formation of agreements and each requires further explanation.

The first variable concerns the degree of overlap that exists in the Constitution. Although most federations would not meet the ideal level of "watertight compartments" proposed by K.C. Wheare (1963, 4-5), there is still some difference that can be identified in the degrees of overlap that do exist. Some federations operate within a constitutional framework which allows both the national and subnational governments to legislate in the same jurisdictions. Other federations possess constitutions with distinct categories of responsibilities and through their evolution have attempted to maintain some degree of separation (see, for example, the current efforts of Germany's federalism reform and their attempts to disentangle overlapping jurisdictions).

It is expected that those federations that possess a higher degree of overlap in their constitutional responsibilities will exhibit more agreements. When governments occupy the same policy fields, the potential for interaction and coordination increases. This creates

[1] For the purposes of this investigation, the focus will be on *national* intergovernmental agreements defined as any formal, written agreement to include 90 percent or more of the national and subnational governments of a country. Because national agreements affect a country's federal and intergovernmental framework as a whole their effects are of particular interest, as opposed to smaller bilateral or multilateral agreements which, while interesting, may only operate to fulfill local or regional concerns. Further, only formal, written agreements will be considered as they are the only ones that can fully verified and collected.

additional opportunities for intergovernmental agreements to be formed as opposed to the fewer opportunities in federations that have more complete and independent jurisdictions.

The second factor is the degree of centralization in a federation's division of powers. Centralization can manifest itself in two ways. First, the constitution can grant more powers and authority to the central government; the smaller the area of jurisdiction left to subnational governments, the more centralized that a federation can be said to be. Second, there can be centralization in the financial means to execute governmental powers. Should the national government of a federation possess a larger number of revenue sources, it can move beyond the explicit division of powers and influence the subnational governments.

In either case, a more centralized federation is likely to have fewer intergovernmental agreements than a more decentralized one. The more policy areas in which the central government has sole jurisdiction, the fewer possible areas in which governments will need to coordinate. Likewise, if the national government has the ability to impose its will upon other governments through its financial powers it can create a national program without the need to solicit a formal agreement.

The third variable addresses the existence of a forum for intrastate federalism. Intrastate federalism is defined as the existence of a body within the national legislature which serves (in some part) as a forum for regional influences and intergovernmental relations (Smiley and Watts, 1985). While virtually all federations exhibit some form of bicameralism, this does not guarantee intrastate federalism.

The degree of intrastate federalism found in a federation can be divided into three categories. In the first, there is no element of intrastate federalism as the federal legislature serves no specific intergovernmental purpose. This category can include federations that have a regionally distributed chamber, but do not allow for the input from subnational units in the selection of representatives (for example, the Canadian Senate). The second category of country is one in which there is a partial degree of intrastate federalism. In such federations, the national legislature includes a chamber which is explicitly organized by region or individual subnational unit. However, rather than including direct representatives of each subnational government, members are selected by the people directly, as in the current American Senate. There is the ability for the concerns of subnational units to be represented, but not the direct concerns of subnational governments. Finally, there are those countries which exhibit a full degree of intrastate federalism. These federations possess national legislatures which include a chamber divided by subnational governments whose representatives are selected by those governments directly. These representatives are then able to speak for their governments and interact directly within the national legislature. The common example for full intrastate federalism would be the German Bundesrat.

Federations that include the full degree of intrastate federalism are likely to have fewer agreements than those with partial or no level. If subnational governments are able to interact directly, as part of the legislative process of the national government, coordination is more likely to be included within national business as opposed to distinct agreements.

The fourth and final variable involves the number of subnational governments at the state or provincial level. As the number of governments increases, a coordination problem can develop as it becomes progressively more difficult to meet together, let alone form an agreement (Esman, 1984, 27). Therefore, it is expected that as the number of subnational governments increases, the less likely it is that national intergovernmental agreements will be formed. It is worth pointing out, however, that this relationship is not likely to be a linear one. The difference

between a federation with six subnational governments and one with nine may not be significant, but a much larger number – as in the case of the United States – might make national agreements almost impossible.

Case Studies Summary:

Four case studies have been selected to study these hypotheses: Australia, South Africa the United Kingdom and the United States[2]. They have been chosen for their range of federal types, possessing a variety of constitutional characteristics that allow for the observation of the aforementioned variables. Of these cases, there also seems to be a significant range in the number of national intergovernmental agreements that have been formed. Data for both Australia and the United States begins from the start of the post-World War II era (1945)[3]. Data for South Africa begins with the ratification of the new constitution in 1996 while the United Kingdom begins with the formation of the new devolved legislatures in 1999.

FIGURE 1 HERE

Australia possesses the largest number of intergovernmental agreements both in terms of the absolute number and on a per year basis. The United Kingdom comes closely behind, in terms of its per year ratio and even exceeds the United States in absolute number, despite having only ten years of data as opposed to sixty-three for the United States. South Africa however, has yet to record a single written, national agreement in its twelve year modern history. Each country will be discussed individually to establish the context for these agreements and the status of the four variables that are to be considered.

It must be acknowledged that as the number of cases is equal to the number of variables, no statistical control for each of the hypotheses is possible. While a pure quantitative analysis cannot occur, the influences of the variables can be identified by more closely examining the context of each federation and its record of agreement formation.

Australia:

A federal democracy since 1901, Australia is one of the oldest federations in the world. It also possesses the largest number of intergovernmental agreements amongst the four countries considered here. Australia recorded 28 national agreements between 1945 and 1986 and another 20 between 2000 and 2008 (see Appendix A). The high number of agreements suggests the possibility of favourable constitutional conditions for the formation of agreements. A closer examination of each variable will help to determine which may be having an effect.

Overlap: The framers of the Australian constitution were influenced by the American model for federalism and sought to carve out jurisdictions by enumerating federal powers, while reserving all other powers to the states (Saunders 2002, 31). Unlike the American constitution, the Australian provides a concurrent element for many of these national powers – railway powers, for example require coordination with the states. Additionally, the constitution reserves partial powers to the national government in certain areas that the states are competent such as

[2] It is reasonable to question the inclusion of the United Kingdom as it is not technically a federation as compared to the other three countries. However, the process of devolution has created a system of multilevel governance in which intergovernmental relations and agreements are key elements (see *Devolution and Power in the United Kingdom*, edited by Alan Trench, 2007). As such, it acts as something of a nascent federation and is worthy of including in this investigation.

[3] Unfortunately, reliable data for Australian intergovernmental agreements is currently only available from 1945-1986 (via the Compendium of Intergovernmental Agreements) and then from 2000, available from the Council of Australian Governments. While this does create a thirteen year gap, there are sufficient results to analyze.

insurance. Comparing Australia with five other federations, including the United States, Thorlakson (2003) found that Australia possesses a relatively high number of areas in which both the national and state governments are present. In addition, an increased federal role in funding programs run in state policy areas such as education and health has further blurred the lines of jurisdiction.

The significant degree of overlap found in Australia would seem to allow for a larger number of agreements. The concurrent areas of policy, both constitutional and de facto, provide opportunities for coordination in order to allow coherent policy to be developed across governments.

Centralization: As mentioned, the framers of the Australian constitution were influenced by the American model for federalism (as opposed to the Canadian one) and sought to guarantee the states significant authority and autonomy by granting them reserve powers. Despite these efforts, Australia experienced centralization both constitutionally and financially.

Constitutionally, the courts have broadened the interpretation of the enumerated federal powers, allowing for the extension of federal jurisdiction. For instance, the national government has been able to utilize its treaty-making power to cross into jurisdictions, such as the environment, in which it does not explicitly have authority (Saunders 2002, 37). When the Commonwealth negotiates an international treaty, it is able to impose these conditions upon the state governments, whether it has jurisdiction or not. Finally, in terms of those powers which are explicitly concurrent, the national government's laws prevail in a conflict, adding an additional element to the central government's powers.

The financial powers of the Commonwealth government had a centralizing effect, even early on in Australia's history (Williams and MacIntyre 2006, 16-18). Through transfer payments to the states, the Commonwealth has been able to make policy in fields such as health, housing and education, traditionally state jurisdictions (Watts 1999, 21-23). Despite these significant centralizing forces, it is worth emphasizing that unlike in the United States, these advantages of the national government have not translated into the growth of coercive instruments (such as mandates and sanctions). Rather, the Australian case has seen the federal government negotiate with states to produce agreements, as opposed to simply delivering financial or legal ultimatums.

Intrastate Federalism: Australia can be said to have a partial level of intrastate federalism. Its Senate is organized to allow for an equal number of representatives from each of Australia's six states, while the territories – Northern and Australian Capital – are each granted two.[4] The senators are elected by the people meaning that the state governments do not directly take part or negotiate through the Senate, though local concerns can be expressed by senators. With that said, the party system plays a strong role in Australia's Senate – in part due to the use of proportional representation in elections – 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 (Galligan and Wright, 2002). As the Senate does not operate as a body of intrastate federalism, this would not seem to prevent the formation of agreements.

Subnational Governments: Australia has six states, all of which have regularly participated in intergovernmental relations in Australia. In addition to the states, Australia also

[4] While the Australian Senate has always maintained equal numbers of representatives for each state, the actual number has increased over time. The original constitution allowed for six senators from each state, but this was increased in 1948 to ten. In 1984, this was again increased to twelve per state, the number which it currently stands at.

has two territories: Northern 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.

As such the number of subnational government in Australia does not seem to provide any barrier to coordination. Not only are there a substantial number of agreements, but the members of each government interact often via the Council of Australian Governments and its various ministerial councils (Council of Australian Governments 2008).

Conclusion: Australia exhibits a significant frequency of intergovernmental agreement formation, something that is reflected in its constitutional characteristics. There are not so many subnational governments to create a collective action problem; indeed, all evidence points to an active system of intergovernmental relations. This may be necessary as Australia possesses a significant degree of overlap, both in terms of the constitution and the extension of the national government's competencies through its financial powers. Australia also lacks a body for intrastate federalism that might otherwise engage in some of the business of intergovernmental relations. The one feature that might preclude the formation of agreements, centralization, appears to have a limited effect in this case, as the federal government does not often use its financial powers in an attempt to impose its will on the states.

United Kingdom:

The United Kingdom is the youngest federal system of the cases here and in truth, is not even technically a federation. However, the process of devolution has created distinct governments for Scotland, Wales and, at times, Northern Ireland[5]. These governments have their own democratically elected legislatures, their own bureaucracies, a set of jurisdictions in which they are competent and a system of intergovernmental relations, allowing for a comparison with the other cases.

In the brief history of devolution, the United Kingdom has seen the development of a system of intergovernmental relations between the national Parliament and the devolved governments. This has included the development of several intergovernmental agreements, known as concordats (see Appendix B for a full listing). With eight agreements in the first ten years of devolution, the UK comes second in this study with a per year ratio of 0.8. It is worth noting however, that the majority of these agreements (six) happened at approximately the same time and comprised the ratification of the basic terms of devolution, including the Memorandum of Understanding. In the last five years, only two national agreements have been formed, a rate of 0.4 per year. Compared to Australia, a federation with a long record of intergovernmental agreements, the United Kingdom has also experienced several years in which no agreements have been reached.

Overlap: The terms of devolution in the UK have roughly followed along the lines of the American example by allowing the subnational governments to legislate in those areas that are not reserved to the national Parliament. This leaves, amongst the devolved powers important fields such as education, healthcare, local government and cultural matters (Trench 2007, 54). However, even these areas are not off-limits to Westminster to legislate in. While this would be somewhat limited by the Sewel convention – which establishes that the national Parliament must

[5] When considering the United Kingdom's intergovernmental relations and agreements, only Scotland and Wales will be considered as relevant subnational governments for this study. The parliament of Northern Ireland and its executive were suspended from 2002 to 2007 when the power-sharing between nationalists and unionists collapsed.

have permission from the devolved legislatures to legislate in a policy field in which they are present – this does establish that the UK clearly does not exhibit any sort of watertight compartments. Complicating the matter of overlap further is the fact that some powers reserved to the national Parliament can cross into devolved jurisdictions. For example, the existence of research councils throughout the UK has an impact on funding for universities, crossing into the education field.

Centralization: The United Kingdom can be regarded as relatively centralized example of multilevel or federal governance. Constitutionally – another term used loosely in the context of the UK given the lack of a single, written constitution – there seems to be significant policy areas in which the devolved governments are free to legislate such as healthcare, education, and the environment. However, aside from the significant financial constraints that exist for Scotland and Wales (which will be discussed subsequently), there exist constitutional elements of centralization. The UK retains jurisdiction over foreign relations, and agreements made internationally, particularly at the European Union, can restrict the powers exercised by the devolved governments. This is particularly true for agriculture and environmental policy, devolved matters both subject to a high degree of EU regulations (Trench 2007, 54-56). In addition, while the Sewel convention is supposed to limit unilateral national action in a devolved field, it is generally up to the national government to exhibit restraint or to resolve a conflict, should one arise (Scotland 2008).

The major thrust of centralization in the United Kingdom seems to be financial in nature. The devolved governments are almost completely reliant upon the UK Treasury for the funding necessary to sustain their programs and operations (Bell and Christie 2007, 74). The Scottish budget for 2007-2008 noted that 91% of their funding came from UK transfers and funds, with only 7% raised from their own business tax sources (Scotland 2006, 1). Similar proportions are also found in Wales (Wales 2006). Changes to the funding formula are determined by the Treasury itself so any new spending must be approved by the centre (Bell and Christie 2007, 74-76). While the devolved governments retain discretion over how funds are spent in theory, the fact that their overall budgets are essentially determined by transfers from the central government greatly limits their powers.

The near total financial control exerted by the centre in the United Kingdom clearly grants significant powers to the national government. While this is not surprising given the UK's history as a unitary system, it creates a power environment that may impede the formation of agreements.

Intrastate Federalism: The House of Lords has undergone numerous consultations and reforms in recent years in an attempt to modernise and diversify its representatives, including an attempt to increase regional and national representation (see the Royal Commission on the House of Lords, 2000). However, despite some changes to allow for more regional representation, the House of Lords cannot be said to be a body for regional or national representation as this is not the principle organizing feature.

Subnational Governments: In theory, the format of federal governance in the United Kingdom is divided along the lines of the four historical nation-states that comprise it: England, Scotland, Wales and Northern Ireland. In practice, it does not operate so simply. Initially devolution was extended to all these nation-states, with the exception of the English. However, the Northern Irish government is dependent upon power-sharing amongst the different factions and when this could not be maintained, the government was suspended in 2002. Additionally, for the purposes of intergovernmental relations, the UK Parliament serves the function of

representing both the national interest explicitly, and the English nation implicitly, due to the lack of another representative body. In practice then, there are three continually-active governments in the UK: the national Parliament, the Scottish Parliament and the Welsh Assembly.

This clearly does not amount to enough governments to trigger a collective action problem; indeed, the UK has the fewest number of subnational governments of the cases selected. If anything, 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 two devolved governments, the UK can address them individually, forming something of a "hub and spoke" model with the national government at the centre. This may be somewhat confirmed when looking at the complete list of Scotland and Wales' concordats (both national and bilateral). Scotland in particular exhibits many more bilateral agreements between Westminster and Edinburgh than national ones including Wales (Scotland 2009).

Conclusion: The United Kingdom presents an interesting case of a system of unitary governance transforming into a federal one. While it saw a flurry of national agreements formed at the beginning of devolution, this rate has since slowed significantly. Lacking any element of intrastate federalism and possessing a high degree of overlap, there are existing constitutional features that could allow agreements to form. However, the high degree of centralization of fiscal powers would be a reasonable inhibiter to the formation of agreements. Compared to Australia, which exhibited some similarities in terms of its constitutional variables, the national government in the UK maintains much greater financial powers. Moreover, evidence of significant bilateral relations raises the possibility that having a very small number of subnational governments may actually impede agreement formation as the central government is able to address each individually.

United States of America:

The United States has the distinction of being the oldest formal federation in the world. From the ratification of its constitution in 1787, it has served as a model – both to emulate or reject – for many of the federations that have followed since. The data (see Appendix C) suggest however, that the US has not been a leader in terms of the formational of national intergovernmental agreements[6]. There have been very few national intergovernmental agreements formed since the Second World War, both in absolute terms and on a per year basis (only 0.11 agreements per year). While this small number is not enough to place it last in the frequency of agreements, it certainly indicates that something is limiting their formation in the US.

Overlap: A common interpretation of the initial federal structure of the United States was a clear separation of power between the national government and the states (Schram 2002, 344). The powers of the national government were enumerated by the constitution and these were thought to be somewhat restrictive, leaving the states a wide area to legislate in (Zimmerman

[6] Intergovernmental agreements in the United States actually come in two forms: interstate compacts and administrative agreements. Interstate compacts act as a formal, legally binding treaty and require passage by the state legislature to become official. Administrative agreements are more flexible, ranging from verbal reciprocity agreements between states to formal signed documents. Both have been considered in this study, though for an administrative agreement to apply, it must be a formal, written document. See Zimmerman, 2002 for a more complete discussion of these intergovernmental instruments.

1996, 4). However, over time, judicial interpretation, policy changes and particularly the growth of the welfare state have led to a less watertight framework.

Specifically, Section 8 of the constitution, allowing the federal government to make any laws necessary to execute its powers (sometimes known as the "elastic clause") has been interpreted more broadly (Katz 2006, 301). This change, coupled with the national power to regulate interstate and international commerce has helped to muddy the lines of jurisdiction as federal powers have expanded to include programs in areas such as education. Thus, rather than the "ideal" separation of powers, the lines of jurisdiction have blurred somewhat, increasing overlap and the possibility that agreements might form.

Centralization: In terms of the strict constitutional division of powers, the United States possesses a more decentralized constitution than the other cases selected here. Congressional powers enumerated by Article I, Section 8 of the Constitution focus primarily on foreign policy, defence and international trade. Strictly interpreted, this would leave a wide body of jurisdiction to the states with no constitutional provision for an override or intervention as exists in South Africa (or to a lesser extent, in Australia for concurrent powers). The constitutional evolution, however, has not allowed this division to remain static, as judicial interpretation combined with the federal financial powers has seen the centralization increase in the US. Notably, the legal battles over Roosevelt's New Deal policies saw the court rule in favour of the federal government and its plans to create programs within state jurisdiction. As the welfare state expanded, the federal government was the only actor able to fund large new spending projects, increasing state reliance on their fiscal powers (Gerston 2007, 57-58). This financial strength has been leveraged into conditional grants which the federal government has used to pursue policy objectives within state jurisdictions, especially in the fields of education, health and the environment (Stephens and Wikstrom 2002, 17).

This raises an important point about the evolution of centralization in American federalism compared to the other cases here. The division of powers is relatively decentralized, even with some of the federal encroachment that has taken place. Moreover, the American federal system has a lower level of financial centralization than the others: the US federal government controls only 58% of government revenue compared to 68% in Australia and well over 90% in both South Africa and the UK (Thorlakson 2003, 13, Watts 1999). Likewise, only 25% of state revenues come from federal transfers in the US, compared to 45% in Australia and 96% in South Africa (Watts, 2008, 105). However, the national government has been able to leverage their power into intergovernmental instruments that either coerce state participation in national endeavours or pre-empt any opportunity for coordination. Mandates, sanctions and pre-emptions all allow the federal government to impose its will through its power over national criminal and civil law, conditional grants and the ability to set national standards. Recent changes to the laws concerning blood-alcohol levels for drivers demonstrate this effectively. Nineteen states had adopted laws establishing a blood-alcohol limit of 0.08, with the possibility of more states joining in. This type of environment has the potential to yield intergovernmental coordination and agreement in other circumstances. In this case, however, the federal government chose to use their power of pre-emption to pass a law legislating a national limit thus forcing states to comply (Bowman 2002, 13). Thus, while the initial division of powers, both constitutional and financial might seem to indicate a comparatively decentralized federation, the United States certainly exhibits some strong central powers.

Intrastate Federalism: The US Senate can be said to exhibit a partial degree of intrastate federalism, at least since 1913. Prior to the passage of the 17th Amendment, Senators were

selected by state governments, providing a full level of intrastate federalism. Since then, two Senators from each state have been elected directly by the people. As with Australia, these Senators are seen as representing a state and its interests but cannot speak for the state government itself. The Senate does not provide a competing forum for intergovernmental relations and should not have the effect of reducing the number of agreements that will be formed.

Subnational Governments: The United States has the largest number of subnational units in this study and with fifty states, is far ahead of second-place South Africa and its nine provinces. The large number of subnational governments certainly makes coordination between all or even most of them much more difficult than the other cases here. This helps to explain the relatively small number of national intergovernmental agreements in the US, especially compared to another mature federation like Australia.

A closer look at the data gives additional support for this hypothesis. The US is unique in the fact that its national agreements are often not negotiated in a single session with all participants. 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 Australia and the United Kingdom, where national agreements are often negotiated during meetings involving all the governments, American agreements seem to start with a smaller group, before gradually expanding to include others. It is also worth mentioning that of the six agreements listed, only two – the Compact on Juveniles and the Commercial Safety Vehicle Alliance – actually have the support of all fifty states.

The difficulties of national coordination between all fifty states (with or without the federal government) are further corroborated when looking at the complete record of interstate compacts (a database is provided by the Council of State Governments at their website: www.csg.org). For instance, nearly all of the states are party to a compact dealing with low-level radioactive waste. Despite the clear desire for coordination, there is not a single national compact, but multiple regional agreements between smaller groups of states (Weissert and Hill 1994, 34-35). Regional agreements are also common in areas such as the environment and policing (Zimmerman 2002). Thus, the small number of national agreements, the means of their formation and evidence of other intergovernmental agreements point to the significant difficulties created by the large number of governments found in the US.

Conclusion: With so few national intergovernmental agreements found in the United States, what distinguishes this federation from the previous two? The degree of intrastate federalism is only partial and does not seem to supplant other forms of intergovernmental relations. The level of centralization could be part of the explanation, though it certainly does not differentiate the US from either Australia or the UK, where the level of constitutional and fiscal centralization is at least as great (and in the case of the UK, the level of fiscal centralization is empirically higher). The first element that might distinguish the US is in the degree of overlap. Unlike the other countries, the US has a very limited degree of concurrent jurisdiction, as defined by the constitution and the courts (Thorlakson 2003, 7-8). As previously discussed however, the growth of the welfare state and federal financial powers have seen increased involvement in state jurisdictions, creating some de facto overlap.

A more compelling explanation can be found in the number of subnational governments. The long period over which agreements are acceded to demonstrates the lack of a truly national process to form agreements. The existence of regional bodies also seems to limit the possibility

for national agreements as states can operate within smaller forums where they can have greater influence.

South Africa:

The modern constitution and government of South Africa were finalized in 1996, the result of long post-Apartheid process to establish a new order for the country. Greatly inspired by the German system of cooperative federalism, South Africa adopted a framework in which governments were expected to work together for the good governance of the country (Chaskalson et al 1999, 5-2). In practice, this has led to a country that has produced no national, written intergovernmental agreements. While some might suggest that South Africa's relatively short time under the new constitution may have prevented this sort of intergovernmental activity, the experience of the United Kingdom indicates that it is possible for such agreements to be formed, regardless of the age of a federal system. As such, it is likely that there is a confluence of constitutional forces in South Africa that may impede the formation of national intergovernmental agreements.

Overlap: The South African constitution contains a high degree of overlap between the powers of the national and subnational governments. The notion of cooperative governance has been taken to mean a role for both levels of government in many jurisdictions (DPLG 1999, 23-24). There is a long list of concurrent powers set out by the constitution, including education, culture, housing, language policies and health services, many of which are considered traditional subnational fields in other federations. The provinces maintain a very small area of exclusive jurisdiction, including provincial culture and sport, provincial roads and traffic and veterinary services. Compared with the other three cases, South Africa maintains the largest number of concurrent powers while designating the fewest to exclusive jurisdiction.

Centralization: Despite the constitutional virtues of concurrency and cooperation, the national government has a high degree of power in South Africa. This power comes from centralization in both the constitutional and financial realms. Constitutionally, the federal government has very few limits to its authority, as it can legislate in any field, save the small number of enumerated provincial jurisdictions. However, according to section 44(2) of the Constitution, even these exclusive provincial fields may be entered into by the federal government for a number of broadly-conceived reasons including national security, economic unity and common standards. Thus the federal government has the potential to legislate in virtually any policy area. The issue of concurrent powers also demonstrates the strong trends of centralization in South Africa. In fields where both the national and provincial governments are active, the Constitution stipulates that while they are instructed to work together, in the case of an irreconcilable conflict, the federal legislation or policy will take precedence. Given that most areas of provincial jurisdiction are concurrent, this federal "tiebreaker" adds significant power to the national government.

This pattern of centralization is found in the fiscal design of the South African federation as well. The provincial governments are greatly constrained in their ability to raise revenue as they are constitutionally prohibited from raising funds from income tax, value added tax and sales tax (Section 228). Effectively, this limits them to user fees and the ability to tax lotteries as even property taxes are reserved to the local governments. In his study of South African fiscal federalism, Wehner (2000, 59) found that income and sales tax make up the "main sources of government revenue", creating a provincial dependency on federal transfers. Accordingly, the provinces are only able to raise 4% of their own revenues. The federal government is then able

to establish conditional funding for the provinces, through the use of mandates which further restrict provincial autonomy.

Taken together, the constitutional and financial situation in South Africa is highly centralized, more so than any of the other case studies. The strength of the national government both legislatively and financially provides some explanation for the lack of national agreements.

Intrastate Federalism: Unlike any of the other case studies, South Africa's second chamber of the national legislature provides a full degree of intrastate federalism. Modelled after the German Bundesrat, the National Council of Provinces (NCOP) is made up of direct representatives from the governments of each province. The ten person delegation for each province is selected by the provincial legislatures, reflecting the balance of parties, and is led by the premier (or their designate). In order to affirm that the representatives are speaking for the province, they must cast a single vote as a delegation on any matters that concern the province[7].

The presence of the NCOP allows for the inclusion of provincial business within the national legislative process. Any national bill that may have an impact on the provinces has the opportunity to be vetted and debated within that forum as opposed to requiring independent consent via an intergovernmental agreement. For example, the NCOP is responsible for examining national government spending and analyzing its impact on the provinces (Simeon and Murray 2001, 74-75). By contrast, in Australia important spending changes often take the form of intergovernmental agreements such as 1999's agreement of the Reform of Commonwealth-State Fiscal Relations. In South Africa, the MINMECs (meetings between Federal Ministers and Provincial Members of the Executive Council) often report their findings to the National Cabinet and the NCOP, integrating these other aspects of intergovernmental relations within intrastate federalism (DPLG 1999, 92). In these ways, the NCOP's position in national legislation fills a role that might otherwise be carried out by intergovernmental agreements.

Subnational Governments: With nine provincial governments, South Africa possesses the second-most in this study, but this is still a distant second behind the United States. This would not appear to explain the lack of intergovernmental agreements, compared to either Australia or the United Kingdom as the governments in South Africa interact regularly through the NCOP, while ministerial councils can also be held.

Conclusion: South Africa is a particularly interesting case as the country is completely devoid of any national intergovernmental agreements. This is made more curious by the fact that at first glance, two of the variables would seem to allow, or even encourage, the formation of agreements. Unlike the United States there are not so many subnational governments as to impede coordination. Moreover, the degree of overlap is perhaps the highest of the four cases considered here, raising the potential for more areas that could be served by intergovernmental agreements.

The data makes it clear, however, that these conditions are not sufficient for agreement formation, at least in the case of South Africa. The overwhelming power of the central government surely plays a strong role in this. Just one aspect of this power – the central government's ability to legislate national standards – replaces a whole category of agreements found in federations such as Australia. Combined with strong fiscal powers which are often utilized as part of conditional grants, the national government is able to preclude many situations in which an agreement might otherwise arise. The National Council of Provinces clearly has an important role to play in this as well. Not only does it subsume intergovernmental relations into

[7] For matters solely concerning national powers such as defence, each member casts a separate vote and a majority is required. Provincial jurisdiction involves both schedule 5 exclusive powers and schedule 4 concurrent powers.

the national legislative process, but it also helps to legitimize the power of the federal government by including provincial consent. Finally, it is worth noting that the dominance of the African National Congress at all levels of governance (national, provincial and local) further encourages centralization and the lack of intergovernmental agreements by allowing for "in-house" negotiations (Simeon and Murray 2001, 76-77).

As part of their efforts to reform their intergovernmental relations, the South African Parliament passed the Intergovernmental Relations Framework Act 2005. This contained specific provisions and templates for a formal type of intergovernmental agreement known as an "implementation protocol". While these protocols have yet to be used at the national level, it remains to be seen whether creating a special instrument for intergovernmental agreements will encourage their formation in the future.

Conclusion:

The evidence gathered in this investigation has indicated that certain patterns emerge when the constitutional powers of federations are compared with their formation of intergovernmental agreements. The four federations selected displayed a number of different constitutional characteristics, while the number of national agreements ranged from relatively high in Australia to none at all in South Africa, allowing for a diversity of outcomes. Having analyzed each country separately, a few results stand out when examined comparatively. First, while constitutional overlap may have allowed for the formation of intergovernmental agreements, it was not a sufficient condition. While the US exhibited the least amount of overlap and a low number of agreements, South Africa had greater overlap and no agreements at all. Second, it is difficult to conclude yet what effect centralization truly has on agreement formation. The inclusion of a more decentralized country such as Switzerland in future research might provide a better test of this variable as even the most decentralized case here (US), presents a notable degree of centralization. Finally, the variables concerning a full degree of intrastate federalism and a high number of subnational governments had a noticeable effect in limiting agreement formation. Not only did the number of agreements in South Africa and the US suggest this, but other details from each country provided further evidence to this (such as the time period required for national agreements in the US).

These results indicate the important effects that constitutions can have on the formation of intergovernmental agreements. Future work might expand on these variables and cases to learn even more about this important aspect of federalism.

FIGURE 1:

Country	No. of IGAs	Period	Ratio:
Australia	48	50	0.96
United Kingdom	8	10	0.8
United States	7	63	0.11
South Africa	0	12	0

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Appendix A: Australian Intergovernmental Agreements[8]

Date:	Title/Topic:
1953	Blood Transfusion Services
1955	Exotic Diseases Cost Sharing Agreement
1969	Fishing Industry Research Agreement
1972	States Grants (Fruit-Growing Reconstruction) Agreements 1972, 1974, 1976[9]
1972	Softwood Forestry Agreements 1972-1976[10]
1973	National Plan to Combat Pollution of the Sea by Oil
1976	Softwood Forestry Agreements 1976
1976	Agreement as to the Responsibility between the Commonwealth of Australia and State Authorities for Marine Search and Rescue Operations[11]
1979	Softwood Forestry Agreements 1979
1973	Sewerage Agreements
1978	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation – Formal Agreement
1979	Offshore Constitutional Settlement
1981	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation – First Amending Agreement
1981	Commonwealth-State Policy on Financial Assistance to Group Apprenticeship Schemes
1981-86	National Air Monitoring Program
1982	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation – Admin. Remedies Agreement[12]
1983	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation – Second Amending Agreement
1983	Commonwealth-State Scheme for Cooperative Companies and Securities Regulation – Fee Sharing Agreement
1983	Commonwealth – State Medicare Hospital Agreements
1984	Agreement for the Establishment of the National Crime Authority Intergovernmental Committee 1984
1984	Commonwealth-State Housing Agreement
1984	National Sports Facilities Program
1984-85	Agreements on the Eradication of Brucellosis and Tuberculosis in Cattle
1985	States Grants (Rural Adjustment) Agreement 1985
1985	Home and Community Care Agreement 1985
1985	Supported Accommodation Assistance Program
1985	Community Employment Agreement
1986	National Preference Agreement[13]
1986	Commonwealth-State Housing Agreement (Service Personnel) 1981-86[14]
1986	Australian Traineeship System

[8] Data assembled from the *Compendium of Intergovernmental Agreements* (1996) and the website of the Council of Australian Governments.
[9] The Agreement was appended to Commonwealth legislation; amendments to the agreement were then included as amending legislation.
[10] Original Agreement was 1972, was revised in 1976.
[11] "Scheme" began operating in 1972, formalized by an agreement in 1976.
[12] Amendments were separately concluded agreements.
[13] NSW and Western Australia signed on a couple weeks after original signatories.
[14] Originally negotiated in 1981, it was postponed five years "pending the outcome" of a Defense report.

*** Data Not Yet Available From 1987-1999***

2000	Food Regulation Agreement
2000	National Action Plan for Salinity and Water Quality
2001	Gene Technology Agreement
2002	Corporations Agreement
2002	Food Regulation Agreement
2002	Intergovernmental Agreement on Australia's National Counter-Terrorism Arrangements
2002	Memorandum of Understanding: National Response to a Foot and Mouth Disease (FMD) Outbreak
2004	Intergovernmental Agreement on Research Involving Human Embryos and Prohibition of Human Cloning
2004	Australian Energy Market Agreement
2005	Tourism Collaboration Intergovernmental Arrangement
2005	An Agreement on Surface Transport Security
2006	Intergovernmental Agreement Establishing Principles Guiding Intergovernmental Relations on Local Government Matters
2006	Intergovernmental Agreement for a National Registration and Accreditation Scheme for the Health Professions
2008	Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
2008	Food Regulation Agreement
2008	An Agreement on Australia's National Arrangements for the Management of Security Risks Associated with Chemicals
2008	Personal Property Securities Law Agreement
2008	Gene Technology Agreement Renewal
2008-2009	Intergovernmental Agreement on Federal Financial Relations

1945 – 1986 and 2000 – 2008: 50 Year Time Period

Appendix B: United Kingdom Intergovernmental Agreements[15]

Date:	Title/Topic:
2002	Memorandum of Understanding – Devolution[16]
2002	Agreement on Joint Ministerial Committee
2002	Concordat on Coordination of European Union Policy Issues
2002	Concordat on Financial Assistance to Industry
2002	Concordat on International Relations
2002	Concordat on Statistics
2005	Concordats between HM Treasury and Devolved Governments (Similar Bilateral Arrangements)
2006	Concordat on Inquiries Act 2005

1999 – 2008: 10 Year Time Period

[15] Data assembled from the concordat records websites available from the Governments of Scotland and Wales.
[16] Note: the memoranda of understanding contained the same general positions, but devolved different sets of powers and organization.

Appendix C: United States Intergovernmental Agreements[17]

Date:	Title/Topic:
1937-52	Interstate Compact for Parole and Probation
1955-72	Interstate Compact on Juveniles
1955-1975	Compact on Mental Health
1958-85	Driver License Compact
1964-81	Compact for Education
1980	Commercial Vehicle Safety Alliance
2000	NASDTEC (Teacher Certification)

1945 - 2008: 63 Year Period

[17] Data assembled from the electronic interstate compact database provided by the Council of State Governments and Zimmerman 2002.