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Date **June 24, 1999**
Abstract

The purpose of this dissertation is to examine the politics of separatism in multinational federations. Switzerland, Canada, and India are investigated in detail. Switzerland is a multinational federation that has not experienced a separatist movement for more than one hundred and fifty years. In Canada, there is a significant separatist movement in the province of Québec. India has experienced a number of violent secessionist crises in a number of states over the past two decades. The cases thus exhibit a range in the dependent variable (presence or absence of secessionist movements). This study adopts a legal-institutional approach to the problem of secession in multinational federations. This approach marries the classical understanding of federalism as a system of government with divided sovereignty to the more recent state-society and new institutional approaches in political science. Federalism is operationalized around three core institutions: constitutions, intergovernmental fiscal relations, and party systems. These three institutions are situated as the independent variables in the study. The dissertation argues that the institutional structure of federalism is a critical determinant of stability or instability (the presence or absence of secessionism) in multinational federations.
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I have incurred enormous personal debts during the preparation of this dissertation. First, the Department of Political Science, at the University of British Columbia, was extraordinarily supportive during my entire program. The staff, Dory Urbano, Nancy Mina, and Petula Muller, was especially kind, patient, and helpful beyond belief.

I cannot possibly name all the people who personally assisted me over the course of this dissertation but I would like everyone to know that I am very grateful. A few people, however, deserve special mention. I would first like to thank my committee, Professors John Wood, David Elkins, and Philip Resnick, for their constructive assistance. My supervisor, Professor John R. Wood, was especially helpful and supportive over the course of my entire program. In India, I would like to pay a special thanks to my hosts, Rajender Singh Sandhu and his family. Once again, I owe a deep intellectual debt to Professor Harish K. Puri.

Over the years, I have had a number of great colleagues. In particular, I would like to thank Dan Wolfish, for coffee, bagels, and the Wolfish Amazing Computer. Paul Howe made my graduate experience much more bearable, and my dissertation has been improved by numerous conversations with him about the nature of nationalism. I would like to thank Tim Schouls for his wonderful friendship, and welcoming me into his family. As with my Masters degree, I have shared this experience with Adam Jones; his friendship has again been a great source of support. And I would especially like to thank Will Bain; it wasn’t Kuwait, but it was a battle. Thank you one and all.

Finally, I would like to thank my parents, Malcolm and Sally Telford. This dissertation could not have been completed without their endless love and support. I have thus dedicated this dissertation to them.
Dedicated

to my parents,

Malcolm and Sally Telford.
Part I

Introduction
The post-Cold War era has been characterized by political turbulence (Rosenau 1990). Since 1989, twenty-eight new states have joined the United Nations. Unlike the states that joined the United Nations during the wave of decolonization after World War II, many of the states now joining the UN have seceded, peacefully or otherwise, from larger, multinational states. Indeed, the number of intra-state conflicts has been rising since 1945, while the number of inter-state conflicts has declined. Holsti has estimated that "more than two-thirds of all armed combat in the world since 1945 has taken the form of civil wars, wars of state against nation, wars of secession, and major armed uprisings to oust governments. These are internal wars" (Holsti 1995, p.322). In short, he argues, "war today is rooted in the lack, or disintegration of, community within states" (Holsti 1995, p.320). In this era, people of distinct nationalities are clearly finding it difficult to live together harmoniously in the confines of a single state.

An English scholar remarked recently that “federalism is a device for postponing war as long as possible” (Hughes 1993, p.165). Despite this Hobbesian pessimism, recent events suggest that the age of federalism might be near its end, at least in multinational federations. While Switzerland continues to thrive, other multinational federations have not been so fortunate. The Soviet Union, Czechoslovakia, and Yugoslavia have been torn asunder, with horrific violence in the latter case. India, Pakistan, and Nigeria have also experienced serious separatist crises, often with considerable violence. Even wealthy and democratic federations, such as Canada, Belgium, and Spain, have

---

1 Seventeen of the twenty-eight new member states of the United Nations have emerged from the collapse of multinational states. Another eight are micro-states that have finally gained admission to the UN. These include Andorra, Liechtenstein, Marshall Islands, Micronesia, Monaco, Palau, Moldova, and San Marino. The admission of these micro-states may encourage other micro-nations to seek statehood. The other three new members of the UN are the Democratic Peoples Republic of Korea, the Republic of Korea, and Namibia. Incidentally, Switzerland, which will be one of the case studies in this dissertation is not a member of the UN. This stems from the country’s policy of international neutrality.
endured separatist pressures. Maintaining "unity with diversity" is clearly a difficult proposition. The central question of this study is thus, why are some multinational federations threatened by separatist movements from minority nationalities, while others are comparatively stable?2

This question will be examined with a detailed analysis of Switzerland, Canada, and India. In Switzerland, there does not appear to be a threat of secession from any of the cantons or nations. It is thus a stable federation. In Canada, there is a significant, although democratic, secessionist movement in Québec. Canada is thus only a partially stable federation. India, by contrast, has experienced violent secessionist crises in Punjab, Kashmir, and Assam, while more moderate nationalist sentiment has been expressed in other states at various times. Political violence has claimed the lives of more than 50,000 people in Punjab and Kashmir in the past two decades. India may thus be described as an unstable federation. The three cases thus illustrate varying degrees of stability. This may be called their federal condition. In methodological terms, stability (the presence or absence of secessionist movements) is the study's dependent variable.

This study develops a new legal-institutional approach to explaining the problem of stability/instability in multinational federations. This approach marries the classical approach to the study of federalism with the more recent state-society and institutional approaches in political science. Federalism is operationalized around three institutions -- constitutions, intergovernmental fiscal relations, and party systems. The first two institutions are part of the formal structure of federalism, while the party system is an political institution that has become wedded to the operation of federalism. These three institutions of federalism are situated as the independent variables in the study. The dissertation will argue that the institutional structure of federalism is a critical

2 By stability, I mean the absence of secessionist movements.
determinant of stability or instability (presence or absence of secessionism) in multinational federations.

Federalism and Political Stability

In his book Political Stability in Federal Governments (1991), Jonathan Lemco statistically tested many of the variables thought to be associated with political stability in federations, but none of these variables satisfactorily explains the three cases to be examined in this study. Following his supervisor, William Riker, Lemco believes that a “centralized” constitution and centralized political parties are the most important variables for political stability, defined as the presence or absence of secessionist movements (1991, p. 19). Notwithstanding my methodological reservations about whether one can measure and compare federations on a centralization-decentralization continuum (see, Chapter 2), it is generally accepted that Switzerland has the most decentralized constitution, followed by Canada, while India has a highly centralized constitution. Switzerland, however, is the most stable of the three federations being examined in this study, while India is the least stable. In these three countries, stability is thus inversely related to constitutional centralization. Similarly, India has the most centralized parties and the greatest level of instability.

Lemco reports that the number of units and the absence of “especially large units” are also positively correlated with political stability (1991, p. 19). While stable Switzerland has a larger number of units than partially stable Canada, the number of units in Switzerland (26) is similar to the number of units in highly unstable India (25). The ratio between the largest and smallest units in Switzerland and Canada is 100:1, while it is 330:1 in India. This variable obviously cannot explain the differing levels of stability in Switzerland and Canada, and it is probably not related to India’s instability either. It is hard to imagine that the partition of India’s larger states would
ameliorate secessionist aspirations in the smaller states.

Lemco's tests indicate that cross-cutting cleavages are positively associated with political stability (1991, p.20). While cross-cutting cleavages are more evident in Switzerland than in Canada, India has even more cross-cutting cleavages than Switzerland. On the other hand, Lemco argues that "language-region correspondence, race-region correspondence, and religion-region correspondence are negatively correlated with federal political stability" (1991, p.20). In other words, grouping distinct people in separate units promotes separatism. This does not seem to be the case in these three countries. Québec and Punjab, both separatist units, have a high degree of internal differentiation. Québec is about 80% francophone and 20% anglophone/allophone, and there are overlapping francophone communities in the neighbouring provinces of Ontario and New Brunswick. Punjab is about 55% Sikh and 45% Hindu, and there are significant Sikh populations in Haryana, Uttar Pradesh and Delhi. While communal friction in these units may be a source of instability, one must remember that there is also internal differentiation in the Swiss cantons. Three cantons are bilingual and another four cantons are bi-denominational, while Grisons is trilingual and bi-denominational (see, Appendix 9).

Lemco argues that higher levels of development are positively correlated with stability, while economic growth is negatively correlated with stability (1991, p.20-1). India is the least developed federation studied here, and poverty is certainly a serious political problem in India, but development cannot explain the differing levels of stability between Switzerland and Canada, two of the most highly developed countries in the world. Economic growth rates in Switzerland and Canada have been fairly similar as well. Lemco also reports that "balanced communal competition...is positively correlated with federal political stability" (1991, p.20). While there is a significant economic
disparity between the Swiss cantons, these disparities are distributed more or less equally between French and German speaking areas. In Canada, Québec is economically a middle ranked province. French Canadians in Québec were historically subordinate to anglophone business interests in the province, and they were under-represented in the federal civil service. The separatist movement in Québec, however, arose as these conditions were ameliorating. “Balanced communal competition” does not seem to explain the Indian case either. One separatist state, Punjab, has the highest per capita income in the country, and the Sikhs in particular are a highly successful economic minority. Kashmir, on the other hand, is an economically deprived state and Muslims more generally are an economically disadvantaged group. Separatist groups in India do not share a common economic disadvantage; their dissatisfaction with the Indian union must therefore stem from other factors.

Lemco also reports that “a long-lasting national constitution....and long-lasting political parties are positively associated with federal stability” (1991, p.20). Age is almost a tautological explanation for political stability. It is like saying he who lives longest is healthiest. In any event, it is not a persuasive explanation for the three cases in this study. While India does indeed have a younger constitution than either Switzerland and Canada, constitutional age cannot explain the differing levels of stability in the latter two cases. Switzerland and Canada adopted their modern constitutions at almost the same time, 1848 and 1867 respectively. In fact, as Switzerland affected a total revision of its constitution in 1874, it technically has a younger constitution than Canada.3

While Switzerland has a constitutional history dating back to 1291, Canada and India have

3 The Swiss constitution technically dates from 1874 but it is so similar in structure to the 1848 version that the Swiss still regard 1848 as the anniversary of their modern constitution.
modern constitutional histories dating back to the eighteenth century, albeit under British tutelage. This should have provided sufficient time to develop effective constitutional arrangements in Canada and India. However, it is true that political stability in these three countries is correlated with independent history, but correlation is not causation. We have to be careful not to be ahistorical. Political stability was achieved in Switzerland after the adoption of its modern constitution, while Canada and India have experienced increasing degrees of instability since the adoption of their constitutions. This suggests that the institutional structure of these constitutions affects political stability. Indeed, this study argues more generally that the institutional structure of federalism (constitutions, fiscal relations, and party systems) determines political stability or instability. These variables, however, were not tested by Lemco in his comprehensive review of stability in federal systems; he only tested variables exogenous to federalism. There is thus a need to examine the institutional structure of federalism in relation to political stability.

Federalism, the State, and the State of the Discipline

The institutional approach developed here may be considered a variant of the "state-society" and "new institutional" approaches in political science. It represents a dynamic revival of the legal-constitutional study of politics. Prior to World War II, formal-legalism formed "a sort of consensual paradigm of academic political study" (Eckstein 1979, p.2). The objective of formal-legalism was to determine the rules of the game and the boundaries of the political arena. The rules and boundaries of politics were thought to structure, if not exactly determine, political behaviour. In other words, formal rules were positioned as independent variables in the world of politics.

If we look at pre-constitutional history, India has by far the oldest civilization of these three countries, while Canada is a relatively new society.
However, "[t]he 'old' institutionalism consisted mainly, though not exclusively, of detailed configurative studies of different administrative, legal, and political structures" (Thelan and Steinmo 1992, p.3).

The behavioural revolution in the 1950s represented a rejection of formal-legalism and the old institutionalism. For behavioralists, "the state was considered to be an old-fashioned concept, associated with dry and dusty legal-formalist studies of nationally particular constitutional principles" (Skocpol 1985, p.4). Formal-legalism gave way to the "systems" approach to politics, developed particularly by David Easton and Gabriel Almond.\(^5\) The systems approach to politics was organic and functionalist. The objective of the systems approach was to determine the processes by which demands in society ("inputs") were fulfilled by the political system ("outputs"). What happened in the middle, between the inputs and the outputs, was not particularly considered. The focus of systems research was on the allocation and distribution of political goods. Politics was about who got what, when, and how (Lasswell 1950), and social forces were thought to determine politics. In other words, individuals and groups in society were the independent variables in the political process. After the advent of systems theory, "the term state virtually disappeared from the professional academic lexicon" (Krasner 1984, p.223).

The state was rehabilitated as a "conceptual variable" by Nettl (1968), although it was another decade before state-centric approaches began to flourish. In the middle of the 1980s, Skocpol declared that "bringing the state back in" represented a "paradigmatic reorientation" in the social sciences (Skocpol 1985, p.4). The sheer volume of influential scholarship in the state-centric mode

made this claim seem plausible.6 These studies demonstrated that the state -- defined as a set of rules and institutions for the governance of a political society within territorially defined and internationally recognized borders -- could be an independent and consequential political actor in the politics of many societies. The state had interests and objectives, and its actions frequently affected the nature of politics in a society. As such, the neo-statist approach opened a plethora of new research questions.

Krasner has suggested five characteristics that distinguish the new statist approaches from the old behavioural approach. "First, statist approaches see politics more as a problem of rule and control than as one of allocation" (1984, p.224). Second, state-centric approaches position the state as an autonomous actor and independent variable. Third, statists are more concerned about the institutional constraints of individual behaviour. Fourth, state-centric approaches tend to place the state in historical context. Fifth, state-centric approaches reject the organic, and implicitly harmonious, characterization of political systems. Krasner argues, "[s]ystems are not composed of interrelated and compatible components. Structures do not exist because they perform certain functions and functions do not necessarily give rise to corresponding structures. Rather, political life is fraught with tensions and conflicts, especially for the state" (Krasner 1984, p.225). In sum, the statist approach sought to determine the political consequences of state action in society.

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The neo-statist approach, however, was not without its critics. David Easton and Gabriel Almond dogmatically defended the political system approach that they developed in the 1950s. David Easton argued that "[t]he state, a concept that many of us thought had been polished off a quarter of a century ago, has now risen from the grave to haunt us once again" (Easton 1981, p.303). He described the resurrection of the state concept as a Marxist-inspired, neo-conservative effort to restore political order after the failure of the "counterculture movements" in the 1960s (Easton 1981, p.305). He stated, in conclusion,

[o]ne thing is clear. The state has now laid siege to the political system. If over the next couple of decades it were to succeed in displacing the political system as a key orienting idea in analysis and research, this would threaten us with a return, not to a tried and true conceptual tradition of political research, but to a conceptual morass from which we thought we had but recently escaped (Easton 1981, p.322).

Almond was no more charitable. He insisted that "[t]he concept of political system included the

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8 The statist literature, he argued, "expresses a simple conservative longing to recapture the golden age of the nineteenth century when sovereignty in society could be easily located, and authority automatically commanded respect" (Easton 1981, p.305-6). "For the economic liberal," he adds, "the rediscovery of the state as a concept serves to locate an easily defined source to blame for our many social woes" (Easton 1981, p.306).

9 Almond ironically may have contributed to the state-society movement. In the 1950s and 1960s, Almond chaired the Social Science Research Council's Committee on Comparative Politics, which advocated the systems and developmental approaches to politics. After the Committee published Crises and Sequences in Political Development (1971), edited by Leonard Binder, it commissioned empirical studies, first Charles Tilly (ed) (1975) Formation of National States, and subsequently Raymond Grew (ed) (1978) Crises of Political Development in Europe and the United States. But, "[t]he Tilly and Grew volumes openly criticized[d] the theoretical ideas advocated by the Committee on Comparative Politics that sponsored these projects" (Skocpol 1985, p.32; note 13). These studies gave rise to the "bringing the state back in" movement, which has been sponsored by the Social Science Research Council's Committee of States and Social Structures.
phenomena [sic] of the state" (Almond 1988, p.855; emphasis added). He accused the leading proponents of the new state approach of misreading, or worse not reading, the old pluralist literature. He contended, "neither Skocpol nor Krasner provide us with a literature search commensurate with the scope and variety of the political science literature about which they are generalizing" (Almond 1988, p.859). While he grudgingly acknowledged that the new state approach may have made a modest contribution to our understanding of politics, he maintained that "it has been purchased at the exorbitant price of encouraging a generation of graduate students to reject their professional history and to engage in vague conceptualizations" (Almond 1988, p.853; emphasis original).

Ruth Lane has argued more recently that the "basic difficulty" with the new statist approaches "was that the discipline returned to the state without having anything resembling a theory of the state" (Lane 1997, p.79). Krasner, however, acknowledged that his five characteristics of statism "do not constitute a coherent theory of the state" (Krasner 1984, p.225). But he maintained that state approaches "see a different political universe, ask different questions, investigate different empirical phenomena, and offer different kinds of answers" than systems approaches (Krasner 1984, p.226). Lane, in fact, acknowledges that "[t]his type of analysis of the state....opened an entirely new perspective on institutional behaviour" (Lane 1997, p.88).

The new statism, in short, gave rise to a new study of institutionalism. Although the new institutionalism appears to have "a clear brand name," it has become "more a flag of convenience

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10 Almond added, "[i]f there is something basically at fault with this literature -- and I am sure that the statists, coming from their primarily neo-Marxist and international relationist backgrounds have something novel to contribute to the tradition of institutional history -- it is still a fundamental rule of scholarship that one searches the literature before venturing to improve on it" (1988, p.872).

than a meaningful label" (Lane 1997, p.114). Thomas Koelble has suggested the "[n]ew institutionalists fall into three broad categories: rational choice, sociological, and historical institutionalist" (Koelble 1995, p.232). While all these approaches focus on the role of institutions, "they diverge sharply on theory and method" (Koelble 1995, p.232). Koelble explains,

[t]o rational choice institutionalists, institutions are an intervening variable capable of affecting an individual's choices and actions but not determining them. To the historical institutionalists, institutions play a determinant role since they shape the actions of individuals but are at times affected by collective and individual choices. To the sociologists, institutions are themselves dependent upon larger 'macro level' variables such as society and culture, and the individual is a largely dependent and rather unimportant variable (Koelble 1995, p.232).

Each approach, he concludes, has its own merits. "It is the task of the researcher," he suggests, "to show why he or she chose a particular theoretical lens to investigate" his or her research problem (Koelble 1995, p.243).

The approach adopted in this study most closely resembles the historical institutional approach, or perhaps an historical-structural approach. Koelble argues,

[h]istorical institutionalism is extraordinarily useful in the analysis of institutional development and policy making. It focuses on the impact of political struggles on institutional outcomes and the way institutional outcomes in turn shape further rounds of political struggles over policy and institutional rules. The approach points to the important interaction between intended and unintended consequences of political exchange and to the impact of this interaction on the determination of strategic goals of individuals. It thereby alerts us to the interplay between structure and agency, with a greater emphasis on the role of structure than agency (Koelble 1995, p.242).

While institutions are not the only variable of political behaviour, the structure of political

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12 For an excellent introduction to historical institutionalism, see Thelan and Steinmo (1992).
institutions shapes political behaviour (Ashford 1978). Thelan and Steinmo posit, "the institutionalist claim is that institutions structure political interactions and in this way affect political outcomes" (Thelan and Steinmo 1992, p.13; emphasis added). More fundamentally, Krasner has argued, "[p]olitical life is characterized, not simply by a struggle over the allocation of resources, but also periodically by strife and uncertainty about the rules of the game within which this allocative process is carried out" (Krasner 1984, p.225). We shall see in the course of this study that this is precisely what has happened in Canada and India. Québec and Sikh separatists reject many of the constitutional rules that have been established in Canada and India. In short, they have come to harbour a deep resentment of the institutional structure of Canadian and Indian federalism.

**Federalism and the New Institutionalism: Bringing Sovereignty Back In**

This study seeks to explain the politics of separatism in multinational federations by developing a new institutional approach to federalism that focuses on sovereignty. Federalism was studied historically with a legal-institutional approach. *The Federalist* papers, De Tocqueville's analysis of democracy in America, and especially Albert Dicey's study of the law of the constitution established the legal-institutional approach to federalism. Kenneth Wheare exemplified this approach in the twentieth century. These scholars were always cognizant of the location of sovereignty. The key characteristic of federalism is that it is a system of government with divided sovereignty. This may be referred to as the federal principle. While the classical scholars made important contributions to our understanding of federalism, they often just provided static descriptions of institutional arrangements. The legal-institutional approach to the study of federalism was consequently abandoned with the onset of the behavioural revolution in the social sciences after World War II.
The behavioural study of federalism was championed most forcefully by William Riker (1964; 1975). Riker was particularly scathing in his condemnation of Wheare. He remarked that Wheare's classic study *Federal Government* "is highly legalistic in tone and displays very little understanding of political realities" (1964, p.157). Riker, instead, attempted to "measure" federalism on a centralization-decentralization continuum. However, some political phenomena, and sovereignty in particular, do not lend themselves easily to measurement. It is thus necessary to develop measurable indicators that 'represent' the subject. Measurements of federalism typically relied on the allocation of powers and fiscal capacity, but this is more a measure of the relative size of each order of government, rather than the intrinsic nature of federalism. This sort of behavioralism obscured the essence of federalism as a system of government with divided sovereignty.

One of the objectives of this study is to bring sovereignty back into the study of federalism. The division of sovereignty is the key to the institutional structure of federalism. In federal political systems, sovereignty refers to the legal authority to make autonomous political decisions within a constitutionally allocated sphere of jurisdiction. Sovereignty provides a political community protection and security from the outside world; it allows the community to preserve and promote its distinctive way of life. It is thus highly desired and jealously guarded. If one order of government in the federation can interfere with the political decision making process in the other order of government, we may say that the system is quasi-federal; its sovereignty is only partially divided. Quasi-federalism may provoke insecurity in the constituent units of a federation, especially if the local political community regards itself as a *nation*.

This study thus attempts to marry the classical approach to federalism, and its concern with sovereignty, with the new institutional approaches in political science. This is a study in dynamic
institutionalism: federal institutions are positioned as independent variables and analysed to explore their effects on the politics of Switzerland, Canada, and India. Laws and institutions have consequences; it is thus important to begin mapping those consequences. While political processes and behaviour are important, we neglect the legal and institutional dimension of politics at our peril. Federalism is quintessentially a legal and institutional arrangement and it ought to be studied as such, not in a static manner, as often happened earlier, but in a dynamic fashion that focuses on political consequences and outcomes.

I think an analogy may illustrate the argument I am trying to develop in this study. In Europe, hockey is played on a larger ice surface than in North America. The European arena measures 100 by 200 feet, compared to 85 by 200 feet in North America. When hockey is played on the larger European ice surface, there is an emphasis on skating and passing. In North America, on the smaller ice surface, there is a premium placed on player size and body checking. In other words, a different style of game is played in the two places because of the institutional structure of the arena in which the game is played. Similarly, the institutional structure of federalism in different multinational federations may give rise to different political games. It may, in fact, account for the presence or absence of separatist movements.

The Plan of Study

The dissertation will unfold in the following manner. Part II will explore the theoretical considerations employed in the study. It will be argued that federalism is an excellent instrumentality for multinational state-building. It will also be suggested that a desire for sovereignty is an inherent characteristic of nationalism. Thus, it will be hypothesized that multinational federations will only be stable if the system is designed according to the principle of divided
sovereignty. The remainder of Chapter Two will explore what a federal system might look like if it was designed to reflect the principle of divided sovereignty. Particular attention will be paid to the institutional structure of federal constitutions, intergovernmental fiscal relations, and party systems. In each instance, the sovereignty of both orders of government should be respected. This ideal model of federalism will serve as a framework for the rest of the study. Each case will be examined to determine how closely it conforms to the ideal model developed in this chapter.

Before proceeding, it is imperative to be absolutely clear about the nature of the argument. I do not wish to suggest that the institutional structure of federalism causes nationalism. That would be an overstatement of the argument. Nationalist movements usually have deeply embedded cultural origins. Put another way, Québec nationalism existed long before Québec separatism. Nationalist aspirations are situated in this study as an intervening variable, through which the institutional structure of federalism is filtered and interpreted. In other words, minority nationalities react to the institutional structure of federalism. If the structure of federalism respects the principle of divided sovereignty, minority nationalities will likely feel secure, but if the principle of divided sovereignty is not respected, nationalist resentment may be provoked, which may destabilize the federation.

Part III will analyse in turn the constitutions and constitutional development in Switzerland, Canada, and India. This section will reveal that the Swiss constitution is structured explicitly according to the federal principle. The Canadian constitution is ambiguous; Wheare argues it is quasi-federal in construction but federal in practice, while Québec nationalists have argued that it is federal in construction but quasi-federal in practice. The constitution of India is definitely quasi-federal; the central government can overwhelm the states almost at will. Part IV will explore the fiscal relations in each case. Again, it will be seen that intergovernmental fiscal relations in
Switzerland are governed by the federal principle, while fiscal relations in Canada and India are quasi-federal, much to the consternation of the Canadian provinces and Indian states.

Part V will examine party systems in each country, and the politics of Québec and Sikh separatism in Canada and India respectively. This section will demonstrate that Swiss party system, as with Switzerland’s constitution and fiscal systems, is highly federal and consequently consensual. In short, the recognition of cantonal sovereignty has prevented the rise of separatist parties. By contrast, it will be shown that Québec and Sikh separatists are motivated in large degree by the quasi-federal constitutional and fiscal systems employed in Canada and India respectively. The denial of provincial and state sovereignty in Québec and Punjab has alienated Québécois and Sikh nationalists. However, it will be demonstrated that the highly federal party system in Canada has minimized political violence and channelled the politics of Québec separatism into the arena of democratic party politics. By contrast, the quasi-federal party system in India has failed to coopt separatist politics; India has thus had to endure violent secessionist movements in Punjab, Kashmir and Assam.

Part VI will conclude that Switzerland conforms most closely to the ideal federal model developed in Chapter Two, Canada less so, and India least of all. It will be demonstrated in this last section that political stability in these three federations is causally connected to the institutional structure of federalism in each case. I will conclude that what minority nationalities “really want” is sovereignty within their political spheres of jurisdiction. This, I submit, can only be achieved with a classical model of federalism, as outlined in ideal form in Chapter Two. If majority nationalities refuse to divide and share sovereignty, minority nationalities will likely seek to exit the federation. It is thus imperative for students of federalism to wrestle with the problem of divided sovereignty.
Part II

Theoretical Considerations
Chapter Two

Federalism as an Exercise in Multinational State-Building:

Bringing Sovereignty Back In
Multinational state-building is a complex and problematic exercise. Indeed, John Stuart Mill argued, in *Considerations on Representative Government*, “[f]ree institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist” (Mill 1972, p.392). However, Mill conceded that multinational state-building might be accomplished with federalism, should there be “a sufficient amount of mutual sympathy among the populations” (1972, p.398). The purpose of this chapter is to explore how federalism might be employed for multinational state-building, and to develop an approach to the study of multinational federations.

This chapter has four objectives. First, I wish to demonstrate that federalism is an instrumentality for state-building in societies exhibiting multiple political identities, not a response to military threat. These identities include sub-identities associated with particular cultural, historical, or political communities, and a common civic identity shared by all the communities residing in the (proposed) federation. In some federations, such as the United States or Australia, the sub-identities are associated with territorial areas. In other federations, such as Switzerland, Canada and India, the local communities are distinguished by language, religion, or even race, and thus may be thought of as distinct national identities. These latter cases may thus be regarded as multinational federations.

The second objective of this chapter is to restore the centrality of sovereignty in the study of federalism. The importance of sovereignty has been obscured by efforts to measure the degree of ‘centralization’ or ‘decentralization’ in federal systems. The significance of the American constitution is not its level of centralization or decentralization but that it institutionalized for the
first time in history the theory of divided sovereignty. This is the essence of federalism. Indeed, federalism may be defined as a system of government with divided sovereignty. It is thus imperative to be cognizant of the division and location of sovereignty.

The third objective of this chapter is to demonstrate that sovereignty is also integral to the study of nationalism. The desire for sovereignty appears to be a recurring characteristic of nationalist movements. Nationalist sentiment, furthermore, is frequently temperamental. Nationalists often exhibit feelings of wounded pride. Nationalism, in short, is fuelled by resentment. These characteristics of nationalism complicate the process of multinational state-building. In short, nationalist resentment is likely to be provoked if nations are denied at least a portion of sovereignty. If the nationalist desire for sovereignty is to be overcome by federalism, the federation must ensure that the units are accorded sovereignty in their constitutional sphere of jurisdiction. National leaders accept federalism with the understanding that each order of government will be granted sovereignty in its delegated sphere of jurisdiction. This is the federal bargain. If the sovereignty of the constituent units is infringed or eroded, nationalist resentment will almost certainly percolate and the federal bargain may be called into question.

The fourth objective of this chapter is to develop an ideal model of federalism to illustrate what a federal system might look like if it was designed strictly according to the principle of divided sovereignty. It will be suggested that this sort of federation should recognize the principle of divided sovereignty in its constitution and that this should be respected in political practice; each order of government should be provided independent and sufficient sources of revenue to meet its constitutional obligations; and political parties at each level of the system should be independent of each other. Each of the case studies will be compared to this ideal model along all three axes in the
The overall objective of this chapter is to develop a new institutional approach to the study of federalism that will explain political stability and instability in multinational federations. Political stability is the study's dependent variable. If sovereignty is indeed integral to nationalism, we would expect to find that stable multinational federations respect the principle of divided sovereignty more closely. In other words, federalism \textit{per se} is not necessarily sufficient for multinational state-building; only an institutionally well-structured federalism can facilitate multinational state-building. The institutional structure of federalism is thus positioned as the independent variable in this study. As such, the traditional institutional approach to federalism, typified by Kenneth Wheare, is transformed into a dynamic and explanatory approach to federalism.

The Origins of Federalism: A State-building Explanation

The first objective of this chapter is to demonstrate that federalism is an instrumentality for state-building in societies exhibiting multiple identities, not a response to military threat, as has often been suggested. William Riker, in particular, argued that every successfully formed federation has initially experienced "a significant external or internal threat" (Riker 1975, p.116). Riker's realist interpretation of federalism was derived from the American case. He wrote, "I have outlined what I call the 'Military Interpretation of the Constitution of the United States' and have demonstrated that it accounts for the total local, national, and international features of constitution-writing" (Riker 1975, p.116). Riker's realist interpretation of federalism was derived from the American case. He wrote, "I have outlined what I call the 'Military Interpretation of the Constitution of the United States' and have demonstrated that it accounts for the total local, national, and international features of constitution-writing" (Riker 1975, p.116).

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1. It should be stressed that this model represents only one possible type of federation. Models could also be developed for various sorts of asymmetrical federal arrangements or for federal systems with more than two orders of government, amongst others.

2. Kenneth Wheare also suggested that federations resulted from military threats (1953, p.37), but he did not belabour the point and, in fact, he later moved away from this position (see note 11 in this chapter). Riker, on the other hand, insisted upon the point dogmatically.
The United States, however, was not in military danger in the late 1780s. Richard Henry Lee, a leading opponent of the American constitution, exclaimed bluntly: "We are in a state of perfect peace, and in no danger of invasions." Indeed, the Continental Army was disbanded in 1783. For the next twenty years Americans were content to leave defence in the hands of the state militias, while the federal army was created only in fits and starts (Kohn 1975). If the United States had been in imminent military danger, it is inconceivable that they would not have maintained a robust federal army. Thus, despite Riker's insistence, the military imperative appears to be a spurious variable.

Federalism is more persuasively understood as an exercise in state-building. It creates two orders of government, one to govern regional communities, and another to govern the concerns of the whole federation. Wheare argues,

"it would seem that federal government is appropriate for a group of states or communities if, at one and the same time, they desire to be united under a single independent general government for some purposes and to be organized under independent regional governments for others. Or, to put it shortly, they must desire to be

3 It is quite clear that Riker's "Military Interpretation of the Constitution of the United States" was arrived at through *ex post facto* Cold War reasoning. This seems to be acknowledged by Riker himself, when he wrote, "[f]rom the end of the War of 1812 until the manufacture of an atomic bomb by the Soviet Union, most Americans felt safe from European invasion. During that long period it was difficult to conceive of the international situation of the American states in the 1780's, when European aggression seemed both imminent and inevitable...*But in the 1950's and 1960's it is again easy to sympathize with the fears and calculations of politicians of the era of the Articles*" (1964, p.17-18; emphasis added).


5 Federalism is not even a logical response to a military threat. Indeed, De Tocqueville concluded that the primary weakness of federalism is its inability to meet sustained military challenge: "No one can appreciate the advantages of a federal system more than I. I hold it to be one of the most powerful combinations favouring human prosperity and freedom. I envy the lot of the nations that have been allowed to adopt it. But yet I refuse to believe that, with equal force on either side, a confederated nation can long fight against a nation with centralized government power. A nation that divided its sovereignty when faced by the great military monarchies of Europe would seem to me, by that single act, to be abdicating its power, and perhaps its existence and its name" (De Tocqueville 1969, p.170).
united, but not to be unitary (Wheare 1953, p.36).

This idea was developed further by William Livingston, whose great insight was to distinguish federal society from a federal political system. A federal society is characterized by the presence of territorially situated diversities within a single country or aspiring country. The "essence of federalism" thus lies in society, not the constitution or other institutional structures. For Livingston, "[f]ederal government is a device by which the federal qualities of the society are articulated and protected" (1956, p.2; emphasis added).^6

Livingston's theory of federalism has two independent variables. First, there must exist a federal society. Second, political leaders must decide to create a federal government and then develop the necessary instrumentalities. In Livingston's words,

[s]ocieties employ instrumentalities for the expression of diversities in accordance with what men in particular societies think is necessary; and this view of what is necessary and what is not will vary considerably from society to society. What is adopted by these particular men is an instrumentality to serve the needs of a particular diversity. If enough of these are employed, the result is a federal constitution or a federal government (Livingston 1956, p.5).^7

In short, Livingston linked the macro-social structure, territorially based diversities in a society, with the micro-political decisions of leaders in these societies to obtain a federal constitutional outcome.

The distinguishing characteristic of federal societies is that the people of such societies exhibit a dual identity, a local sub-identity and a general identity shared by the associated

^6 Riker argues that Livingston's "definition goes too far and takes in too much. By it, one makes federations out of such unitary governments as the United Kingdom with its Celtic-speaking minorities in Wales and Scotland, France with the Celtic-speaking Britons in Brittany, and Spain with its large Basque-speaking minority in the North" (Riker 1975, p.105). Livingston, however, would only claim that these are examples of federal societies, not federal governments.

^7 These instrumentalities include 1) a written constitution; 2) a formal distribution of powers; 3) a tribunal for constitutional interpretation; 4) a bi-cameral legislature; 5) dual citizenship; 6) a federal executive; and 7) a mechanism for constitutional change (Livingston 1956, p.10-11).
communities. What are the constitutive elements of these identities? For Livingston, diverse identities may stem from "[d]ifferences 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" (1956, p.5). In an effort to be parsimonious, we might distil these diversities to territorial or political diversities on the one hand and national diversities on the other hand. Federations may be developed around both sets of diversities.

Federalism in the United States and Australia was designed to unite the various colonial territories in their respective continents. In the American colonies, the markers identifying the various state identities were not significantly different. By and large, the American colonists were of the same heritage, spoke the same language, practised the same religion, and had similar political philosophies. They were, in fact, the same ethnic group divided by history and geography. After the revolution, the thirteen original colonies of the United States collapsed into two groupings, broadly the north and the south, before coalescing into one nation in the years following the civil war. The Australian states, despite some regional frictions, also quickly merged into one nation after federation in 1901. These two federations, notwithstanding significant multicultural diversity, may be considered uninational federations.

Federations such as Switzerland, Canada, and India are qualitatively different from those like the United States and Australia. Switzerland, Canada, and India are multinational federations. The cultural markers separating the various diversities in these countries have proven more enduring than the markers that separated the contending diversities in Australia and the United States. The boundaries separating the diversities in Switzerland, Canada, and India were much more clearly
ethnic in character and they were especially separated by language and religion. These diversities may be considered as nations. Multinational federations should be considered a distinct subset of federal systems, and they ought to be studied differently from federations that exhibit only a single national identity.

**Multinational Societies and Federations**

Nation and nationalism are difficult concepts to define. The term nation conveys the idea of a "people" (Greenfeld 1992, p.6). The term comes from the Latin word *nasci*, to be born, and implies that there is an ancestral linkage between those who are thought to belong to the nation. There is a strong ethnic dimension to the nation. In fact, the term ethnic is derived from the Greek word *ethnos*, meaning "nation." An ethnic group is a collectivity of people that share a common language, religion, and history. These markers must be seen only as general guides; they are neither necessary or sufficient. A common language is not a sufficient marker for an ethnic group: Serbs and Croats speak the same language but form two ethnic groups, based on religious differences. On the other hand, an ethnic group does not necessarily have to exhibit common markers: Germans may be both Catholic and Protestant, but they are still one ethnic group.

While an ethnic group may be defined by anthropologists, a nation is self-defined. A nation might be considered as "a self-aware ethnic group" (Connor 1978, p.388). Paul Brass has argued that this involves a two-step process from ethnic designation to ethnic community to national identity. In his formulation, a nation represents a politically involved ethnic community (Brass 1991, p.19-23).⁸ Part of the difficulty in coming to terms with the concept of nation is that it does not

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⁸ Brass stresses that these processes are not inevitable, and that they may well be reversible (Brass 1991, p.13; p.16). The distinction between an ethnic community and a national group may also be contextual. Italians living in Italy would likely regard themselves as part of the Italian nation but, in North America, they may perceive themselves only as an
necessarily reflect an empirical reality. A nation may well be an "imagined" community (Anderson 1983). The boundaries of the nation extend to all those who share the common imagination. The idea of a homeland, however, is also an important element of the nationalist imagination. For the purposes of this study, we may define nation as a geographically situated community of politically aware people distinguished by unique cultural markers, such as language, religion, or distinct political histories.

How an ethnic group transforms itself to a politically aware nation has still not been explained satisfactorily. A variety of theories have been advanced to answer this thorny question. These theories may be broadly described as primordialist, instrumentalist, and structural. Scholars from the first group frequently argue that a romantic intelligentsia is responsible for national awakening (Smith 1986). These scholars focus on the tendency of nationalist leaders to evoke 'memories' of a glorious 'golden age.' By contrast, instrumentalists, employing micro-economic theory, focus on profit-seeking political entrepreneurs as the agents of nationalism (Rogowski 1985). Paul Brass suggests that his approach to ethnic nationalism may be considered instrumentalist, but in a political sense rather than an economic sense (1991, p.16).

Numerous structural explanations have also been posited. Some scholars have focused on the state as a political source of nationalism (Hobsbawm 1992). However, most structural explanations are economic in nature. One of the most provocative structural theories suggested that nationalism was a product of economic deprivation or "internal colonialism" (Hechter 1975). Others focus on resource competition (Olzack and Nagel 1982; 1986). And Marxists tend to see nationalism as a by-product of capitalism and class politics. Each of these theories explains some ethnic community. In fact, in this context, they might regard their nationality as Canadian or American.
cases well, but none seems able to explain the full range of nationalist movements. A synthetic approach that combines identity formation, structural circumstance, and political leadership thus seems to be necessary for a complete understanding of nationalism.

While the formation of national identity is a complex process, the emergence of multinational societies is even more complicated. How do distinct, territorially situated, nationalities develop the sense that they constitute a single, albeit federal, society? In other words, how does a federal identity emerge? A number of variables can be isolated by focusing on the historical interaction of geographically contiguous communities. First, there may be overlapping traits that unite distinct communities. Hinduism in India, for example, provides a basis of unity for different linguistic communities around the country. Second, sustained social and economic transactions may bring distinct communities together. Third, distinct communities may be united by political treaties, as was the case with the Swiss confederation. The relations between distinct communities may develop organically, as was the case in India, or they may result from military or colonial conquest, as was the case in Canada. Over time, the emergence of shared values and desires may lead political elites from the various sub-communities to favour political unification. Their historical differences, however, may necessitate the formation of a federal political system, such that the distinct communities may enjoy the advantages of both unity and regional autonomy.9

Citizens of a multinational state will typically exhibit a dual identity: a national sub-identity with one's own community and a civic identity associated with the state. A federal political system

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9 The formation of federal societies was studied separately by Karl Deustch et al and Ronald Watts. Each study constructed a long list of conditions that might facilitate the formation of pluralistic communities (Deutsch et al 1957, p.58; Watts 1966, p.42). While both these works lack theoretical parsimony, they go a long way towards explaining how federal societies are formed.
will allow both identities -- the regional nationalism and the common *civisme* -- to be maintained.\(^\text{10}\) In short, federalism gives institutional expression to both identities. Federalism may thus be employed by political leaders when faced with the prospect of forming a multinational state, especially if the nations are situated territorially. The sentiments of nationalism and *civisme* are more than sufficient to *make* and *break* countries, as we shall see in the case studies that follow in the dissertation.\(^\text{11}\)

Before proceeding, it is important to specify the nations in each of the multinational federations investigated in this study. Switzerland is perhaps the most complex case. The country is characterized by the presence of four linguistic groups (German, French, Italian, and Romansh) and two dominant religions (Protestant and Catholic). Italian and Romansh are spoken predominantly in two cantons, Ticino and Grison respectively. These small communities may be regarded as distinct nations within Switzerland. The German and French communities are subdivided by religion. On certain issues, the communities are mobilized by religion but, on other issues, the alliances shift to a linguistic basis. Religion was historically the more salient cleavage but, with the modern decline of religious values in western societies, language is becoming increasingly more important. While the cross-cutting cleavages do not reduce the various

\(^\text{10}\) The word *civisme* is employed in this study to refer to loyalty to the state, as opposed to nationalism, which is employed solely to describe loyalty to the nation.

\(^\text{11}\) Wheare later came to a similar position, although he couched the argument in terms of "nation-building," leaving us with the rather convoluted notion of *multinational nation-building*. Nevertheless, he perceptively argued that federalism is "an appropriate form of government to offer communities or states of distinct or differing nationality who wish to form a common government and to behave as one people for some purposes, but who wish to remain independent and in particular to retain their own nationality in all other respects" (Wheare 1955, p.29). This argument was developed in a chapter entitled, "Federalism and the Making of Nations," which appeared in *Federalism: Mature and Emergent*, edited by Arthur MacMahon. The argument in this chapter departs markedly from his contention in *Federal Government* that federalism usually emerges from a military imperative. This chapter was published between the third and fourth additions of *Federal Government* and it is curious that he did not revise the military argument in the fourth edition of the book in light of the new position he advocated in the MacMahon volume.
communities to individual cantons, the historical importance of the cantons has made them the primary source of political identity in Switzerland and the basic unit of the Swiss political system.\footnote{The importance of the cantons can be appreciated by the notoriously difficult process of acquiring Swiss citizenship. Before one can apply for Swiss citizenship, one must first obtain cantonal citizenship.}

The situation is comparatively more simple in Canada. The French and English speaking communities have long been considered as the “founding nations” of the country. Over time, the French-speaking nation has become almost synonymous with Québec, although there are still many French Canadians residing outside Québec. The English-speaking nation is spread out over the other nine provinces, notwithstanding certain regional variations. While the anglophones and allophones in Québec, about twenty percent of the population, tend to regard themselves as part of the (English) Canadian nation, the Québécois dominate the political process in Québec. The Québécois and the ‘Rest of Canada’ may thus, heuristically at least, be considered as the two nations of the federation.\footnote{Many aboriginal communities also regard themselves as nations and a third order of government may one day be created to accommodate these small and dispersed nations but, as non-governmental actors, they fall outside the purview of this study.}

Language and religion are the most common national markers in India. The Hindi-speaking community of north India, which constitutes forty percent of the population and is spread out over six states (plus Delhi), may be regarded as the dominant nationality in the federation.\footnote{The six Hindi-speaking states include Uttar Pradesh, Bihar, Madhya Pradesh, Rajasthan, Haryana, and Himachal Pradesh. Delhi, with a population now over ten million people, is officially a Union Territory.} It should be noted, however, that the Hindi-heartland is ethnically quite diverse, with significant Muslim and Sikh minorities scattered across the region. The Hindi-heartland is surrounded on three sides by a number of large states, each characterized by their own language, such as Bengali or Tamil, which
may be thought of as nations. This study will consider in some detail the politics of the Sikh nation, which resides primarily in Punjab, notwithstanding large Sikh populations elsewhere in India. Unlike the other nations in India, the Sikh nation is defined primarily by religion. Hindus in Punjab (about forty percent of the population) generally do not identify with the Sikh nation but the politics of Punjab is dominated by Sikhs. Kashmir represents a nation characterized by both religion (Islam) and language (Kashmiri), notwithstanding the large Hindu and small Buddhist minorities in the state. For the purposes of this study, the six Hindi-speaking states collectively and the other linguistic (and religious) states may, at least heuristically, be regarded as the nations of the Indian federation.

In sum, multinational federations are characterized by the presence of distinct groups of politically aware people who exhibit contending identities and loyalties. Nationalism and civisme, love of nation and state, are not fixed and permanent, but neither are they transitory and whimsical. Nationalism and civisme sit in constant tension with one another, and they may fluctuate depending upon how these tendencies are perceived to be developing in other groups. Minority nationalities become particularly alarmed when dominant nationalities equate their national identity with the state. This may precipitate an intensification of minority nationalism and decrease their loyalty to the state. These shifting identities and loyalties make state-building a particularly difficult enterprise in multinational societies and it consequently increases the importance of the institutional structure of federalism.

**Federalism and Divided Sovereignty**

The second objective of this chapter is to restore the centrality of sovereignty in the study of federalism. The importance of sovereignty was overlooked when some influential scholars

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15 The state boundaries in India were redrawn after independence to correspond more closely with linguistic areas. This served to strengthen state identities in India. This is discussed further in Chapter 5.
endeavoured to develop a measure of federalism after the onset of the behavioural revolution. William Riker, in particular, insisted that a 'measure' of federalism was required to facilitate a 'scientific' comparison of federal systems (Riker 1975, p.140). Riker's approach to federalism, however, contributed less than what was promised. While Riker maintained that he had at least developed "a partially verified theory" about the origins of federalism, he acknowledged that "I am not hopeful of being able to construct a theory about any feature of federations subsequent to their birth....Probably the best one can do is to create typologies of the varieties of federal life around considerations that seem important to the fact of federalism" (1975, p.131). Most commonly, political scientists have attempted to place federal systems "on a continuum with respect to centralization" (Riker 1975, p.103), but de Tocqueville noted long ago that "[c]entralization is now a word constantly repeated but is one that, generally speaking, no one tries to define accurately" (1969, p.87).

Federalism, in short, does not lend itself easily to measurement. The endeavour to measure the degree of centralization, furthermore, misses the point about federalism. Federalism is about the division of sovereignty and, in some cases, the reconciliation of contending nationalisms, not political decentralization. The debate in Québec is not about the appropriate level of decentralization; it is about federalism and separatism or, in other words, divided sovereignty and

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16 Riker's attempt to measure federations followed from his realist explanation for federalism. If federalism emerges from a military imperative, as Riker maintained, then it is important to know the 'strength' of the federal government. It follows from the military assumption that 'centralized' federations are preferable because they presumably would be 'stronger' militarily than 'decentralized' federations. Indeed, Riker insisted that it was the creation of "centralized" federalism in the United States that made federalism viable. He argued that "[p]eripheralized federalisms.....fall gradually apart until they are easy prey for their enemies," while "centralized federalisms.....render the whole federation able to function more effectively in a hostile world" (Riker 1964, p.7-8).

independent sovereignty. The terminology of centralization and decentralization, which has
pervaded study of federalism for the past thirty years, has obscured the essence of federalism as a
system of government with divided sovereignty and consequently this approach is unable to explain
the success or failure of federalism in multinational societies. Federalism is a legal and institutional
arrangement and it ought to be studied as such, not in a static manner, as often happened in the past,
but in a dynamic fashion that focuses on change and political interaction.

Kenneth Wheare's *Federal Government* is the definitive illustration of the legal-institutional
approach to federalism and it provides us with a classical definition of federalism:

> By the federal principle I mean the method of dividing powers so that
> the general and regional governments are each, within a sphere
> coordinate and independent (Wheare 1953, p.11).

For Wheare, it was essential for the two orders of government to possess certain powers
*independently* of each other. Riker condemned Wheare's definition of federalism for its "excessive
legalism" (1975, p.103), although "it is not immediately apparent why this should be regarded as a
criticism...it may well be thought a virtue rather than a defect that the approach should be disciplined
by a framework of constitutional law" (Birch 1966, p.16). However, Riker rather pejoratively
maintained that “[I]turing behind Wheare’s definition [of federalism] is the notion of sovereignty
and the necessity for full and formal juristic independence of [both] levels of government” (1975,
p.103).

Despite Riker's condemnation of Wheare, the notion of sovereignty has been integral to the
operation of federalism since the American revolution. After the revolution, the colonies, now
states, were for all practical purposes sovereign republics and their sovereignty was later recognized
in the Articles of Confederation:
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.

The Articles of Confederation, in short, established a league of independent states, united primarily for the purposes of waging war against the former colonial power.18

The federal constitution that emerged from the Philadelphia convention in 1787, which proposed to divide sovereignty between the states and the union, provoked a vigorous debate between Federalists and Antifederalists concerning identity, liberty, and the nature of sovereignty. The Federalists were the new Americans and they sought to perpetuate the union with the new constitution, while the Antifederalists identified with their states and sought to preserve state sovereignty. Since Hobbes, it was widely accepted that sovereignty had to reside in a specific location, usually a monarch but possibly a parliament. The Antifederalists asserted vigorously and repeatedly that “[t]he logic of the doctrine of sovereignty required either the states legislatures or the national Congress to predominate” (Wood 1969, p.527). As one Antifederalist snapped, “two coordinate sovereignties would be a solecism in politics” (quoted in Wood 1969, p.528).19 The Federalists quickly realized that the question of sovereignty was the primary obstacle preventing the ratification of the constitution.20

18 The Articles of Confederation were drafted by the Continental Congress in 1776-77, but they were not ratified by the states until March 1781.

19 An Antifederalist delegate to the New York constitutional ratification assembly argued, “[t]he idea of two distinct sovereigns in the same country, separately possessed of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity as that two distinct separate circles can be bounded exactly by the same circumference” (see, Kenyon 1966, p.401; emphasis original).

20 In response to the Antifederalists, Alexander Hamilton argued, “[t]he proposed Constitution, so far from implying the abolition of the State Governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This corresponds, in every rational import of the term, with the idea of a Foederal Government”
James Wilson, in the Pennsylvania Ratification Convention, finally found the words to defeat the Antifederalists on their own terms. He accepted that sovereignty did indeed have to reside in a *single* location. Sovereignty, he argued, "resides with the people." What is more, he asserted, "they can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper." For greater specificity, he continued, "they can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States" (quoted in Wood 1969, p.530). As such, Herbert Storing quips, "the Americans gradually blundered into a new political theory" (1981, p.4) -- the theory of divided sovereignty. De Tocqueville described American federalism as "an entirely new theory, a theory that should be hailed as one of the great discoveries of political science in our age" (1969, p.156).

In this study, the notion of sovereignty will be added explicitly to Wheare's definition of federalism. In short, federalism is a system of government in which there is a division of sovereignty between two orders of government, represented by a constitutional division of powers, such that both directly govern the same citizenry in the same territory. By the federal principle, I mean the recognition of divided sovereignty. In federal political systems, sovereignty refers to the legal authority to make autonomous political decisions within a constitutionally allocated sphere of jurisdiction.\(^{21}\) If this is denied in certain respects, we may say that the system is only quasi-federal.

**Nationalism and Sovereignty**

The third objective of this chapter is to demonstrate that the concept of sovereignty is also

\(^{21}\) Within democratic federations, the sovereignty of each order of government will of course be circumscribed by the limits of liberal justice. Moreover, unlike sovereignty in international politics, the sovereignty of each order of government is contestable in the courts, which are free to declare legislation of either government *ultra vires*.\(^{21}\)
integral to nationalism. The quest or desire for sovereignty appears to be a recurring characteristic of nationalism. Indeed, Ernest Gellner has asserted that "[n]ationalism is primarily a political principle which holds that the political and national unit [should be] congruent" (Gellner 1983, p. 1). There may not be a theoretical explanation for this phenomenon; the answer probably lies with a prevailing belief that peoples or nations should form states. This belief may stem from the French Declaration of the Rights of Man and of Citizens, which declared that "the nation is essentially the source of all sovereignty." Regardless, this characteristic of nationalism complicates the process of multinational state-building.

Resentment also appears to be a recurring feature of nationalism. This trait probably arises from the origins of nationalism. Although the origins of nationalism are disputed, Liah Greenfeld has argued persuasively that Henry the VIII's secession from Rome and his assumption as the supreme head of the Church of England signals the beginning of the age of nationalism. In short, "the Reformation rendered the break from Rome meaningful and sanctioned the development of separate identity and pride" (Greenfeld 1992, p.52). When the international state system was formalized in the middle of the next century England became the first nation-state. The impressive political and economic power England displayed in the following centuries made England an object of envy. Greenfeld has argued persuasively that over time other societies came to feel a certain ressentiment towards England and thus strove to obtain the same socio-political successes of England. And there was a domino effect. French nationalism reflected a resentment of the English; German nationalism a resentment of France; Russian nationalism a resentment of Germany, and so forth. American nationalism, or more precisely civisme, was generated by a resentment of British rule. Confederate nationalism during the Civil War was fuelled by a resentment of Yankee
domination. Québécois nationalism historically reflected a resentment of les anglais. English Canadian nationalism stems from a resentment of Americans. Later, Indian civisme was also formed from a resentment of British colonialism. Resentment, jealousy and perhaps fear, of a politically dominant group is still frequently associated with nationalist sentiments. This is a crucial 'fact' that must be considered in the process of multinational state-building.

For the purposes of this study, resentment and a desire for sovereignty are assumed to be inherent features of nationalism. These two specific characteristics of nationalism are critical for the process of multinational state-building and consequently for the formation and development of federal political systems. The difficulty in multinational federations is that there are contending nodes for sovereignty. From these premises, it is consequently speculated that stable multinational federations should follow the federal principle more closely. The federal principle stipulates that sovereignty should be divided between two autonomous, but inter-related, orders of government. Political entrepreneurs adopt federalism so as to provide a substantial measure of sovereignty to each nationality entering a federal constitutional arrangement. Understood as such, violations of the federal principle, or infringements of this sovereignty, will likely offend nationalist sentiments in one or more of the distinct nations that comprise the federation. If violations of the federal principle are severe or prolonged, there is the distinct possibility that some minority nationalities will resent the limitation of their sovereignty and in time seek to exit the federation.

Sovereignty is integral to both federalism and nationalism. It is thus time to bring the idea of sovereignty back into federal studies, at least when multinational federations are concerned. Fortunately, the classical approach to federalism, exemplified by Wheare, can be easily wedded to the new institutional approaches in political science. In this approach, the institutional structure of
federalism is positioned as an independent variable to explain political outcomes in modern federations. The remainder of the chapter will detail the indicators of federalism that will structure the rest of the study. It is time to revitalize the legal-institutional approach to the study of federalism in a dynamic fashion that incorporates political change and behaviour. Federalism is quintessentially a legal institution and it should be studied as such.

**The Institutions of Federalism: Respect for Divided Sovereignty**

While federalism may be described as a system of government with divided sovereignty or as an instrumentality for multinational state-building, these descriptions are not sufficient to structure a study of federalism. This section will thus explore what a federal system might look like if it was designed to reflect the principle of divided sovereignty. Three indicators of federalism have been developed for this study. The constitution is the first place to begin an analysis of federalism. In a well-structured federation, the principle of divided sovereignty should be clearly articulated in the constitution. The division of powers, furthermore, should accord each order of government independent spheres of jurisdiction. If the federal principle is to be maintained, constitutional interpretation and amendment must ensure that sovereignty remains divided. Fiscal relations between the two orders of government constitute the second point of reference in the study of federations. The federal principle suggests that each order of government must be allocated independent sources of revenue sufficient to meet its constitutional obligations. The party system forms the third indicator of federalism. In a system of divided sovereignty, political parties at each level of the system ought to be independent of each other. The federal principle can be negated by

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22 It is important to stress again federalism may serve other purposes, and consequently entail different structures.
a non-federal party system, while a well-structured party system can serve to diffuse political conflict. These three dimensions will be briefly elaborated below, and they will structure the analysis of the three case studies to follow. This ideal model is presented as a heuristic device against which to evaluate federal practice in multinational federations.

1A. The Constitution

A written constitution is a political and legal imperative in a federal system. The provision of sovereignty and the division of powers between two orders of government is too complex to be left to informal agreement. This has been noted by Dicey:

> The foundations of a federal state are a complicated contract. This compact contains a variety of terms which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements (Dicey 1959, p.146).

The process of amendment and interpretation must also be explicitly specified in order to prevent constitutional paralysis. The written constitution thus provides the basic political structure for all federal systems and it is the logical place to begin an analysis of any federal system.

The hallmark of a federal constitutional is the division of power between two orders of government, as Dicey so eloquently noted:

> the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states (Dicey 1959, p.143).

The division of powers is not a product of science; as Davis quips, "[i]t is not a mathematical division where high exactitude is possible" (Davis 1967, p.10). The division of powers is a political
bargain. What is relevant about the federal bargain is its form, not its content. It is the principle of independence or sovereignty, in the allocated spheres of jurisdiction, that is absolutely integral to the federal bargain. If the bargain is satisfactory to all parties, it does not matter how many powers are delegated to each order of government. In short, the bargain must adhere to the federal principle. It is from this premise, following Wheare in large measure, that we should begin our analysis of multinational federations.

The first task in the study of any federal system then is to analyse the provisions of the constitution to determine the independence and sovereignty of the two orders of government. A government that is sovereign should be able to govern without external interference, and there must be reasonable guarantees for its continued existence. If a regional government can be dismissed from office or eliminated entirely by a fiat of the central authority, the system is not federal. The system of local government in Great Britain is thus not federal: local governments may be created or abolished by an act of parliament. All sovereignty in Britain resides in the central parliament and the crown. Similarly, if legislation of a regional government can be vetoed, reserved, disallowed or otherwise nullified, we can say that the federal principle is being violated. The Swiss constitution enshrined the federal principle in Article 3, while the framers of the Indian constitution refused to employ the word federal at all, preferring instead to describe India as a "union." The Canadian constitution is ambiguous; Canada is described in the preamble as "federally united" but the federal principle is not followed throughout.

The federal principle must be followed not only in the constitution but most especially in

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23 Davis notes, "the federal principle does not prescribe any physical, moral, or qualitative conditions for the distribution of functions. It is indifferent to the precise content of the division, and it argues that there is no a priori principle by which a distribution of functions could be affected. The definitive element of the federal state is simply in the form of the division, not the substance" (Davis 1967, p.6-7).
practice: "it is not enough that the federal principle should be embodied predominantly in the written
constitution of a country.....What determines the issue is the working of the system" (Wheare 1953,
p.33). We will find in the constitutions of Canada and India numerous violations of the federal
principle. In Canada, however, some of the constitutional prerogatives of the central government
have atrophied over the years. Thus, these apparent constitutional violations of the federal principle
do not constitute violations of the federal principle in practice. In India, on the other hand, the
central government has increasingly employed provisions of the constitution that violate the federal
principle. We must therefore be careful to examine both the written constitution and the "living"
constitution.

1B. Constitutional Interpretation

The most important determinant of the "living" constitution is judicial authority. Each
federal system requires a system of constitutional interpretation and jurisprudence. Two aspects of
the system of constitutional interpretation are particularly important for this study. First, we must
determine whether the structure of the judicial system is in accordance with the federal principle.
Second, we must determine if the decisions of the judicial system follow the federal principle. In
sum, the judicial system should respect and maintain the principle of divided sovereignty.

De Tocqueville was particularly alert to the question of the judiciary and the federal principle.
He reserved his harshest criticism of American federalism for this matter. In a federal system there
ought to be two systems of justice, one responsible for the adjudication of federal law and one for
the determination of the law in each constituent unit of the federation. But, as de Tocqueville
perceptively noted, "however much care was taken to define the jurisdiction of each of these systems,
frequent collisions between the two could not be prevented. So, in such a case, who had the right
to decide competence?" (de Tocqueville 1969, p.142).

A court system devised in accordance with the federal principle would incorporate a final system of adjudication composed by both orders of government. De Tocqueville continued to say that "[o]ne could not grant that privilege to the various courts of the states; that would have destroyed the sovereignty of the Union" (de Tocqueville 1969, p.142). So, concluded de Tocqueville,

The Supreme Court of the United States was therefore entrusted with the right to decide all questions of competence. That was the most dangerous blow dealt against the sovereignty of the states. It was now restricted not only by the laws but also by the interpretation of the laws...It is true that the Constitution had fixed precise limits to federal sovereignty, but each time that the sovereignty is competition with that of the states, it is a federal tribunal that must decide (de Tocqueville 1969, p.143).

"This provision, more than any other," he emphasized a few pages later, "seems to me a profound attack on state sovereignty" (de Tocqueville 1969, p.147).

De Tocqueville conceded that in practice the system did not violate state sovereignty to the degree possible given the structure of the American judicial system (de Tocqueville 1969, p.143). If de Tocqueville had witnessed the Civil War and post-war reconstruction, he might have decided that this quasi-federal system of justice disadvantaged the states in favour of the central government. The point is that the structure of the system of constitutional adjudication may well influence the federal process in a given case. This brings us to the second aspect of the system of constitutional interpretation relevant to this study: are the decisions of the judicial system in accordance with the federal principle? Or, have the decisions permitted one order of government to assume primacy?

The Swiss Federal Tribunal does not have the competence to determine the constitutionality of federal law in Switzerland. This egregious violation of the federal principle, however, is offset by the Swiss penchant for direct democracy. Switzerland, in short, has popular review rather than
judicial review. In the first eighty years of the Canadian federation, the final determination of constitutional questions lay with the Judicial Committee of the Privy Council in London and not with judges appointed by the government of Canada. The JCPC seems to have inserted the federal principle into a constitutional document that was federal in form but not necessarily in spirit. In effect, the JCPC granted sovereignty to the provinces, and constrained the federal government. The system of adjudication since 1949, when the Supreme Court of Canada became the final arbitrator of the Canadian constitution, has, at least tacitly, permitted the rising hegemony of the federal government. The Supreme Court of India has been unable to circumscribe the assertiveness of the central government. In sum, we must analyse both the structure and decisions of the judicial system to determine if the constitution is evolving in a manner consistent with the federal principle.

1C. Constitutional Amendment

As federalism requires a written constitution, federations must have a formal mechanism of constitutional amendment. What the ideal federal amendment procedure would entail is not clear. An amendment procedure that requires unanimity amongst the two orders of government would transform the system from federalism to confederalism but, if the central government can amend the constitution itself, the system would be essentially unitary. It is thus generally accepted that a federal amending procedures should require agreement between the central government and a clear majority of the states. If the requirements for formal constitutional change are too difficult to obtain, the amending formula may be described as rigid. If, on the other hand, constitutional change can be affected easily, the formula may be described as flexible. The trick, of course, is to find the appropriate balance between these two extremes.

The process of formal constitutional amendment is frequently time-consuming and politically
awkward, and thus often avoided in favour of easier modalities. It may be hypothesized, however, that the formal constitutional amendment possesses a higher degree of legitimacy than either judicial interpretation or informal constitutional change. While judicial interpretation is a formal process, it is "open to the objection that the means of popular control over the judges who exercise it are likely to be so attenuated by their indirect selection and length of tenure that the people can exercise almost no control over them, except indirectly and at long intervals" (Livingston 1956, p.13). Informal constitutional change is less regularized than the judicial process, and is subject to greater potential abuse. The rules of the game are not as clear, and minorities have less protection. In sum, while changing conventions, new legislative acts, and new interpretations may effect serious changes in the constitutional structure, the formal amendment is superior to them all; it may override any of the others and none of the others may override it. It provides the ultimate authority and is the final arbiter of all disputes. How it is to be exercised is therefore of the greatest importance (Livingston 1956, p.13-14).

We may thus assert that formal constitutional change has the greatest political legitimacy, followed by judicial interpretation, and lastly by informal constitutional change.

An initial glance at the case studies to be investigated here appears to validate Livingston's assertion. The Swiss have relied more heavily on formal constitutional amendment than almost any other federation and Switzerland appears to be the most stable multinational federal system. India has also pursued formal constitutional amendments, but the amending formula seems to be altogether too flexible. The ease with which the central government in India has amended the constitution may well have violated the federal principle, undermined the authority of the states, and consequently destabilized the federation. The omission of an amending formula in the B.N.A. Act seriously hampered the early evolution of Canadian federalism and for most of the twentieth century the
question of the amending formula has bedevilled the operation of federalism in Canada. Canada has thus frequently relied on informal constitutional change, much to the consternation of Québec. The process of constitutional amendment appears to have a large impact on the operation of federalism and thus must be closely scrutinized.

2. Fiscal Relations and the Federal Principle

"The problem of finance," Birch argued persuasively, "is the fundamental problem of federalism" (Birch 1955, p.xi). A constitutional recognition of divided sovereignty will only be meaningful if each order of government has independent and sufficient sources of revenue. Once again, Wheare is emphatic:

The federal principle requires that the general and regional governments of a country shall be independent each of the other within its sphere, shall be not subordinate one to another but coordinate with each other. Now if this principle is to operate not merely as a matter of strict law but also in practice, it follows that both general and regional governments must each have under its own independent control financial resources sufficient to perform its exclusive function (Wheare 1953, p.97).

Although Wheare was very clear about what was required in principle, we must still consider what financial independence would mean in practice. Davis has suggested that fiscal independence in an ideal federal system would entail four dimensions. In an ideal federal system each order of government would have "a) the right to decide when to raise revenue; b) the right to elect the purposes for which revenue is to be raised; c) the right to determine the amount to be raised; and d) the machinery to administer these decisions" (1967, p.17). What we wish to determine is whether the federal principle is being followed in the practice of fiscal relations. To assess this question we must determine 1) if the two orders of government are able to collect sufficient revenue to assume
their responsibilities, or if one order of government is dependent to some degree on the other. 2) Is one order of government spending revenue in an area of jurisdiction of the other order of government? and if so, is that government, in effect at least, determining policy in that area of responsibility? In short, both orders of government must have the ability to impose and collect taxes sufficient to finance their areas of constitutional jurisdiction.

The practice of fiscal federalism, however, is much more complicated than the theory. While both orders of government are granted the right to levy taxes independently, they must be careful not to over-tax the citizenry. As Wheare stated, "[t]he tax payer's resources must be distributed proportionately to the debt owing to each government (Wheare 1953, p.110). Determining the proportion of tax owing to each order of government is enormously difficult, and a potential source of political conflict. It is difficult, furthermore, to predict future transformations of the economy and the long-term availability of fiscal resources, yet these need to be detailed in a federal constitution to avoid political conflict. The constitution of Canada did not delegate sufficient fiscal resources to the provinces, while the federal government of Switzerland has been constrained by having constitutional recourse only to indirect taxes.

In federal systems, there is also the added difficulty that needs and means vary from one jurisdiction to another. Regional governments with high financial requirements will very often have low resource bases to tax. In other words, poor states can be expected to have high expenses but little financial means. This predicament has led in the post-war Keynesian era to the development of "equalization" payments. In short, the central government will over-tax rich states and compensate poor states. While equalization does not seem like an unreasonable policy in a liberal state, it has quite often led to the bending of the federal principle. Many central governments have
also initiated a plethora of social welfare programs, often in provisional areas of jurisdiction, financed by a labyrinth of "conditional grants." It is not certain, however, that "conditional grants" are in accordance with the federal principle, and they may have been even more destabilizing in multinational federations.

It is in the realm of fiscal relations, as Wheare foresaw, that the federal principle has been most seriously stretched. Central governments have become predominant in most, if not all, federations in the post-war era, and they have become so through their superior financial means. The policies of equalization and social welfare are not unreasonable in a liberal state but the violation of the federal principle may well have political repercussions in federations that have maintained their initial multinational character. In Canada and India, the violation of the federal principle in fiscal matters, I suggest, has contributed to the secessionist tendencies of various minority nationalities. The central government in Switzerland accumulated powers from the cantons in the war years through quasi-federal emergency powers, but after the war these powers were sanctioned by constitutional amendment or allowed to lapse. Consequently, the transformation of the Swiss state has not been as destabilizing to the federation.

3. The Federal Principle and the Party System

The party system has become an integral, albeit non-constitutional, dimension of the federal fabric. Kenneth Wheare unfortunately glossed over the importance of the party system in the operation of federalism (1953, p.87). He was much more concerned with constitutional, judicial, and fiscal questions -- the formal dimensions of federalism. It is in the area of party systems that Wheare's legal-institutional approach to federalism can be revised and made more dynamic. Fortunately, Rufus Davis has outlined the essential features of a party system structured by the
What kind of party system then does the federal principle predicate? In theory one may propose such a model as this: a dual party system -- analogous to the dual legislative/administrative machinery -- in which the parties are exclusively identified with and operate at, either the federal or state level; in which the parties are structurally separate from each other in their composition; and in which the parties perform their main business -- the nomination and endorsement of parliamentary candidates, formulation of policy, electoral management and proselytising -- completely independent of each other (Davis 1967, p.24).

This would constitute an ideal federal party system. Davis was quick to note that no such party system has ever existed, and he cast doubt about the analytical utility of the federal principle in relation to the operation of political parties (Davis 1967, p.29). Total independence of the parties in a federal system is indeed unlikely, but we can expect the federation to be more stable the more this can be approximated.

When we come to examine the party system in each case, we must first analyse the organizational structure of the major parties to determine if the parties are structured federally. In other words, are parties with the same name organizationally independent of each other? Do these parties have independent means of finance? Are these parties electorally independent, or do they rely on the same electoral machinery and vote banks? Do these parties have a significant overlap of personnel and membership? Do the party systems at the state level mirror the party system at the federal level, or is each system unique and independent? Finally, we must determine if parties of the same name govern independently of each other. The greater the level of independence exhibited in the party system, the more federal is the system.

The point of federalism is to provide each order of government with a degree of sovereignty. The formal separation of the two orders of government, however, can be undermined by a governing
party with a non-federal structure. In such a party, the state units are subordinate to the party's high command in the centre. If a party governing a particular state is controlled by the party headquarters in the centre, the raison d'etre of federalism is negated. A political party that spans the breadth of the country will presumably have a demographic composition similar to that of the entire country. If that party imposes its position on each state, minority nationalities may feel dominated by the majority. The constitutional guarantees of sovereignty will thus cease be meaningful.

The threat to federalism by a highly centralized party was never more apparent than in the former Soviet Union:

> the greatest factor of centralization and control over the Union Republics is the relentless impact of a highly centralized party structure upon the flexible structure of formal federalism. This imposition of a monolithic Party upon a federal frame ensures fundamental uniformity in thought and action upon the operation of the national units at all levels of the Soviet administrative apparatus (Aspaturian 1950, p.39).

The federal principle was so thoroughly violated by the modus operandi of the Communist Party that the former Soviet Union cannot be considered an example of federalism.

In the case studies to be examined in this dissertation, the party system, or more precisely the Congress Party system, in India has hitherto maintained an integrated, hierarchical political structure. Indeed, all the federal parties in India have quasi-federal political structures, although this may be changing with the formation of multiparty coalitions in the centre. Nevertheless, the quasi-federal structure of political parties in India may well have contributed to the instability displayed in the Indian federation. The Canadian party system is arguably the most federal feature of the Canadian political system, and this has almost certainly helped to mitigate instability in Canada. The Swiss

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24 Conversely, it would be possible for the state units to subordinate the central party apparatus. This would more likely be a problem in confederal political systems.
party system is not only highly federal, it is also fully consociational. "Amicable agreement" is the *modus operandi* of the major political parties in Switzerland (Steiner 1974). Switzerland demonstrates that a federal party system may be both federal *and* cooperative.

**Conclusion**

The model elaborated above may be considered as an ideal type of federation. It suggests what a federal system might look like if it was structured strictly according to the principle of divided sovereignty. This model provides a point of reference for the analysis of the structure of federalism in Switzerland, Canada, and India. The employment of ideal types in the study of politics has a venerable tradition. Indeed, Plato argued that knowledge constituted the recognition of *forms*, not practices. Ordinary people could only see shadows, while philosophers recognize ideals. Plato realized that "practice" has "a lesser grip on truth than theory," but he insisted in Book Five of the *Republic* that defects in political administration can be identified by the comparison of practice to theory (1974, p.132-3; paras 473a-b).

Max Weber also routinely employed the notion of ideal types in his studies. "The much discussed 'ideal type,' a key term in Weber’s methodological discussion, refers to the construction of certain elements of reality into a logically precise conception" (Gerth and Mills 1958, p.59). Weber "felt that social scientists had the choice of using logically controlled and unambiguous conceptions, which are thus more removed from historical reality, or of using less precise concepts, which are more closely geared to the empirical world" (Gerth and Mills 1958, p.59). Weber, of course, had a deep interest in comparative world history and culture. "The quantitative approach to unique cultural constellations and the conception of ideal types are intimately linked with the comparative method. This method implies that two constellations are comparable in terms of some
feature common to them both. A statement of such common features implies the use of general concepts... As general concepts, ideal types are tools with which Weber prepares the descriptive materials of world history for comparative analysis” (Gerth and Mills 1958, p.60). It is important to stress that “[t]he term ‘ideal’ has nothing to do with evaluations of any sort” (1958, p.59); it is simply a tool to facilitate the study of comparative political sociology.

Without pretending to have the insights of Plato and Weber, this study will endeavour to employ their methodology. The intention here closely resembles a study about consociational democracy undertaken by Kenneth McRae some years ago. He explained that “[t]he consociational model may therefore be useful as an ideal type against which to measure societies that are consociational only to a limited extent....In looking at the Canadian case, then, we may examine how closely the Canadian experience has approached the consociational model at any given point in time, and we may also consider whether the consociational model suggests possible reforms for the existing Canadian system” (1974, p.238). This study will pursue the same objective with regard to federalism in Switzerland, Canada, and India.

In his appraisal of federal systems, Kenneth Wheare asked a simple question: “Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them? If so, that government is federal” (1953, p.32-33). If not, he concluded, the system is “quasi-federal.”

Wheare apologized for applying the federal principle rigidly: “I have defined the federal principle strictly and I have classified federal and non-federal constitutions and governments fairly strictly also....All this concentration on the federal principle may give the impression that I regard it as a kind of end or good in itself and that any deviation from it in law or in practice is a weakness or defect in a system of government. It seems necessary to say, therefore, that this is not my view. Federal government is not always and everywhere good government. It is only at the most a means to good government, not a good in itself. And therefore, while I have maintained that it is necessary to define the federal principle dogmatically, I do not maintain that it is necessary to apply it religiously. The choice before those who are framing a government for a group of states or communities must not be presumed to be one between completely federal government and non-federal government. They are at liberty to use the federal principle in such a manner and to such
Without fundamentally altering Wheare's meaning, this study will examine three multinational federations to determine if the principle of divided sovereignty is respected along all three axes delineated above. In other words, we wish to determine if the principle of divided sovereignty is respected in the constitutional, fiscal, and party systems in each of the three cases. The dissertation will thus unfold in three parts. First, we shall examine the constitution and the division of powers in each of the three case studies. Second, the fiscal relations between the two orders of government will be examined in each case. Third, we shall examine the party system to determine how closely it is structured according to the federal principle.

Wheare's institutional approach was unfortunately largely descriptive. The purpose here is explanatory, not just descriptive. In this approach, the institutions of federalism are examined to explain political stability. If sovereignty is indeed integral to nationalism, we would expect to find that stable multinational federations respect the principle of divided sovereignty more closely. In other words, stable multinational federations should more closely resemble the ideal model described above. We should thus expect Switzerland, the most stable federation examined, to be closer to the ideal model along all three axes, while Canada should be further from the ideal model, and we would expect India, the most unstable of the three federations, to be furthest from the ideal model. The next nine chapters will examine the empirical data in each case to test this hypothesis.

a degree as the think appropriate to the circumstances" (1953, p.33). While Wheare is correct, I would also differ with him slightly. I will argue that in multinational federations insufficient respect for the federal principle will have serious consequences, but I realize that it might not always be possible to strike a federal bargain that respects the principle of divided sovereignty in all respects.
Part III

Constitutional Systems in Multinational Federations
When studying federations, the first task is to analyse the constitution and the processes of constitutional change. If the federal principle is to be in effect, the constitution must be constructed such that each order of government is sovereign in its spheres of jurisdiction. If one government can infringe upon the other's jurisdictional area, we may say that the constitution in this regard is only *quasi-federal*. It is important to distinguish between the written constitution and political practice. It is possible for the constitution to be quasi-federal but for the system to be federal in practice, or vice versa. Moreover, the processes of constitutional change -- amendment, judicial interpretation, and informal evolution -- must also be examined to determine whether the changes are in accordance with the federal principle. A quasi-federal constitution, and especially changes that violate the federal principle, will likely not be sufficient to contain nationalist resentment.

The Swiss constitution conforms closely to the federal principle. The process of constitutional change in Switzerland has also been highly federal in Switzerland. The Swiss have relied heavily on formal constitutional amendment and the amendment referendum, which requires the support of a majority of people living in a majority of cantons. This has ensured that amendments to the constitution have had a high degree of legitimacy, even if they have violated the federal principle. In sum, the explicit recognition of cantonal sovereignty in the Swiss constitution has successfully reconciled the contending nationalisms in Switzerland.

The Canadian constitution is ambiguous. The preamble describes it as federal, but the sovereignty of the provinces has never been recognized. Furthermore, a number of provisions are quasi-federal and these were exploited by the federal government, at least until judicial review circumscribed its power. The omission of an amending formula in the BNA Act seriously hampered the early evolution of Canadian federalism and it has frustrated the operation of Canadian federalism
for most the twentieth century. Federalism in Canada has evolved more in keeping with the Westminster tradition of gradualism, possibly at the expense of alienating Québec. In the past fifty years, successive governments of Québec have objected to federal intrusion into their areas of jurisdiction. In short, they have opposed the infringement of their provincial sovereignty. Many Québécois now reject federalism in favour of independence.

The Indian constitution was intended to be quasi-federal. The Indian states have not been able to challenge the federal government in the courts, because the practice of quasi-federalism in India is almost wholly constitutional, much to the displeasure of many states. The central government, moreover, has displayed no inclination to alter the quasi-federal structure of the constitution. In fact, the Indian state has relied on the quasi-federal provisions of the constitution to control political opposition in the states. This strategy of control has provoked considerable nationalist resentment in many states. Indeed, Punjab, Kashmir and Assam have endured considerable political violence in the past two decades; over 50,000 people have been killed in Punjab and Kashmir insurgencies. It is this horrific violence that leads me to describe India as an unstable federation.
Chapter 3

The Swiss Constitution

The Federal Principle in Action
The Swiss constitution was promulgated in 1848, after a brief civil war. While there were periodic breakdowns of cantonal administration in the early years of the confederation, the Swiss constitution has very successfully united the cantons and diverse nationalities that comprise Switzerland. Despite the enormous turmoil that tore at the social fabric of Europe in the first half of the twentieth century, there has never been a secessionist threat from the cantons. Switzerland has been the most stable federation in the world, and it demonstrates that distinct nationalities may live in harmony, if the political system is well structured.

The Swiss constitution conforms closely to the federal principle. The sovereignty of the cantons, in their sphere of jurisdiction, is assured in Article 3 and this has been respected in political practice. While the relations between the centre and the cantons have changed considerably since confederation, the processes of political development have also conformed to the federal principle. The Swiss have relied heavily on formal constitutional amendment and the amendment referendum, which requires the support of a majority of the people and a majority of the cantons, has ensured that amendments to the constitution have a high degree of legitimacy. This regard for the federal principle may explain Switzerland's remarkable political stability.

**Swiss Political History**

Switzerland became the world's second federal country in 1848, but Switzerland's confederal history dates back to 1291. In that year the three cantons of Uri, Schwyz, and Unterwalden joined

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1 A total revision of the constitution was effected in 1874, but this did not substantially alter the framework that was established in the first constitution. The Swiss still regard 1848 as the year the modern constitution was enacted.

2 The objective of the Jura movement after the Second World War was to separate from the canton of Berne and establish a new Swiss canton. It was never suggested that Jura should separate from Switzerland. The Jura movement is thus qualitatively different from the Quebec or Sikh separatist movements.
in a "Perpetual League" for common defense (Codding 1961, p.21). Over the next 225 years ten more cantons joined the League, and a further nine joined in the nineteenth century. The old Swiss confederation was a very loose security alliance forged between essentially sovereign cantons (Codding 1961, p.24). The central Diet, formed by the sovereign representatives of the thirteen cantons, met only periodically and was highly ineffective (Codding 1961, p.24). In fact, on the eve of the French Revolution "no central government existed that could make binding decisions. The Diet could neither act quickly nor decide on such essential matters as military arrangements, citizenship, moneys, or tariffs. Cantons were sovereign in these areas, and the results were as varied as the cantons themselves" (Codding 1961, p.25).

In 1798, Napoleon swept into Switzerland and precipitated fifty years of political instability. From that time to the founding of the Federal Republic of Switzerland, the country experimented with four constitutions. After five hundred years of confederal politics in Switzerland, the French imposed a unitary constitution on the country in 1798. This constitution also created a single Swiss citizenship, introduced civil liberties, elevated French and Italian as languages equal to German, created a common Swiss currency for the first time, and abolished the remaining vestiges of feudalism in the country. In short, this constitution transformed the Swiss confederacy into a modern state and, more significantly, the idea of a Swiss nation was born (Bonjour 1952; Kohn 1956).

The unitarian dimension of the 1798 constitution did not conform to the Swiss experience, thus "the strongly entrenched sentiments of local autonomy and of traditional diversity revolted against centralized uniformity" (Kohn 1956, p.43). Napoleon himself consequently abrogated the 1798 constitution and replaced it with the 1803 Act of Mediation. The 1803 constitution restored cantonal sovereignty, while maintaining the liberal principles of the previous constitution. It was
not, however, a resurrection of the old confederal system. In fact, the 1803 constitution established Switzerland as a genuinely federal state (Codding 1961). It was this constitution that provided the inspiration for the 1848 constitution (Kohn 1956, p.45), the one still in effect today. The 1803 constitution fell, however, when Napoleon was toppled in 1815.

The new constitution of 1815 was drafted under the watchful gaze of the major powers which defeated Napoleon, and it returned Switzerland to the pre-nineteenth century confederal era. Codding describes the 1815 constitution as "impetuous and brutal" (1965, p.29). He says further that "[i]n one fell swoop, Switzerland turned its back on liberalism and progress and returned to the primitive tenets of the Old Confederation" (1965, p.29). Switzerland was once again subjected to cantonal sovereignty. The embryonic Swiss union was stillborn. The 1815 constitution, however, could not hold back the tide of liberalism and the nascent Swiss civisme for long.

As the nineteenth century progressed, Swiss liberals began demanding greater economic freedom, a unified administration with a common commercial and tariff policy, a single Swiss citizenship, and a restoration of the civil liberties embodied in the Napoleonic constitutions (Kohn 1956, p.85). In short, a liberal Swiss civisme began to flourish in the 1830s. This emerging Swiss civisme and liberalism, by and large a Protestant phenomenon, was alarming to the more conservative, Catholic Swiss who foresaw threats to their religious traditions (Kohn 1956, p.85).

When Swiss liberals began to tax the Catholic church, abolish monasteries, and ban the Jesuit order, seven Catholic cantons moved in 1847 to establish a separate league within the Swiss confederation -- the Sonderbund. When the Sonderbund refused the Diet's command to dissolve, "the Diet sent an army of 100,000 into the field to dissolve the league by force" (Codding 1961, p.29).

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3 The seven cantons which formed the Sonderbund were Lucerne, Uri, Schwyz, Unterwalden (Obwalden and Nidwalden), Zug, Fribourg, and Valais.
The Sonderbund was crushed in a three-week campaign. By most accounts, the victorious army conducted itself with the utmost restraint so as not to cause undue bitterness amongst the defeated population (Bonjour 1952, p.265; Kohn 1956, p.106).

After the Sonderbund civil conflict, the Swiss had to decide how to rebuild Switzerland. A strong Swiss identity, or civisme, had developed over the course of the 19th century, especially among Protestant liberals. However, cantonal identities, which stretched back centuries, were even stronger. The Sonderbund alliance demonstrated that sub-nationalism could not be ignored. A unitary system of government was an impossibility, yet a return to the old confederal arrangement would not have given institutional recognition to the rapidly developing Swiss identity. Federalism was the only instrumentality that could reconcile Swiss civisme and the various sub-nationalities. In short, federalism provided a basis for a Swiss union, while maintaining cantonal sovereignty, which facilitated the preservation of distinct cantonal identities, traditions, and institutions.

After the civil war the constitution of 1815 was abrogated. A new constitution was drafted in June 1847 and submitted to the cantons for ratification. The new constitution was thoroughly federal. A bicameral legislature was created and a Supreme Constitutional Court was established. The federal government, as in the United States, was to assume only delegated powers, while all residual powers were invested in the cantons. On 12 September 1848, the federal Diet announced that the new constitution had been ratified by 15 and 1/2 cantons, approximately 2 million people, and rejected by 6 and 1/2 cantons, approximately 300,000 people. Among the six cantons that rejected the new constitution, five had belonged to the Sonderbund. Furthermore, all three cantons from the original 1291 Swiss confederation rejected the new constitution. Notwithstanding these results, the Diet adopted the new, federal, constitution.
The constitution of 1848 "represented a victory of centralism over particularism" but "it did not eliminate cantonal sovereignty" (Gruner and Pitterle 1983, p.31). The new Swiss constitution at once created a sovereign central government for the first time but, in deference to the defeated Catholic cantons of the Sonderbund, the cantons retained a substantial degree of autonomy (Kobach 1993, p.24). While the constitution of 1848 is still regarded as the foundation of modern Switzerland, a "total" revision of the constitution was effected in 1874. Although the amendments to the constitution did not appear to be significant, the subsequent alterations in the Swiss political system were profound. The constitution of 1874 represents, on one hand, a triumph for liberalism, since it finally made the nation a single economic unit. On the other hand, in terms of domestic politics, it marks the end of the liberal era. The introduction of direct democracy by referendum, in which each law can be submitted to a popular vote if a petition with sufficient signatures is presented, is one of the most important turning-points in modern Swiss history (Fahrni 1997, p.75).

Thereafter, Catholic conservatives were able to thwart the legislative agenda of the liberal radicals until, in fact, the Catholics were incorporated in the governing structures at the centre. The era of "konkordanz-demokratie was born" (Kobach 1993, p.28).

Perhaps even more than the United States, the Swiss state is derived from the people. Thomas Fleiner-Gerster has written,

the Confederation of Switzerland is not a decentralized State giving autonomy to the cantons, it is a State which deduces its powers from the consent of the cantons and of the people. The Constitution conveys a limited power to the Confederation, a power which has itself been given by the cantons and the people (1987, p.145).

In Switzerland, the "people" are understood to be "sovereign" (Steiner 1991, p.306), but the cantons

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4 This development was followed with the introduction of the proportional representation electoral system in 1919, and the adoption of the 'magic formula' in 1959, which incorporates representatives from all four major parties in the governing Federal Council.
are regarded as the "building blocks" of Swiss federalism (Steiner 1991, p.311). Swiss citizenship is derived from membership in a local community and a canton (Barber 1988, p.43). While Switzerland is composed of four linguistic nations, they are dispersed among the twenty-six cantons. Cantonal sovereignty, which can only be infringed with the consent of the people, has served to maintain distinct cantonal identities.

The Constitution of Switzerland

The Swiss constitution is a mixture of high principles and mundane details (Linder 1994, p.98). Christopher Hughes, the foremost non-Swiss scholar of the constitution, is less diplomatic; he states bluntly, the Swiss constitution "is by English standards carelessly drafted" (Hughes 1954, p.1; footnote). Notwithstanding the somewhat muddled character of the Swiss constitution, the federal principle was explicitly enshrined in the constitution. While some scholars have characterized Swiss federalism as "extreme" or "radical" (Bogdanor 1988, p.69; Barber 1988, p.31), it is perhaps more accurate to say that it corresponds closely to a classical definition of the federal principle.

After invoking the trust of "Almighty God" in the preamble of the Constitution, Article 1 declares,

"[t]ogether, the peoples of the [twenty-three] sovereign cantons of Switzerland united by the present alliance, to wit Zurich, Berne, Lucerne, Uri, Schwyz, Unterwald (Upper and Lower), Glarus, Zug, Fribourg, Soleure, Basle (City and Rural), Schaffhausen, Appenzell (both Rhodes), St. Gall, Grison, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchatel, and Geneva [and Jura] form the Swiss Confederation."

All references to the Swiss constitution are from the unofficial translation provided by Gisbert Flanz and Gunter Klein in Albert Blaustein and Gisbert Flanz (eds) (1982) Constitutions of the World, Oceana Publications: Dobbs Ferry, New York. This passage has been amended above to include the creation of Jura in 1979. English names for the Swiss
The enumeration of the cantons, including the half cantons, in this article guarantees their continued existence. The list implies that cantons cannot be added, deleted, or partitioned, or unified in the case of the half cantons, without a formal constitutional amendment to this article (Hughes 1954, p.3). This legal truth was displayed with the creation of the new canton of Jura in 1979.

For the purposes of this study, Article 3 is the key feature of the Swiss constitution. It states,

\[
\text{[t]he Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution and, as such, exercise all rights which are not entrusted to the federal power.}
\]

While the language of Article 3 is clear, its consequences are more obscure. Hughes is quite sceptical about the significance of this article. He has claimed that the cantons were historically never sovereign; rather, "they scrambled from one pre-state subordinate status straight into federal subjection" (1993, p.157). He argues that the juristic meaning of Article 3 is "highly disputable, and it may have none" (1954, p.5). He notes that the "most important of the powers specifically of 'sovereignty' are in the hands of the federation," and "[t]here is no field in which the Cantons are in a narrow sense 'sovereign,' since some principles of the Federal Constitution...cover all fields" (1954, p.5). He acknowledges, however, that Article 3 cannot be "explained away entirely" (1954, p.5).

Wolf Linder, on the other hand, has argued that Article 3 has effectively guaranteed cantonal autonomy and, by extension, granted the linguistic and religious minorities of Switzerland significant constitutional protection (1994, p.42-3). Linder also states that unwritten constitutional traditions cantons are an amalgamation of French, German, and Italian names, as well as some anglicizations, see Appendix 1.

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6 The half-cantons were formerly the unified cantons of Unterwalden, Appenzell, and Basle. They split in the fourteenth century, 1597, and 1833 respectively as a result of internal disputes. For all intents and purposes, each of the six half-cantons operates as if it were a full canton, except that they have only one representative each in the Council of States, the second chamber of the Federal Assembly, and for the purposes of constitutional referendums they count as only half a vote (Codding 1961, p.37; see also Hughes 1954, p.3-4).
have guaranteed political autonomy to the more than 3,000 communes, or local governments, in the country (1994, p.49). Article 3 has had two important consequences. First, it indicates that the federal government is only entitled to powers expressly delegated to it and that all residual powers lie with the cantons. Second, the article has ensured that the federal government cannot acquire new powers without a formal amendment of the constitution. In short,

*The constitutional rule in Article 3 says that all (future) powers shall be invested in the cantons, unless the Swiss people and the cantons decide, by constitutional amendment, that they shall be attributed to the federation* (Linder 1994, p.42).

Thus, while the 'water-tight' compartmentalization of Swiss federalism may have become rather porous in the twentieth century, the processes of constitutional change have ensured a high degree of legitimacy to the current structure of Swiss federalism. All new arrangements have, eventually, secured the support of a majority of people, living in a majority of cantons.

Hughes has argued that Article 2, the purposes of the confederation, is "virtually an alternative centralistic constitution," which compromises cantonal sovereignty. He states, "[a] central government which has all the powers necessary to secure independence, maintain peace and good order, and foster the common welfare of its subjects, hardly has need of any more" (1954, p.5). He notes, however, that "[m]ost jurists agree....that the use of this Article as a competence is illegal" (1954, p.5). Similarly, articles five and six, in which the confederation is required to guarantee the sovereignty of the cantons and their constitutions, have not served to erode cantonal autonomy.

**Deviations from the Federal Principle**

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7 Article 2 states, "[t]he aim of the Confederation is to preserve the outward independence of the fatherland, to maintain internal peace and order, to protect the freedom and the rights of the confederates and to promote their common prosperity."
The constitution permits federal intervention in cantonal jurisdictions in the case of "internal troubles" or external threats. The cantonal government is required to inform the central authorities, if cantonal governance is threatened. Article 16.2 states,

> whenever the cantonal government is unable to summon help, the competent federal authority may intervene without being called upon; this authority is bound to do so whenever the security of Switzerland is at stake.

Unless there is a complete collapse of cantonal administration, a federal intervention should only occur when a canton requests assistance. However, it was "not the practice of the central government to wait to be invited to intervene. In the language of the Constitution, it always consider[ed] that the troubles 'endanger the security of Switzerland'" (Hughes 1954, p.16). Between 1848 and 1932, there were nine cases of federal intervention (Codding 1961, p.40), and there have been none subsequently.

Cantonal sovereignty is obviously risked by this article, but the next clause states that "[i]n the event of a federal intervention, the federal authorities shall see to it that the provisions of article 5A be observed" (Article 16.3). In other words, the confederation is obliged to guarantee the sovereignty of the cantons, notwithstanding an intervention. Indeed, after order was reestablished in each instance of federal intervention, cantonal integrity was restored. Although it is hard to imagine that this clause will ever be used again, it is included in the proposed constitution now under consideration.\(^8\)

Politically stability in the constituent units is one of the perplexing questions for federalism.

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\(^8\) Switzerland is in the process of considering a total revision of the constitution (see below); Article 43.2 of the proposed constitution states that the Confederation "intervient lorsque l'ordre d'un canton est trouble, ou menacé par un danger émanant d'un autre canton, et que le canton concerné ne peut pas préserver son ordre constitutionnel lui-même ni avec l'aide d'autres cantons" (GOS 1996c, p.18).
The units are normally supposed to ensure political order but, if they are unable to do so, it is not usually clear what should be done. It therefore makes a degree of sense to include such procedures in the constitution, even if they might deviate from the federal principle, but it is incumbent upon the federal authorities to respect the constitution and the rule of law when invoking these procedures. The Canadian constitution does not include any modalities to quell disturbances in the provinces. A political convention exists such that the federal government will not intervene unless it is requested by a province but if the political administration of a province ever collapsed entirely, Canada would enter a constitutional crisis. The Indian constitution, on the other hand, is perfectly clear on this matter but, unlike its Swiss counterpart, the central government of India has subjected this power to considerable abuse, to the detriment of centre-state relations (see below). The Swiss seem to have struck the right balance between constitutional law and political practice in this matter.

The federal government of Switzerland has had recourse to other emergency provisions in the constitution, although some of these have now been tempered by amendment. Article 89 bis permits the central government to pass urgent decrees, known as *arrêtés*. These were used extensively during World War One and through World War Two when they were not subject to legislative challenge. A constitutional amendment in 1949 placed a one year time limit on all *arrêtés* and subjected them to a possible "abrogative referendum" (Linder 1994, p.121). Such decrees can only be extended beyond the one year time limit if they have achieved majority support in a popular vote. Prior to this amendment, the federal government's reliance on urgent *arrêtés* seriously threatened the federal principle and the sovereignty of the cantons (see Chapter 6).

In addition to governing by emergency decree during the world wars, the Swiss Parliament delegated "full powers" to the Federal Council, although the constitution does not recognize such
a measure.\textsuperscript{9} Parliament in effect forfeited its legislative mandate to the Federal Council for the duration of each war. Wolf Linder notes,

\begin{quote}
[u]sing its 'full powers' during the Second World War, the Federal Council issued some 1,800 emergency ordinances, whereas the Federal Assembly, in the same period from 1939 to 1949, adopted some 220 laws and ordinances. The emergency ordinances of the Federal Council were subject to some control by parliament, but were not subject to referenda (1994, p.121).
\end{quote}

Although the constitution has not been amended to recognize this procedure, Linder is of the opinion that the "Federal Assembly and the Federal Council would rely on the same procedures should war threaten again" (1994, p.121). Although this power is constitutionally dubious, it has only been used in the most extreme circumstances, with an almost unanimous political consensus. Moreover, much of what was legislated during these times was later repealed and approved by the people in popular votes. While there were no institutional constraints on the federal government, it was scrupulous not to abuse its power. This may reflect the sovereign power of the people.

Finally, the constitution is emphatic that federal law is superior to cantonal law. First, the cantons are obliged to accept federal law. Article 85.8 empowers the Federal Assembly to take measures "to secure the observance of the Federal Constitution and the guarantee of Cantonal Constitutions and the fulfilment of Federal Obligations" (see, Hughes 1954, p.91). In short, the federal government has the power to force the cantons to comply with federal law. The makers of the Swiss constitution were obviously determined to avoid the question of nullification. Second, Article 2 of the Transitory Provisions appended at the end of the Swiss constitution states,

\begin{quote}
\textsuperscript{9} Hughes argues that the "full powers" doctrine was only inferred from several oblique passages of the constitution and it was unconstitutional in three respects: "powers belonging to the Cantons were exercised by the central government, powers belonging to the Legislature were exercised by the Executive, and guaranteed constitutional rights of the citizens were suspended" (1954, p.169).
\end{quote}
the provisions of existing federal laws, concordats, cantonal constitutions and laws which are inconsistent with the present Federal Constitution shall cease to be in force with the adoption of the latter or, as the case may be, the enactment of the federal laws it provides for.

This has given rise in Switzerland to the well known legal maxim "federal law breaks cantonal law."

The question of which law shall prevail, constituent unit or federal, in the case of a conflict has plagued all federal states since the adoption of the American constitution. Most countries have opted to defer this question to a supreme court on a case by case basis. The Federal Tribunal in Switzerland, however, has no such power.

Dicey and Wheare postulated that judicial review was a hallmark of federalism but, on this score, Switzerland does not appear to meet a minimum definition of federalism (Livingston 1956, p.191fn). Switzerland has three orders of courts: district, cantonal and federal. The lowest courts are elected directly by the people, while the cantonal courts and the federal tribunal are elected by the cantonal and federal assemblies respectively (Linder 1994, p.9). The cantonal courts interpret both federal and cantonal law. The federal tribunal is the final court of appeal beyond the cantonal courts. The federal tribunal may resolve conflicts of competency between the two orders of government (Hughes 1954, p.122), but it cannot rule on the constitutionality of federal laws (Codding 1961, p.101).\(^\text{10}\) It thus cannot strike down federal laws on the grounds that they might be ultra vires (Hughes 1954, p.121). This stands in stark contrast to the supreme courts in both Canada and India, not to mention most other federal countries. The weakness of the Federal Tribunal would

\(^\text{10}\) Hughes (1954, p.77) notes that this situation leaves individual rights vulnerable to federal legislation. Article 66 states, "[f]ederal legislation shall determine the circumstances in which a Swiss citizen may be deprived of his political rights" (Hughes 1954, p.77). The Federal Tribunal is powerless to contest the legality of legislation enacted under this article. Livingston also speculates that "the absence of judicial review is one of the important reasons for the greater use of the amending power in Switzerland" (1956, p.193).
be an egregious violation of the federal principle, if it were not for the well-established practice of
direct democracy in Switzerland.

**Direct Democracy**

Direct democracy in Switzerland has a long history and many forms but, for our purposes,
three institutions are especially important -- the optional legislative referendum, the compulsory
constitutional amendment referendum, and the constitutional initiative.\(^\text{11}\) The optional legislative
referendum, also known as the "facultative" referendum, was introduced, by constitutional
amendment, in 1874 and it has been effectively utilized to challenge contentious legislation by the
federal government. All federal legislation, except urgent *arrêtés*, is withheld for ninety days after
gaining final assent of the Federal Assembly to permit popular challenge. The submission of a
petition with the signatures of 50,000 Swiss citizens is all that is required to force a popular
referendum on the issue.\(^\text{12}\) Alternatively, the vote of eight cantonal governments may prompt a
popular referendum, although this mechanism has never been employed. All legislation is subject
to this process and "[t]here is nothing that MPs can do to prevent a plebiscitary challenge" (Kobach

A simple majority of voters is sufficient to nullify federal legislation in a popular referendum.
Only about seven percent of federal legislation is challenged; in these referendums about 57% fail,
and only 43% are approved by the people (Eschet-Schwarz 1989, p.87-9). In other words, only about

\(^{11}\) Consociationalism is usually understood to mean, in part, that political decisions are made by an elite ruling
collegation. The institution of direct democracy, where the people decide important political questions and constitutional
amendments, is perhaps the most significant deviation from the principles of consociationalism in Switzerland (Katz
1981). This makes Switzerland's multinational harmony even more remarkable.

\(^{12}\) Prior to 1977, only 30,000 signatures were required to mount a legislative challenge (Steinberg 1996, p.100).
4% of federal legislation is rejected by the people. The importance of the legislative challenge is not the amount of legislation that is accepted or rejected. What is important is that all legislation receives the tacit or express approval of the voters. This ensures that federal legislation has a high degree of legitimacy. The facultative referendum also provides the cantons an opportunity to challenge federal legislation that encroaches upon their jurisdiction. If the people accept legislation that might otherwise be considered ultra vires, it nonetheless has a high degree of legitimacy. Perhaps this is why the cantons seem content to defer to the people, and have never challenged federal legislation.

The optional legislative referendum counterbalances the weakness of the Federal Tribunal. Briefly stated, Switzerland has popular review of legislation instead of judicial review (Livingston 1956, p.193). The Swiss feel that an extension of judicial authority would be undemocratic (Coddington 1961, p.112); it would allow the courts to nullify legislation approved by the elected representatives of the people. This, of course, is the situation that pertains in other federal countries. It is frequently argued, however, that the courts have obtained a legislative capacity in the United States and Canada. De Tocqueville was acutely aware of the structural inadequacy of the American courts. He noted that disputes between the federal and state governments are solved by a court appointed by the federal government (1969, p.142-3). This is now a source of contention in Canada, with regard to the Supreme Court reference case on the possible secession of Québec. Switzerland has avoided this theoretical quagmire by taking questions directly to the people.

All constitutional amendments must also be approved by the people. A constitutional referendum must obtain a "double" majority, a clear majority of the people and a majority of the
cantons. Linder describes these as the "democratic majority" and the "federalist majority" respectively, and he notes that the latter may oppose the former. In other words, a minority of voters living in a majority of cantons may frustrate an overall majority vote of the people (Linder 1994, p.48-9). Between 1848 and 1988, there were 129 constitutional referenda; 95 received the required double majority (73.6%), while 4 received a popular majority but not a majority of cantons and another received a majority of cantons but not a majority of voters (Eschet-Schwarz 1989, p.87-9).

One must distinguish between these referenda and the constitutional initiative. In the latter, introduced by a constitutional amendment in 1891, a petition with 100,000 signatures can force a referendum on a proposed constitutional amendment. While this process allows for popular participation in the political system, the vast majority of these proposals fail. Between 1891 and 1977, 116 initiatives were put to the vote; 8 were accepted, 66 rejected, 38 withdrawn and 3 were declared invalid. In thirteen cases, the Federal Council offered a counter-proposal, of which 9 were approved (Coddin 1983, p.21).

The success of constitutional referendums, as opposed to initiatives, belies the assertion that the Swiss are constitutionally conservative (Hughes 1954, p.101). In fact, as Linder has noted, "the image of the stablest [sic] government in the world is in contrast with the most unstable constitution" (quoted in Steinberg 1996, p.100). While the constitution of Switzerland may appear to have a "rigid" constitutional amending formula, the Swiss people have viewed the constitution as a pragmatic document, to be altered according to time and circumstance. Livingston wondered why

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13 For the purposes of referendum, the vote of a full canton counts as one, while the vote of a half canton counts as half. The twenty full cantons and the six half cantons form an electoral quotient of 23, with 12 forming the minimum majority. "If the result is a tie (11.5:11.5) the proposal is rejected" (Linder 1994, p.49).

14 Prior to 1977, a constitutional initiative required only 50,000 signatures (Steinberg 1996, p.100).
the Swiss are so amenable to constitutional amendment, while the Australians are not, "despite the fact that in essential features the two procedures are very nearly identical" (1956, p.197). Livingston concluded that it must be a result of very different political cultures, but this is probably not correct. Switzerland, as we shall discuss in a later chapter, has a consociational form of government composed of four major political parties, representing about 80% of the electorate, whereas the Australian government is usually elected with only about 40% of the popular vote. Thus, when the Swiss government proposes a constitutional amendment it likely reflects a greater social consensus than is the case in Australia. The practice of intergovernmental consultation, as well as the practice of only proceeding when there exists tacit agreement, has insured a high degree of federal harmony in Switzerland. Hughes' claim that the Swiss constitution is too easily amended to protect the federal principle is thus specious.

Political practice in Switzerland may no longer conform exactly to the principles of federalism in all instances, but the processes of political and constitutional change are highly legitimate. The quasi-federal practices in Switzerland, such as they are, have been sanctioned, tacitly or overtly, by the people. Wolf Linder has noted,

> [s]ince Article 3 of the constitution leaves all powers to the cantons unless specifically delegated to the federation, the authorities have to propose an amendment for every major new responsibility undertaken by the federation (1994, p.85).

The double-majority required for constitutional amendments especially provides the cantons reasonable guarantees of their sovereignty. Minority nationalities are thus well protected. In short, the process of constitutional change, irrespective of the substance of those changes, has been thoroughly federal and the Swiss federation has consequently remained highly stable.
The Federal Process in Switzerland: The Redivision and Amalgamation of Powers

The original intent of the Swiss constitution was to create a limited state at the centre and to leave most powers of government to the cantons. As such, the central government received only delegated powers in a few important areas, like defense, customs, and foreign policy. Cantonal powers were not itemized; anything, which was not expressly a federal power, was a cantonal power. This was the classical model of federalism and divided sovereignty. The exigencies of the modern state in the twentieth century, however, have led to an accumulation of powers at the centre. The majority of constitutional amendments since 1848 (130 in total) have transferred powers from the cantons to the federal government, which has "diminished cantonal sovereignty to a large extent" (Fleiner-Gerster 1987, p.147). Many scholars agree that "complete cantonal autonomy is now a reality in only a very small number of policy areas" (Bogdanor 1988, p.78). 15 Contemporary Swiss federalism, however, is extraordinarily complex, contrary to expectations.

While the central government has expanded its legislative power in the twentieth century, it is administratively weak. With the exception of defence and customs, "there are no policy fields in which the federal government has its own executive administration" (Klotti 1988, p.96). Almost all federal legislation is thus implemented and administered by the cantons. Bogdanor and Klotti consequently speak of administrative decentralization in Switzerland, as opposed to the juridical centralization, which has occurred in the constitution.

While the federal government has been accumulating powers by constitutional revision, it has also "delegated" powers to the cantons. Bogdanor reports,

[a] content analysis of the scope of delegation has shown that, in 15

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15 See also, Codd (1961, p.44; 1983, p.12); Klotti (1988, p.93); Kriesi (1990, p.36).
of 24 areas, the federal government delegates competences to the cantons, at least partially. Thus, the cantons enjoy a significant competence in 20 policy areas, five through the distribution of tasks and 15 through the delegation of competences (1988, p.78).

Klotti describes this "remarkable" process as "redecentralization" (1988, p.93). Delegation of powers and administrative decentralization have led to widespread variation in the administration of policy across the cantons. While this is an unacceptable situation for those who desire uniform standards, it is considered highly pragmatic by most federalists.

Other standard indicators of centralization and decentralization also suggest that Switzerland has experienced a long-term decentralizing trend. In terms of total government expenditure and employees, the federal government has been shrinking in relation to the cantons and local governments throughout the century (see, Table 3.1).

Table 3.1: Relative Size of the Federal Government in Switzerland

<table>
<thead>
<tr>
<th>Year</th>
<th>Federal Expenditure as a Total of All Government Expenditure</th>
<th>Federal Employees as a Total of All Government Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910</td>
<td>n.a.</td>
<td>47%</td>
</tr>
<tr>
<td>1930</td>
<td>n.a.</td>
<td>n.a.</td>
</tr>
<tr>
<td>1946</td>
<td>51%</td>
<td>41%</td>
</tr>
<tr>
<td>1950</td>
<td>38%</td>
<td>41%</td>
</tr>
<tr>
<td>1960</td>
<td>35%</td>
<td>39%</td>
</tr>
<tr>
<td>1970</td>
<td>32%</td>
<td>35%</td>
</tr>
<tr>
<td>1980</td>
<td>31%</td>
<td>30%</td>
</tr>
</tbody>
</table>

(Source: Bogdanor 1988, p.80).

In short, the juridical expansion of the federal government is not matched in terms of government size or expenditure; the cantons have not experienced a loss of relative power and there is no danger of the cantons being overwhelmed by an expansionist federal government. Thus, notwithstanding the considerable entanglement of legislation and policy administration, the cantons have not been politically emasculated.
The cantons are still free, within the limits of the constitution, to determine their political structure, including relations with local governments. As noted above, Swiss citizenship is still dependent upon cantonal membership. The cantons, moreover, continue to raise their own revenue. Although they receive transfers from the central governments to finance their programs and local governments, they also collect the direct federal income tax (see, Chapter 6). In addition, the cantons also maintain almost exclusive political control over the police and the administration of justice, social welfare, primary and secondary education, religion, and language policy. Jean Laponce (1992) has argued, that in contrast to Canada, Switzerland created a single economic union, while tolerating cultural protectionism in the cantons, especially with regard to language. This, he suggests, may account for Switzerland's political stability and Canada's perpetual tension with Québec. In short, "the cantons remain the fundamental Swiss political administrative and legal unit" (Glass 1977, p.39). Glass opines further that "Switzerland's extensive cantonal autonomy allows ethnic groups a great deal of control over their own affairs" (1977, p.40).

In sum, the process of Swiss federalism is difficult to articulate definitively. Kriesi has written,

[i]n view of the concomitant tendency of the federal parliament to make ever more general laws which leave a lot to be specified in the implementation process, it is on balance very difficult to say whether the cantons have gained or lost power in the more recent past (1994, p.446).

In behavioral language, federalism in Switzerland has both centralized and decentralized since the First World War. Area specialists are of the opinion that Swiss federalism is "alive and kicking" or "alive and flourishing" (Kriesi 1990, p.446; Codding 1961, p.44).

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The division of powers and government responsibilities has become inordinately complex in Switzerland. Like all federations, the Swiss have not been able to avoid intergovernmental entanglement. This process, moreover, has been almost wholly *ad hoc*; first principles are conspicuous by their absence (Bogdanor 1988, p.81). Bogdanor notes that this type of federal system, if it is to work, requires a high degree of political consensus. He opines,

> [i]n a country such as Switzerland where there is a basic consensus about the fundamentals of social and economic life, a complex federal system can work effectively. But it would be unwise for any country in which this degree of consensus did not exist, to seek to imitate the *Confederatio Helvetica* (1988, p.83).

Bogdanor has put his finger on the nub of the issue, although he may not have realized it. Switzerland has not always been characterized by consensus. Modern Switzerland was born out of civil war, between the conservatism of the catholic secessionists and the protestant liberal centralism of the free radicals. Switzerland has constructed communal harmony through its federalism, not to mention consociationalism, corporatism, and direct democracy. The principle of "amicable agreement" (Steiner 1974; discussed below) has ensured that changes in the federal system have occurred only after procuring the substantial agreement of the Swiss people and the cantons. It is not the substance of the changes that matters; it is rather the process by which the new arrangements were achieved. Cantonal sovereignty no longer means that the cantons have exclusive political autonomy in their areas of jurisdictions; it means that Swiss federalism does not change without their approval. The process of change in Switzerland has ensured that the contemporary federal system has a high degree of public legitimacy.

**Projet 96: Total Revision of the Constitution**

The Swiss constitution has served Switzerland well, and it remains an eminently serviceable
constitution, but frequent amendments have made it rather convoluted. Jonanthan Steinberg has written that it "resembles a sheet on which history has scribbled changes, crossed out certain sentences and forgotten others" (Steinberg 1996, p.101). In 1966, the Federal Assembly initiated the process for a total revision of the constitution. A commission, chaired by former Federal Councillor Friedrich Traugott Wahlen, investigated the issue extensively from 1967 and 1973 and, despite weak public enthusiasm, recommended proceeding with a total revision of the constitution. An expert commission, led by State Councillor Karl Obrecht, considered the recommendations of the Wahlen Commission from 1973 to 1977 and presented a new draft constitution. This draft was shelved in the 1980s but a new draft was prepared in 1996. Parliament is still considering this new draft; if approved, it will be submitted to the people in 1999 for popular ratification.

An examination of these draft constitutions reveals the ebb and flow of Swiss federalism. The 1977 draft sought to institutionalize the primacy of the central government. While the cantons were to remain free to determine their political organization (Article 40), the venerable Article 3, which hitherto guaranteed the cantons their sovereignty, was replaced with the banal assertion that "[t]he tasks of government are divided up between the Confederation and the Cantons" (GOS 1977, p.2). The "guarantee" of cantonal autonomy was similarly anaemic. Article 53 stated only, "[w]henever the Confederation legislates, or acts in other ways, it guarantees to the Cantons all the autonomy compatible with the accomplishment of the tasks of government" (GOS 1977, p.17). In this draft constitution, the cantons were deprived of the sovereignty they had previously enjoyed.

While the distribution of responsibilities was not much changed in the draft constitution, the structure of Swiss federalism was fundamentally altered by the division of powers indicated in

17 For a detailed analysis of the proposed 1977 draft constitution see, Charles F. Schuetz (1982) "Constitutional Change -- Swiss Style," Occasional Papers 9, Department of Political Science, Carleton University, Ottawa, Canada.
Articles 50 and 51. First, each order of government was now delegated powers, instead of just the federal government, as in the prevailing constitution. In short, the cantons were no longer the repository of powers. Second, the list of cantonal responsibilities was qualified by the ability of the federal government to intervene in areas of cantonal jurisdiction. Article 51.2 stipulated,

In these domains the Confederation may: a. enact outline laws to establish minimum requirements or to assure the coordination among the Cantons; b. in certain cases, create institutions of its own (GOS 1977, p.16).

While the cantons were prohibited from encroaching upon federal jurisdictions, the federal government, by this construction, was permitted to intrude into each and every cantonal field of responsibility. This amounted to "a radical break with the past" (Tschaeni 1982, p.127).

The superiority of the federal government was also reflected in the division of revenue. While the sources of federal revenue were itemized in Article 54, almost every source was listed and without limit (GOS 1977, p.17-18). Income tax was the only source of revenue listed for the cantons in Article 55, and Article 55.2 stated that "[w]herever the Confederation levies certain payments the Cantons cannot levy payments of the same kind; unless federal law provides otherwise" (GOS 1977, p.18). Article 55.3, furthermore, indicated that for "the purpose of fiscal harmonization or in the interest of financial equalization" the federal government could regulate cantonal tax schemes. Once again, the sovereignty previously enjoyed by the cantons was being erased.

The draft constitution included some measures to protect the cantons from the federal government. An optional referendum on federal legislation could be initiated by just three cantons (Article 62) and, similarly, three cantons could proposal constitutional or legal initiatives (Article 65). The Federal Tribunal was also to be given the power to review the constitutionality of federal legislation. However,
critics of the draft do not particularly fear unconstitutional actions by the federal government. They oppose the proposed mode of the distribution of tasks because it legally provides the Bund [Federal Assembly] with a predominance that has been unparalleled in Switzerland in the past 175 years (Tschaeni 1982, p.127).

A Canadian commentator, Charles Schuetz, opined that "the Swiss constitutional draft gives the impression that the traditional federal arrangement is rapidly reaching the point of operational obsolescence" (1982, p.32).

The Swiss cantons, not surprisingly, were not favourably disposed to the draft constitution of 1977. In deference to the cantons, the Federal Department of Justice decided to abandon this draft in 1985 and to start a new process afresh. In June 1987, the Federal Assembly adopted an arrêté, which formally approved the new process. Progress was slow, probably because of a lack of public interest. In April 1993, the Federal Assembly adopted the motion of State Councillor Josi Meier, which demanded that the Federal Council ensure that a new constitution was prepared for the occasion of the 150th anniversary of the modern Swiss constitution in 1998. Tying the process of renewing the constitution to Swiss nationalism seems to have given the project new impetus and a new draft was presented at the end of 1997. Parliament is currently discussing the draft and, if approved, it will be submitted to the people for ratification in 1999.

The objective of the new process is not to change the model of the state; it is only to clarify the language of the constitution. The government of Switzerland contends,

[l]e mandat parlementaire établissait clairement les principes pour la poursuite de la réforme constitutionnelle: pas de nouvel ordre étatique, car les principes essentiels de la Confédération -- en particulier la structure fédérale, les institutions de notre démocratie directe, les rapports fondamentaux entre le Conseil fédéral et le Parlement, la neutralité et la solidarité en matière de politique étrangère, l'ordre social et économique -- ne sauraient être considérés comme dépassés (GOS 1996b, p.2).
The official web-site of the Swiss Parliament notes that the constitution has been amended more than 130 times since 1874. These partial revisions, it continues,

ont produit un assemblage disparate, auquel s'est ajouté le poids des ans. Seuls des experts arrivent encore à comprendre certaines de ses parties. Notre Constitution est devenue étrangère aux citoyennes et citoyens de notre pays. La Suisse a donc besoin d'une nouvelle Constitution qui traduise la réalité de notre État fédéral dans la langue de notre époque et d'une manière compréhensible (GOS 1996a, p.1).

The new draft constitution is certainly much clearer than the existing constitution.

The 1996 draft constitution, furthermore, restores the sovereignty of the cantons and the original structure of Swiss federalism. Article 3 now reads,

1. Les cantons sont souverains en tant que leur souveraineté n'est pas limitée par la constitution fédérale.
2. La Confédération remplit les tâches que la constitution fédérale lui attribue.
3. Les cantons participent au processus de décision au niveau fédéral et à la mise en œuvre du droit fédéral (GOS 1996c, p.8).

The essential sovereignty of the cantons is reinforced by various other articles scattered through the draft constitution. Article 34.3 states, "[I]a Confédération observe le principe de subsidiarité," (GOS 1996c, p.16), while Article 38 stipulates that the "Confédération respecte l'indépendance des cantons" (GOS 1996, p.16). Finally, Article 35 clarifies that "[I]es cantons disposent, dans les limites fixées par la constitution fédérale, de tous les droits de souveraineté nécessaires à l'accomplissement de leurs tâches" (GOS 1996c, p.16). The Confederation also guarantees the number and territory of the cantons (Article 44). If the previous draft constitution obliterated the federal principle, the current proposal repeats it frequently.

While the new draft constitution restores the structure of Swiss federalism by delegating powers to the federal government, and guaranteeing the sovereignty of the cantons, the powers
delegated to the federal government are so extensive that hardly any competences are left for the cantons, apart from education. The federal powers are itemized in Articles 49 through 116. In a few instances, cantonal prerogatives are noted in these articles.\(^{18}\) The federal powers include important matters such as foreign affairs and defense, and less important concerns such as the encouragement of sport (Articles 79 and 82). While the structure of this constitution is in accordance with the federal principle, it is difficult to imagine that the cantons will consent to the preponderance of power accorded to the central government.

On the other hand, the financial provisions of the draft constitution more or less institutionalize current practice (see Chapter 6). The federal government is provided a fixed direct income tax of 11.5% (Article 119.1). The federal government has collected a "temporary defense" tax since the Second World War, although it has never been able to make this a permanent feature of the constitution. The federal government also retains the indirect taxes on which it has relied for most of the century and the value added tax, which was finally approved by constitutional amendment in 1993 (Articles 121-124). Provisions have also been made for intergovernmental tax harmonization (Article 120) and equalization (Article 126). The cantons likely will not object to these articles.

The draft constitution now being considered by parliament demonstrates the importance of the federal principle in Swiss political practice. Article 3, which guarantees the cantons their sovereignty, has been the foundation upon which the confederation has been built. The previous attempt to revise the constitution failed, without ever being brought to a vote, because it did not recognize the fundamental sovereignty of the cantons. The cantons require sovereignty to ensure

\(^{18}\) See, Article 50 (foreign affairs), Article 51 (external policy), Article 53 (security), Article 83 (language and culture), Article 84 (religion), Article 113 and 114 (administration of civil and criminal law).
their integrity. Without sovereignty, nationalist resentment could tear asunder the carefully cultivated Swiss civisme. While this proposal will likely have to amend the division of powers, the guarantee of individual fundamental rights for the first time will likely be popular. This draft constitution also incorporates the Swiss practice of intergovernmental consultation. Article 34.4 reads, "[l]es différends entre les cantons ou entre les cantons et la Confédération sont, autant que possible, réglés par la négociation ou par la médiation" (GOS 1996, p.16). As the Swiss celebrate the 150th anniversary of the modern constitution, this simplified constitution will likely be ratified by the people.

Swiss Constitutionalism, Federalism and the Resolution of Crisis: The Jura Case

The Jura region within the canton of Berne consists of seven districts in the north west corner of Switzerland. These include three French-speaking Catholic districts in the north of the region, three French-speaking protestant districts in the south of the region, and Laufen, a German-speaking Catholic district, in the northeast of the region adjacent to both Basle Town and Basle Country. The origins of the Jura movement date to 1815, when the region was transferred to the German-Protestant Canton of Berne by the Great Powers congregating in Vienna after the Napoleonic Wars. While the region experienced frequent agitations during the nineteenth century, the modern movement was initiated with l'affaire Moeckli in 1947. The resolution of the Jura crisis in the late 1970s at once demonstrates Swiss constitutional legalism and pragmatism.

In 1947, the Berne legislature rejected the nomination of Georges Moeckli, a French-speaking Jurassian, as the head of Department of Public Works and Railroads. Moeckli was a member of the

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canton's executive council and a former president of the canton and eminently qualified for the position. While opponents fallaciously questioned his ability to speak the Berndeutsch dialect, his rejection simply smacked of German chauvinism. French Bernese were handed a vivid reminder of their minority status in the canton, and stirred memories of the divisive days of World War I, when linguistic affiliations to warring Great Powers threatened to tear all of Switzerland apart.

The Moeckli affair quickly spawned a number of political organizations committed to the separation of Jura from the canton of Berne. First, the Mouvement Séparatiste Jurassien was formed almost immediately; in 1952, it was transformed into the Rassemblement Jurassien. The pro-Berne Jurassians in turn established the Union des Patriotes Jurassiens. The government of Berne responded with a number of constitutional amendments in 1950. The constitution was amended "so as to recognize the existence of a distinct peuple jurassien and grant equal status to French and German as cantonal languages" (McRae 1983, p.188). The Jura region, furthermore, was "officially guaranteed two ministerial seats on the Cantonal Council" (Jenkins 1986, p.100). While these concessions served to appease Jurassian moderates, the separatists remained committed to the creation of a new canton.

In the late 1950s, the Rassemblement initiated a popular referendum to determine the future status of Jura. The referendum asked the people of Berne to permit another referendum to be held only in the seven districts of Jura on the question of forming a separate canton of Jura. The proposal was overwhelming rejected by the people of Berne (78% in total, 89% if the Jura region is excluded from the total), and even a slight majority (52.48%) of the Jurassians voted against the motion, including a majority of francophone Jurassians (51%). The three French-catholic districts of northern Jura voted largely in favour of the motion, while the French-protestants of southern Jura
voted in equally large numbers against the initiative (see, Jenkins 1986, p.101; Table 8).

In the wake of the referendum defeat Jurassian radicals formed the *Front de libération jurassien* (FLJ), "a small terrorist group which turned to bombs and arson in 1962" (McRae 1983, p.188). The moderate Rassemblement disassociated itself from the FLJ, although "it also defended the use of violence and took full advantage of the domestic and foreign publicity that arose from FLJ activities" (McRae 1986, p.188). It is not clear if this violence influenced the government of Berne but, in 1967, it announced the formation of a twenty-four person commission, *la Commission de 24*, to examine all aspects of the Jura problem. The government also examined "various options for decentralizing cantonal government, including greatly enhanced autonomy for the Jura in the form of special constitutional status within the canton" (McRae 1983, p.190). This was the preferred option of a new group, *le Mouvement pour l'unité du Jura*, which formed in 1969 with the objective of preventing the political division of the Jura region.

Although the Rassemblement jurassien refused to participate in the inquiry, the Commission reported in 1968 and, in 1969,

> the cantonal government proposed additions to the cantonal Constitution so as to allow the electorate of the Jura full rights of self-determination as to the creation of a future canton. To achieve this a carefully drafted constitutional supplement was accepted in March 1970 by 90 per cent of the electorate in the Jura and 85 per cent in the Old Canton (McRae 1983, p.190).^20^

This constitutional amendment established a four-step process for the formation of a new canton. First, upon the initiative of 5,000 citizens, the region would be asked a clear referendum question: "*voulez-vous constituer un nouveau canton?*" Second, any district that dissented from the majority

^20^ Jenkins notes that this amendment to the Berne constitution granted *all* regions of the canton the right of self-determination (1986, p.103).
vote of the region, could by popular initiative, hold a second vote at the district level to determine the future of the district. Third, "any communes dissenting from the decision of their district after the second vote might request a third round of voting at [the] commune level provided that they bordered on a district of their own persuasion" (McRae 1983, p.190). Fourth, any region separated from the canton of its choice by the decision of other districts would be permitted the option of seeking attachment to another canton. In sum, "[t]his procedure was designed to give full expression to the popular will concerning the separation issue down to the level of individual communes, subject only to practical limits to prevent unworkable enclaves" (McRae 1983, p.191). This process was dubbed as a system of "cascading" referendums (Linder 1994, p.67).

The Rassemblement jurassien, which had boycotted the commission of inquiry, now indicated it would participate in a referendum process, if the franchise was determined to its satisfaction. In short, the Rassemblement tried to block the participation of non-Jurassians living in Jura, while incorporating Jurassians who lived elsewhere (Jenkins 1986, p.102). The government refused to accept these demands, and 1972 it proposed instead granting Jura autonomous status. Fearing that the proposal might be accepted by a majority of Jurassians, the Rassemblement reversed its position and accepted the referendum challenge detailed in the constitutional supplement of 1970.

The first referendum was held in June 1974. Again the three northern districts of Jura voted to create a new canton, while the three southern districts opted to remain a part of Berne. In Jura, the result was the opposite of the 1959 referendum: 52% supported the formation of a new canton.

21 "The purpose of this cascade system was clear. The first votation would establish whether the Jurassian people did indeed wish to create their own canton, but given the internal division of the Jura people between separatists and loyalists, no district or commune would be forced to stay with the old canton or go with the new one against its own will. Thus the second and third votation would protect regional and local minorities on either side of the debate" (Linder 1994, p.66).
District by district, the vote was almost identical; the only major change was that the vote in favour of the new canton in Moutier was 43% in 1974, up from 34% in 1959. This mostly accounts for the increase in support for the new canton from 49% to 54% among francophone Jurassians. The German-speaking district of Laufen voted solidly against the formation of a new canton. Second referendums were held in the three southern districts in 1975, but the votes were almost identical. All three cantons voted to remain a part of Berne, for the third time.

It was thus decided that the three northern districts would form the new canton of Jura, while the three southern districts would remain with Berne, but the process was not over. A Constituent Assembly was elected in the designated canton of Jura to draft a constitution. The new constitution was approved by popular referendum in March 1977 (in the three northern districts that formed the new canton), and the Constituent Assembly was granted a mandate to act as a provisional legislature. In accordance with the Swiss constitution, the Jura constitution had to be "guaranteed" by the federal government. The federal government approved the draft constitution in April 1977, sans its irredentist claim (Article 138) to the three Jurassian districts that had opted to remain with Canton Berne. The Federal Council argued that Article 138 was "inconsistent with good relations between cantons" (McRae 1983, p.194).

The final step in the process was to amend the federal constitution. It was necessary to add the name of Jura to the list of cantons in Article 1, and to enlarge the Council of States from 44 to 46 to accommodate the two representatives from Jura (Article 80). These changes could only be made by a formal constitutional amendment, "to be submitted to the people in a referendum and

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22 The German-speaking Catholic district of Laufen opted to remain a part of Berne, although it was not geographically contiguous with the canton of Berne. In 1983, the citizens of Laufen rejected joining Basle Town, Basle Land, and Solothurn, again preferring to remain a part of Berne. Finally, in 1993, Laufen opted to join the neighbouring canton of Basle Land (Linder 1994, p.67).
passed with the usual majorities" (McRae 1983, p.194). In September 1978, 82% of the Swiss electorate approved the creation of Jura, the first new canton to be admitted into the federation in 164 years, and the only canton to be admitted after the constitution of 1848. All the cantons voted in favour of Jura. In fact, every district in Switzerland, save the southern Jurassian district of Courtelary, supported the formation of Jura (McRae 1983, p.195).

The creation of Jura on January 1, 1979, marked the culmination of a remarkable process. The Swiss constitution does not address the question of canton formation, nor secession for that matter. In the midst of a political crisis, the Swiss people determined a constitutional process to resolve this long simmering dispute. The constitution, far from being an instrument of rigidity or coercion, was seen as a flexible document, which would establish the rules of the game and a fair playing field. At each level -- district, cantonal, and federal -- the people were able to participate in deciding their constitutional future.

The risk entailed in holding a general referendum was considerable. Jura's "right" to self-determination was thus counterbalanced by the "rights" of the Swiss to determine their political structure. The careful process to create Jura, which was painstakingly developed over a thirty year period, was placed before remote stakeholders. While the rejection of Jura by the Swiss people could have been catastrophic, the Swiss were not prepared to circumvent their constitution for the sake of "political" expediency. The rule of law was a political imperative in the process of renewing the Swiss federation. The successful resolution of the Jura crisis displays the Swiss proclivity to accommodate "even the smallest ethnic, linguistic and cultural" group and to compartmentalize political identities in small territorial units (Steinberg 1996, p.97), each with the sovereignty necessary to ensure its national integrity. Although the solution to the crisis was agonizingly slow
in coming, it was a remarkable testimony to the robustness of the Swiss constitution and federalism.

Conclusion

Switzerland's experience demonstrates that federalism may be a useful instrumentality for reconciling diverse, territorially situated, nationalities. The simple division of administrative tasks between central and regional governments alone, however, is insufficient to ensure multinational political stability. Only a well-structured federalism that recognizes and respects the essential sovereignty of both orders of government can unite diverse nationalities. Federalism is not merely a political structure; it is a political principle. The federal principle, arguably, has been the key to Swiss political stability.

The federal principle is enshrined front and centre in the Swiss constitution. The Canadian constitution, by contrast, is a study in considered ambiguity, while the drafters of the Indian constitution deliberately avoided using federal terminology in the constitution, preferring instead to describe India as a "union." Article 3 of the Swiss constitution has ensured that all changes in the structure of Swiss federalism must be formally pursued. Unlike Canada, which did not have a formal constitutional amending formula for over one hundred years, it has not been possible for the government of Switzerland to make ad hoc changes in the constitution, or reinterpret it unilaterally. On the other hand, unlike India, the Swiss amending formula was sufficiently rigorous that the federal government could not enact changes alone.

Indeed, the Swiss amending formula requires a substantial majority to consent to constitutional changes. As all constitutional amendments are subject to popular referendum, the government of Switzerland goes to remarkable lengths to ensure that sufficient political support exists before it attempts an amendment. This effort entails considerable consultation between the
various political parties, cantonal governments, and other concerned interests. The *substance* of Swiss federalism may no longer correspond with the federal principle in all instances, but the *process* of constitutional change has ensured that all changes in the structure of the political system have a high degree of legitimacy.

The Jura crisis is a case in point. The final political settlement was less important to the Swiss than the *process* by which the outcome was reached. In the end, a process was established that respected, in turn, the constitution, the federal principle, and direct democracy. While the Swiss constitution may not be the most elegant in the world, constitutionalism is deeply embedded in Swiss political practice. The Swiss authorities refused to sacrifice the constitution for reasons of political expediency. It was thus imperative to develop a constitutional solution to this political crisis. It was also necessary to allow concerned groups to voice their opinions. The system of cascading referendums ensured that all Jurassians could determine the future of their respective districts. While most countries would not dare to allow the majority to determine the political future of a minority group, the Swiss authorities were relatively certain that once a satisfactory constitutional process was determined, the Swiss people would support the wishes of this small cultural community. Indeed, the Swiss people voted overwhelmingly to accept the new canton of Jura into the federal fold. It could be argued, in fact, that the Swiss respect for the federal principle prevented the Jurassians from seeking to separate from Switzerland entirely. Jurassians were confident that their cultural integrity would be assured within the Swiss confederation.

The year 1998 marks the 150th anniversary of the first federal constitution of Switzerland. This constitution, as revised in 1874, has served Switzerland admirably. While it could undoubtedly continue to govern Switzerland for many years to come, the constitution has become rather
convoluted as a result of numerous amendments. The government of Switzerland would like the constitution to be less cluttered and more comprehensible to the ordinary Swiss citizen. It is thus in the midst of preparing a "total revision" of the constitution. This is a testimony to the stability and communal harmony that exists in Switzerland. Canada, by contrast, is so consumed by regional divisions it can hardly amend its constitution let alone contemplate a total revision. The government of Switzerland tried to secure a total revision of the constitution in the 1970s but it was shelved before being taken to a vote because it failed to give adequate expression to the federal principle. The federal principle is so deeply ingrained in Swiss political institutions that it is unimaginable that a new constitution could ignore it. Article 3 of the draft constitution currently being considered restores the pride and place of the federal principle. Only time will tell if the proposed constitution defends the federal principle sufficiently for the federal citizens of Switzerland.
Chapter 4

The Canadian Constitution:

Federalism if Necessary but not Necessarily Federalism
While Sir John A. Macdonald proudly declared that the British North America Act "avoided all conflict of jurisdiction and authority" (GOC 1865, p.33), the Canadian constitution was, in fact, verbose, convoluted, and, at the time of Confederation, incomplete. The Founding Fathers did not grant themselves the power to conduct foreign policy and negotiate international treaties; the final court of appeal was located outside the country; and there was no provision for amending the constitution in Canada. It took more than a century to rectify these deficiencies. Canada did not obtain the power of making foreign policy until the Statute of Westminster in 1931; the Supreme Court of Canada only became the final court of appeal in 1949, when appeals to the Judicial Committee of the Privy Council (JCPC) in the House of Lords were abolished; and there was no amending formula until the constitution was patriated from Britain in 1982. The constitution, moreover, continues to suffer from weak legitimacy in Québec.

The broad parameters of Canadian federalism, indeed many of its details, are well known to students of Canadian politics. The purpose of this chapter is to analyze the Canadian constitution using a classical definition of federalism as a system of government with divided sovereignty. The analysis will show that, unlike Switzerland, the Canadian constitutional framework did not enshrine the federal principle. The purpose of this analysis is not to illustrate that Canada has violated a textbook definition of federalism. The practice of quasi-federalism in Canada has been opposed by leading political figures in Québec since Confederation. Quasi-federalism does not provide the government of Québec the sovereignty it desires. Without a guarantee of sovereignty in provincial areas of jurisdiction, many Québécois have not felt secure in Canada.

The federal principle was violated in at least three important areas. First, the "Peace, Order, and Good Government" clause in the preamble to the federal powers listed in Section 91 had the
potential to completely overwhelm all the items reserved for provincial jurisdiction in Section 92, including important heads of power such as "all matters of merely local or private nature" and "property and civil rights." Second, the declaratory power allowed the federal government to appropriate provincial public works in the "national" interest. The federal government alone determined what constituted the "national" interest. Finally, the federal principle was egregiously violated by the federal powers of reservation and disallowance, which provided the federal government an effective veto over provincial legislation. These three provisions severely compromised the federal principle, and subordinated the provinces to the federal government.

The provincial rights movement, which started shortly after confederation in Ontario and subsequently in Québec, challenged the quasi-federal features of the constitution. While the provinces were unable to effect constitutional change, they indicated to the federal government that they would not be content to be subordinate partners in the confederation. Indeed, the provinces frequently challenged the federal government in court. The decisions of the Judicial Committee of the Privy Council succeeded, over the course of many decades, to circumscribe the general power of the federal government contained in the Peace, Order and Good Government clause. The other aforementioned violations of the federal principle were left unaffected; they were perfectly legal, if non-federal, provisions of the BNA Act. These powers also fell into desuetude in the early 1940s. Thus, the constitution, rather ambiguously, continues to contain quasi-federal provisions that are not used. As political practice in Canada became more federal Québec was politically quiescent, notwithstanding the conscription crises. The politics of separatism was certainly not evident.

Despite the efforts of the JCPC, the government of Canada missed a golden opportunity to structure the country according to the federal principle. The Depression and the War led the federal
government to abuse the federal principle, mainly in fiscal policy, much to the consternation of the Québec government. The government of Switzerland also abused the federal principle during the war but, after the war, it reverted to its traditional practice of federalism. Political practice in Switzerland flows from the federal principle enshrined in Article 3 of the Swiss constitution. The federal principle, however, was not enshrined in the Canadian constitution and thus political practice in Canada has never been compelled to conform to the federal principle. After the war, the government of Canada refused to relinquish the fiscal powers it had appropriated during the war. The refusal to endorse the federal principle, even after decades of judicial interpretation, may have contributed to the politics of Québec separatism in the post-war era.

Confederation and the Origins of Canadian Federalism

The standard explanation for Canadian confederation in 1867 suggests that Canadian politicians feared that the large federal army in the United States would be employed to conquer the entire continent after the Civil War. While the American civil war was undoubtedly disconcerting to politicians in British North America, it was only a backdrop to Canadian confederation, not a cause.¹ The cause of Canadian confederation was not the civil war in the United States, but the crisis of governability in the united colony of Canada. The legislative union of Upper and Lower Canada in 1840 proved to be unworkable by the late 1850s.² In the early 1860s, the crisis of governability

¹ Donald Creighton has written, "[u]nquestionably, a vague, brooding apprehension of the trouble with the United States lay at the back of the thoughts of both Maritimers and Canadians at this time; but in the summer of 1864 its effect on their plans for the political reconstruction of British North America was neither direct nor strong...Both Maritime Union and Confederation were to be planned and considered by themselves, largely apart from the dangerous turmoil to the south" (1964, p.91).

² Political leaders in the province of Canada proposed a federal union of the British North American colonies in 1858 but it elicited no support from the Colonial Office or the Maritime provinces. It failed "largely because it was a proposal from one party in one colony" (Morton 1964, p.77). The following year, George Brown, the opposition leader from Canada West, suggested a federal union of the two Canadas but that too was rejected, likely because French Canadian
deepened. Between 1861 and 1864, the province of Canada endured two elections and four
governments (Careless 1963, p.233). By 1864, "it was clear that the Act of Union [1840] was no
longer a workable constitution, and that a more explicit recognition of federalism was the only
alternative to legislative paralysis" (McRae 1964a, p.252). In short, the political structure of Canada
had rendered the country ungovernable. Confederation was a response to the crisis of gridlock, not
a military threat from the United States.

Two national identities coalesced in confederation -- Québécois and British American. New
France (Québec) was conquered by the British in 1763, bringing together two distinct nationalities
in an uneasy relationship. The British American identity was strengthened by the exodus of loyalist
refugees from the American revolution. The loyalists "represented a declaration of independence
against the United States, a determination to live apart from that country in North America. As a
result, they helped to create not only a new province, but a new nation" (Careless 1963, p.113).
While the loyalists were proud of their British history, the rugged pioneering life in the British
American colonies was markedly different from life in Britain. Over time, this British identity began
to dissipate. The move to free trade in Great Britain, signalled by the repeal of the Corn Laws, was
In short, British Americans concluded that their futures were diverging from that of the mother land.

The move to Confederation, prompted by gridlock in the United Province of Canada, was
fuelled by a nascent Canadian identity, which emerged from over a century of shared experiences.
Virtually everyone at the Québec constitutional conference became giddy envisioning the prospect
of creating a new country from the Atlantic to the Pacific:

leaders feared being relegated to a minority by Brown's insistence on representation by population. Despite this failure,
it was clear that the legislative union between the two Canadas could not last for much longer.
The ambitions called into existence by the Charlottetown Conference were now aroused; provincial horizons began to melt away, and there appeared the breathtaking possibility that a transcontinental nation might be created by the colonists themselves, upon their initiative, by their own energy, and with their own resources (Waite 1962, p.88).

Canada's motto, "a mari usque ad mare," or "from sea to sea," neatly captured the sentiment that was sweeping through the colonies. If the citizens of the British American colonies were not yet Canadians, they were willing to become Canadians. Federalism would facilitate the emergence of this new Canadian identity, while preserving the national identities of the British Americans and especially the Québécois.

The British North America Act

The details of Canadian federalism are enshrined in the British North America Act, which is now referred to as the Constitution Act of 1867. The Confederation debates were uninspiring technical discussions concerning constitutional details. Canada's Founding Fathers did not question the principles of government; they simply agreed that Canada would adopt a "Constitution similar in Principle to that of the United Kingdom." The major exception was the modification of federalism to conform with Canadian circumstances and the Westminster system of government. But the Founding Fathers did not develop a coherent theory of federalism (Russell 1993, p.43). Indeed, Alain Cairns once exclaimed that the BNA Act "is a document of monumental dullness which enshrines no eternal principles and is devoid of inspirational content" (Cairns 1988, p. 27).

The British North America Act is a document replete with considered ambiguity. The preamble of the Act declares the desire of the provinces to be "federally united into One Dominion

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3 The motto and Canada's official title as a "dominion" was provided by Leonard Tilley of New Brunswick, who was inspired by Psalm 72:8: "He shall have dominion also from sea to sea, and from the river unto the ends of the earth..." (Careless 1963, p.248).
under the Crown of the United Kingdom." A more ambiguous phrase could not be imagined; the desire to be united into "One Dominion" under a single crown would appear to signal the creation of a unitary state, yet Canada was conceived as a federation. In keeping with the principles of federalism, two orders of government were created. Each order of government was delegated a set of jurisdictional responsibilities, although the central government was granted considerably more powers (29 items as opposed to 16 for the provinces). The central government also retained paramountcy in concurrent jurisdiction. Further, neither the provinces nor the central government could alter the constitution alone; all amendments had to receive the approval of the Parliament of the United Kingdom. The courts, the Supreme Court of Canada and the Judicial Committee of the Privy Council in London, were given the power to declare federal and provincial legislation unconstitutional. Canada was thus federal in form, but the constitution also contained obvious violations of the federal principle.

**Violations of the Federal Principle in the BNA Act**

The division of powers in the BNA Act was quasi-federal. The preamble to Section 91, the list of federal powers, stated that the federal government could enact laws for the "Peace, Order, and good Government of Canada" (POGG clause). Although this clause was supposed to be limited by the subjects reserved for provincial jurisdiction in Section 92, any legislation could be said to effect peace, order, and good government. The POGG clause thus contained the potential to overwhelm all the items reserved for provincial jurisdiction, including substantial heads of power such as "all matters of merely local or private nature" and "property and civil rights." In a series of decisions, the Judicial Committee of the Privy Council restricted the ambit of the POGG clause (see below), but it took almost fifty years to rectify this violation of the federal principle.
The most conspicuous violations of the federal principle were the powers of disallowance and reservation (Section 90, BNA Act). The power of disallowance permitted the federal government to veto provincial legislation, even if the legislation had received the assent of the province's Lieutenant-Governor. In addition, with the power of reservation, the Lieutenant-Governor could withhold consent of provincial legislation and seek guidance from the federal government. The federal cabinet would determine ultimately if the legislation would receive royal assent. The fact that the Lieutenant-Governor was appointed by the Governor-General, under the advice of the Prime Minister, enhanced provincial suspicions that the representative of the Crown was an "agent" of the federal government. The sovereignty of the provinces to legislate in their spheres of jurisdiction was compromised by the powers of disallowance and reservation. A key characteristic of federalism was thus rendered inoperative.

The power of disallowance was theoretically unlimited. In his first term of office Sir John A. Macdonald, who was concurrently the Minister of Justice and the Prime Minister, detailed the circumstances under which he would employ the power of disallowance: 1) when provincial legislation was wholly illegal or unconstitutional; 2) partly illegal or unconstitutional; 3) when provincial legislation from the realm of concurrent jurisdiction conflicted with federal legislation; and 4) when provincial legislation affected the interests of the Dominion generally (Cook 1969, p.16). While Macdonald tried to define the power of disallowance, it is crucial to note that "in addition to the broad character of these principles, the important fact is that the judgement was to be made not by a court but by the federal minister of justice" (Cook 1969, p.16). The federal

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4 After 1896, the federal government announced that it would only disallow acts if they were ultra vires or in conflict with Dominion or Imperial legislation. It was their intention not to strike down legislation simply because it was felt to be "unsuitable."
government, moreover, was not inhibited to use these powers. Reservation and disallowance were routinely employed by the federal government during the first thirty years of Confederation (see, Table 4.1). These egregious violations of the federal principle did not fall into disuse until the 1940s.

Table 4.1: Disallowance and Reservation

<table>
<thead>
<tr>
<th>Period</th>
<th>Disallowances</th>
<th>Reservations</th>
</tr>
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<tbody>
<tr>
<td>1867-1881</td>
<td>33</td>
<td>44</td>
</tr>
<tr>
<td>1882-1896</td>
<td>32</td>
<td>13</td>
</tr>
<tr>
<td>1897-1924</td>
<td>36</td>
<td>9</td>
</tr>
<tr>
<td>1925-1942</td>
<td>11</td>
<td>3</td>
</tr>
</tbody>
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(Source: G. V. LaForest 1955, Disallowance and Reservation of Provincial Legislation, Ottawa, Department of Justice; Appendices A and B, p.83-115).

Defenders of the Founding Fathers argue that Sections 55 and 56 of the BNA Act also provided the Imperial Parliament in London with the power to reserve and disallow Dominion legislation. Sovereignty, as the Fathers understood it, was thus vested with the Crown, not the provinces or the central government. The Imperial Parliament, however, only ever disallowed one bill (in 1873) and the reservation of Dominion legislation ceased in 1878 (Russell 1993, p.38), whereas the government of Canada consistently employed the powers of reservation and disallowance in the first seventy-five years of confederation, to control the actions of the provinces, contrary to the spirit of federalism. While the powers of reservation and disallowance may have derived from an imperial heritage not federal theory (Russell 1993, p.38), it was the government of Canada that acted imperially to subordinate the provinces, rather than the British crown controlling its dominions.

The BNA Act also afforded the federal government entreé into an important provincial area
of jurisdiction. Section 92.10 granted the provinces the power to effect "local works and undertakings." However, Section 92.10.c allows the federal government "to declare" that certain public works undertaken by the provinces are "for the general Advantage of Canada" and are thus consequently to fall under federal purview. This is known as the declaratory power. It was employed extensively by the federal government, at least 472 times, in the early years of confederation, primarily to effect Macdonald's "national policy (Archer et al 1995, p.36). Once again, the federal principle was severely compromised.

De Tocqueville pointed out some thirty years prior to Confederation that the structure of the judiciary was particularly complicated in federal systems. The British North America Act permitted the federal government the power to appoint almost all judges, both at the federal and provincial level. This is a "further illustration of the modified or quasi-federal system which the Canadian Constitution established" (Wheare 1953, p.71). The provinces were able to circumvent the perceived bias of the Canadian courts by pursuing their cases before the Judicial Committee of the Privy Council in London, which served as the final court of appeal from 1867 to 1949. Since the abolition of appeals to the JCPC, the provinces have had to argue their cases before a judiciary appointed by the federal government. While all the provinces are subject to the same judicial system, this development was most galling in Québec. Jacques-Yvan Morin has written:

Avec l'abolition définitive des appel, en 1949, la Cour Suprême devint ipso facto le tribunal de dernière instance en matière constitutionnelle, sans pourtant jamais avoir obtenu le statut d'une cour constitutionnelle. C'est ainsi que cette Cour qui est appelée constamment à se prononcer sur la validité des lois fédérales et provinciales, dépend du seul gouvernement fédéral, qui en nomme tous les membres (Morin 1968, p.170).

The government of Québec protested this development at the next federal-provincial conference in
Since the Charter of Rights in 1982, and especially since the failure of the Meech Lake Accord in 1990, Canada's non-federal judicial system has lost considerable legitimacy in the province of Québec. Guy Laforest has stated bluntly that "[t]he Supreme Court of Canada should not have any authority on the territory of Québec" (Laforest 1995, p.191). The decline of the Court's legitimacy in Québec maybe the price Canada is paying for adopting a non-federal judicial structure.

In sum, the federal principle was not enshrined explicitly in the constitution. Furthermore, a number of provisions actually contravened the federal principle. While some of these powers atrophied with time or were circumscribed by the courts, the federal government routinely employed these powers in the first seventy-five years of confederation. These violations of the federal principle were strenously opposed in Québec from the outset. In short, the structure of Canadian federalism has been questioned in Québec from the very start. The contemporary politics of Québec separatism is only the latest manifestation of dissatisfaction with the Canadian constitution in that province.

Parliamentary Debates on the Subject of Confederation

The British North America Act was introduced to the Canadian parliament in February 1865 by Sir John A. Macdonald and "[h]is speech on the occasion was one of the ablest that he ever delivered" (Kennedy 1938, p.305). Notwithstanding his oratorical adeptness, Macdonald exhibited considerable ambivalence on the subject of federalism. In fact, he stated an unequivocal preference for a unitary system of government:

as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinion. I have again and again stated in the House that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one government and one parliament,
legislating for the whole of these peoples, it would be the best, the cheapest, and the most vigorous, and the strongest system of government we could adopt (GOC 1865, p.28).

Macdonald, however, was a political realist and he recognized that neither Québec nor the Maritime provinces would ever accept to join a legislative union. With this incontrovertible fact, he concluded that "a legislative union, pure and simple, was impracticable" (GOC 1865, p.32).

While Macdonald came to "accept the project of a Federal Union as the only scheme practicable" (GOC 1865, p.28), he was determined to ensure that the central government would maintain all the powers of a sovereign government. Macdonald was convinced that American federalism was fatally flawed, and he was determined to avoid the same pitfalls. Macdonald argued, [t]hey [the Americans] commenced, in fact, at the wrong end. They declared by their Constitution that each state was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the Constitution, were conferred upon the General Government and Congress (GOC 1865, p.33).

The Canadian constitution, he continued, started from a different referent point. He stated proudly, "[w]e have given the General Legislature....all the powers which are incident to sovereignty" (GOC 1865, p.33). He concluded, "[w]e have thus avoided that great source of weakness which has been the cause of the disruption of the United States" (GOC 1865, p.33). In sum, as Ramsey Cook concluded, "Macdonald never disguised his attitude toward the provinces: they were to be treated not as independent sovereignties, but rather as administrative bodies similar in status to municipal councils" (Cook 1969, p.10).

While Macdonald deserves to be considered the greatest Father of Confederation, he was not much of a federalist. As a monarchist, he did not believe that sovereignty could be divided. He accepted that Canadian sovereignty should lie de jure in the Crown but, as an (English) Canadian
nationalist, he believed that *de facto* sovereignty in Canada should rest with the central government. For Macdonald, federalism was only acceptable if it did not entail divided sovereignty. In short, he was only willing to accept the federal form of government, not the *substance* of the federal principle.

Macdonald's ambivalent feelings concerning federalism have been echoed by (English) Canadian nationalists ever since. English Canadian nationalists continue to believe that sovereignty should lie with the central government. This reflexive belief has unsettled many Québécois.

Macdonald's views on the constitution, however, did not go unchallenged. Antoine Aimé Dorion, leader of the *Parti Rouge*, was a fierce opponent of the British North America Act. "The whole scheme," he said, "is absurd from beginning to end" (GOC 1865, p.255). He laid the blame for the accumulation of power in the central government squarely on the shoulders of Macdonald and Cartier. "This constitution," he declared, "is a specimen of their handiwork" (GOC 1865, p.255). With numerous crown appointments, he stated, "we shall have the most illiberal Constitution ever heard of in any country where constitutional government prevails" (GOC 1865, p.255).

In his dissection of the constitution, Dorion took aim squarely at the violations of the federal principle enshrined in the BNA Act -- the federal veto, the judicial system, and federal paramountcy in areas of concurrent jurisdiction. In one especially powerful paragraph, Dorion argued,

> I am opposed to this Confederation in which the militia, the appointment of the judges, the administration of justice and our most important civil rights, will be under the control of a General Government the majority of which will be hostile to Lower Canada, of a General Government invested with the most ample powers, whilst the powers of the local governments will be restricted, first, by the limitation of the powers delegated to it, by the veto reserved to the central authority, and further, by the concurrent jurisdiction of the general authority or government (GOC 1865, p.694).

In sum, he declared, "I find that the powers assigned to the General Parliament enable it to legislate
on all subjects whatsoever... *because all the sovereignty is vested in the general government* (GOC 1865, p. 689; emphasis added). Inasmuch as the federal government could trespass with impunity in areas of provincial jurisdiction, Dorion concluded, "[w]e shall be -- I speak as a Lower Canadian -- we shall be at its mercy" (GOC 1865, p.690).

Dorion's perspective on confederation, constitution aside, was ambiguous. He was not enthusiastic about union with the maritime provinces. He argued that there was no social or commercial connection between the maritimes and the two Canadas "to justify their union at the present time" (GOC 1865, p.248). But, he added immediately, "I do not say that I shall be opposed to their Confederation for all time to come" (GOC 1865, p.248). On the other hand, Dorion claimed that he had proposed the federation of Upper and Lower Canada in 1856. He insisted, however, "the confederation I advocated was a real confederation, giving the largest powers to the local governments -- and merely a delegated authority to the general government -- in that respect differing *in toto* from the one now proposed which gives all the powers to the central government" (GOC 1865, p.250). It seems clear that Dorion opposed the BNA Act because it did not enshrine the principle of divided sovereignty. These sentiments have been expressed repeatedly in Québec since the start of confederation.

None of the leading men of the government could respond to Dorion's devastating critique of the proposed constitution. As Vipond has noted, "the Reform and *Bleu* understanding of federalism as it was expressed in the years 1864-7 was inchoate, often expedient and frequently confused" (Vipond 1991, p.35). The only supporter of confederation who attempted to meet Dorion on his own terms was Joseph Cauchon, who was "one of the most powerful Conservative figures in Québec" (Vipond 1991, p.34). In a direct response to Dorion during the confederation debate,
Cauchon invoked the principles of the American constitution and he ventured gamely, in direct contradiction to Macdonald, that the British North America Act was similar in principle:

There will be no absolute sovereign power, each legislature having its distinct and independent attributes, and not proceeding from one or the other by delegation, either from above or from below. The Federal Parliament will have legislative sovereign power in all questions submitted to its control in the Constitution. So also the local legislatures will be sovereign in all matters which are specifically assigned to them (GOC 1865, p.697).

While Cauchon is to be commended for his partisan enthusiasm, the constitutional evidence was uncontrovertible: the federal principle was not enshrined in the British North America Act.

The BNA Act was ratified notwithstanding the violations of the federal principle, but its support in French Canada was tenuous. In the Legislative Assembly of Canada, French Canadians voted 27 in favour and 21 opposed, while in the Legislative Council, 14 supported the Act and 6 opposed it (Scott 1958, p.59). *Les Bleus*, it may be argued, accepted the scheme "because Cartier was able to assure them that the guarantees found in the resolutions for their language and religion were adequate" (Lower 1958, p.16). Forty percent of the French Canadian representatives, however, rejected the proposed constitution because it violated the principles of federalism. Furthermore, "the predominant powers appeared to be vested in the federal government and parliament in which the English element would necessarily have a majority" (Scott 1958, p.59-60). The level of opposition to the BNA Act in Québec was not an auspicious beginning for Canadian federalism.

**From Confederation to Federalism**

The constitution, which was so reluctantly endorsed by French Canadians, continued to be challenged from various quarters. The Québec *Rouges* party continued to oppose confederation by advocating provincial rights, but with *les Bleus* firmly in control of the government of Québec, from
1867 through to 1886, there were few major disputes with the central government (Cook 1969, p.14). The provincial rights movement, perhaps paradoxically, was initiated in Ontario -- the home of Sir John A. Macdonald and the province apparently most committed to confederation. The movement was initiated, even more paradoxically, by Oliver Mowat. The long serving premier of Ontario began his professional career in the legal offices of Sir John A. Macdonald (Russell 1993, p.36). He was a father of confederation and he moved to include the federal power of disallowance in the British North America Act, a provision he later repudiated (Vipond 1991, p.76).

Despite these ironies, the fact that the provincial rights movement was initiated in Ontario and led by Mowat was quite logical. Three factors were especially relevant. First, Ontario, unlike the other provinces, was not dependent upon federal largesse and it was determined to prevent the federal government from improving the fiscal viability of the peripheral provinces at the expense of Ontario (Cook 1969, p.20). Second, the rise of the provincial rights movement was intimately related to the evolution of the Canadian party system. The Conservatives, and their Québec allies les Bleus, were the party of the central government; it was almost natural then for the opposition Liberals to be the party of provincialism. The federal Conservatives were in office for all but four years between 1867-1886, while Mowat's Liberals won six consecutive elections between 1875-1896. Third, in addition to these factors, Macdonald and Mowat "were men of very different temperaments, and had long been on touchy personal terms" (Cook 1969, p.20).

Mowat pursued the flaws in the constitution cited by Antoine Dorion during the confederation debates -- the dubious role of the lieutenants-governor, their use of reservation, and the federal power of disallowance. While les Rouges had opposed the inclusion of these items in the constitution, they had little institutional ability to challenge these provisions from the opposition
benches once the Act was ratified. Mowat, on the other hand, had the resources of a provincial government behind his challenges to the constitution. Moreover, he was able to exploit the non-federal aspects of the constitution on the hustings during provincial election campaigns (Vipond 1991, p.56). He also challenged the constitution before the Judicial Committee of the Privy Council. While Ontario later "ceded its leadership as the defender of provincial rights to other provinces -- notably Québec and the western provinces" (Vipond 1991, p.12), Mowat provided a link between Dorion and Honoré Mercier, the first premier of Québec to campaign for provincial autonomy.

Mercier was a Catholic conservative who joined the Québec Liberal party because of his opposition to Confederation (Stevenson 1989, p.101). In due course, he became the leader of the Liberal party but for many years he was unable to dislodge the Conservative Party from the seat of government. He was, however, able to capitalize on the execution of Louis Riel. At that moment French Canadians realized that "when an issue divided Canadians along French-English lines, English-speaking Canadians were the majority and could control decisions at Ottawa. This realization caused French Canadians to look inward and to fall back on their provincial government as the one bastion protecting them against the English-speaking majority" (Cook 1966, p.48). Mercier, "an eloquent Québec nationalist," established the Parti National, "an alliance of Québec Liberals and dissident Conservatives" (McNaught 1988, p.180). His new party won the provincial election of 1886 and he took office in January of 1887 and almost immediately began to campaign for provincial autonomy.

Honoré Mercier's campaign for provincial rights was influenced by a powerful monograph, *Letters Upon the Interpretation of the Federal Constitution*, written by the Québec judge T. J. J. Loranger in 1884. Loranger argued that the federal principle was implicit in the BNA Act:
The resolutions of the Québec conference were founded upon the principle of the strict equality of or equal authority between the Dominion and the provinces, without the subordination of the latter to the former, within the limits of their respective powers. In the sphere of their local powers the authority of the provinces was to remain absolute as the federal power was to be within the limits of its general powers. *It was on these conditions that the provinces, especially the province of Québec, consented to enter the federal union* (Loranger 1884, p.v; emphasis added).

While Dorion had attempted to prevent ratification of the BNA Act because it did not enshrine the federal principle, the only recourse for Québécois leaders after the Act was adopted was "to prove" that the BNA Act did indeed provide the provinces sovereignty in their spheres of jurisdiction. Loranger therefore defended the BNA Act and instead took aim at "the centralising and absorbing tendencies of the Supreme Court" (Loranger 1884, p.v).

Loranger's monograph provided the first legal argument for the compact theory of Canadian federalism. In his opinion, "[t]he confederation of the British Provinces was the result of a compact entered into by the provinces and the Imperial Parliament which, in enacting the British North America Act, simply ratified it" (Loranger 1884, p.61). In short, he argued, "it was the provinces that created the Dominion" (Loranger 1884, p.18). From this premise, Loranger concluded that "[t]he powers of the provinces not ceded to that government are the residue of their old powers" (Loranger 1884, p.62). Consequently, he asserted, the federal "Parliament has no legislative powers beyond those which were conferred upon it by the provinces, and which are recognized by section 91 of the British North America Act"

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5 Loranger was particularly concerned with the Supreme Court's verdict in the case of Andrew Mercer, which ruled that escheats were a federal matter, notwithstanding the fact that "property and civil rights" were a matter of provincial jurisdiction. The JCPC overturned the Supreme Court's ruling, but Loranger later took umbrage when the JCPC upheld the federal government's Temperance Act under the peace, order, and good government clause, despite the fact that the provinces had been accorded an exclusive right to make laws relative to "shop, saloon, tavern, auctioneer, and other licences."
In sum, he argued that the provinces must continue to be treated "as if they had been sovereign powers" (Loranger 1884, p.63).

Although the federal principle was not stated explicitly in the BNA Act, Loranger made a persuasive case that the federal principle was implicitly enshrined in the specific construction of the division of powers in Sections 91 and 92. Loranger noted that the provinces were accorded "exclusive" jurisdiction in the sixteen heads enumerated in section 92, including sweeping responsibility for property and civil rights and matters of a local nature, and that the powers of the federal government listed in section 91 were circumscribed by the powers "expressly" accorded to the provinces. His analysis of Sections 91 and 92 accurately foreshadowed the later decisions of the JCPC, as we shall see below. More immediately, Loranger's powerful monograph gave sustenance to Honoré Mercier's campaign for provincial rights.

Upon taking office, Mercier organized the first inter-provincial meeting. Prime Minister Macdonald was also invited. In his invitation to Macdonald, Mercier wrote that the purpose of the conference was the consideration of "questions which have arisen or may arise as to the autonomy of the Provinces, their financial arrangements, and other matters of common Provincial interest" (GOC 1951, p.7).

Much to Mercier's disappointment, only five of seven premiers attended the conference. Prince Edward Island and British Columbia, which had entered Confederation with more favourable fiscal terms, opted not to attend the conference. Sir John A. Macdonald refused to attend and he ignored the recommendations that emerged from the conference.

Mercier opened the conference by stating twenty-two points that had "more especially attracted the attention" of the government of Québec (GOC 1951, p.12). Mercier demanded the

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6 Dominion-Provincial and Interprovincial Conferences from 1887 to 1926, Ottawa: King's Printer (1951).
elimination of the federal powers of disallowance and declaration, the right for provinces to impose excise duties, a "definitive readjustment of the federal subsidy," and the election of senators by the provincial legislatures (GOC 1951, p.12). Mercier was at pains to note that the conference was not "a hostile move against the federal authorities" (GOC 1951, p.11). The objective of the conference was to obtain better fiscal terms from the federal government and to revise the constitution so as to better assure provincial autonomy. The conference did not succeed in either of these objectives, but it was an important symbolic development in Canadian federalism. The provinces had dramatically demonstrated that they would no longer be quiescent or subordinate partners in the federation. They were instead tangible political realities that could not be ignored. In short, the provinces, led by Mercier, demanded that Canada be governed according to the federal principle. This demand has been echoed repeatedly in Québec ever since.

**The Judicial Committee of the Privy Council**

The real federal-provincial battles of the first seventy-five years of confederation were fought before the Judicial Committee of the Privy Council (JCPC) in London. The decisions of the JCPC were, to say the least, controversial. The constitutional interpretations of the Judicial Committee increasingly diverged from public opinion in (English) Canada. When the JCPC struck down the "New Deal" legislation in the 1930s, there was a tremendous outburst of (English) Canadian nationalism in the legal community. This outburst was defused by the initiation of World War Two but, after the war ended, the government of Canada moved to abolish appeals to the JCPC.

The law lords were variously accused of being ignorant of Canadian history, unappreciative

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7 All citations of JCPC decisions are drawn from Peter Russell (ed) (1982) *Leading Constitutional Decisions* (Ottawa: Carleton University Press), unless otherwise noted.
of the intentions of the Fathers of Confederation, insensitive to the needs of Canada, interpreting the B.N.A. Act merely as a piece of British statutory legislation, and being excessively legalistic. The fact of the matter was that Canadian history was replete with constitutional uncertainty: the Fathers were not united in their intentions; Canadians in different regions had divergent needs; the B.N.A. Act was statutory legislation because that is what the Fathers insisted upon; and the Act was fraught with legal imprecision and ambiguity, especially in the division of powers. The law lords were forced to make sense of the constitution "by a process of textual criticism" (Laskin 1969, p.5). For the most part, they managed this feat with considerable adeptness and consistency (Browne 1967).

Soon after Confederation, the Judicial Committee of the Privy Council was forced to interpret the rather messy division of powers between the federal and provincial governments governed by Sections 91 and 92 of the B.N.A. Act. The Peace, Order, and Good Government clause in the preamble of Section 91 provided the federal government a substantial general power but, "for greater certainty," Section 91 also enumerated twenty-nine specific powers reserved exclusively for the general parliament. Sections 91 and 92, however, provided anything but "greater certainty."

The Russell case (1882) provided the Judicial Committee the first opportunity to clarify the tension between the federal government's ability to make laws for the "peace, order and good governance" of the country and the jurisdictional responsibilities of the provinces. Charles Russell was convicted of illegally selling liquor under the Canada Temperance Act of 1878, notwithstanding the fact that the provinces were accorded the power to licence saloons and taverns, and presumably also the sale of alcohol (Section 92.9). The Supreme Court upheld the conviction by arguing that

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8 The JCPC ruled that the provinces are empowered in Section 92.9 to licence certain establishments for the purposes of raising revenue, not regulating trade and commerce. As the Temperance Act was not designed to raise revenue, the JCPC ruled that it was not a provincial matter (1982, p.45).
the Temperance Act fell within the federal government's power to regulate "trade and commerce" (Section 91.2). On appeal, the JCPC also upheld the federal law, but with a different justification. They determined that "what parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights but one relating to public order and safety" (1982, p.46; emphasis added). The Judicial Committee ruled that the Temperance Act was "clearly meant to apply a remedy to an evil which is assumed to exist throughout the dominion" (1982, p.48; emphasis added). The Temperance Act was thus ruled intra vires because the federal government was accorded the right to make laws for the "peace, order and good government" of the country. With this early case, the law lords gave the "peace, order, and good government" clause wide latitude.

Almost immediately, however, the Judicial Committee moved to limit the ambit of the POGG clause. In the Hodge case (1883), which followed just one year after the Russell case, Lord Fitzgerald developed the "aspect doctrine." Because the construction of the division of powers in the BNA Act was imprecise, he argued "that subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91" (quoted in Laskin 1969, p.88). Fitzgerald noted, furthermore, that the BNA Act explicitly described the powers accorded to the provinces as "exclusive." He thus concluded that "[w]ithin these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion" (1982, p.53). Fitzgerald moved the BNA Act towards the federal principle, although the move was not completed for another four decades.

Over the next forty years, the Privy Council worked assiduously to insert the federal principle in the Canadian constitution. Lord Watson, who served on the Privy Council from 1880 to 1899, was arguably the architect of Canadian federalism. In the Maritime Bank case of 1892, Watson
extended Fitzgerald's understanding of federalism. Watson declared:

The object of the [B.N.A.] Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing Act (1982, p.52).

Although the word "sovereignty" was not used in reference to the provinces, Watson moved Canada much closer to the federal principle.

In the local prohibition case of 1896, which pitted the federal government against the province of Ontario, Lord Watson was even more emphatic about the federal principle. He argued that "the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92" (1982, p.58). He also determined that "all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92" (1982, p.58). Any other interpretation of the division of powers, he argued, "would practically destroy the autonomy of the provinces" (see, Russell 1982, p.59). He concluded,

If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters
which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures (see, Russell 1982, p.59).

In short, Watson seemed to argue that if Canada was to be a federal country -- as the preamble to the B.N.A. Act suggested, and as the division of powers in sections 91 and 92 implied -- the two orders of government must be sovereign in their spheres of jurisdiction. While (English) Canadian nationalists have frequently chastised Watson for his constitutional interpretations, he only actualized the federal aspects enshrined in the British North America Act. This was the constitution Canadians had given themselves, even if they did not realize its full implications.

The process of interpretation that was initiated by Lord Watson was taken to its logical conclusion by Lord Haldane, who served on the Judicial Committee from 1911 to 1928. Bora Laskin has argued that "so far as the introductory clause of section 91 is concerned, it was Viscount Haldane that gave it its particular character" (Laskin 1964, p.68).\(^9\) Haldane asserted, in deciding the fates of the Board of Commerce Act (1919) and the Combines and Fair Prices Act (1919) in 1922, that with regard to their "exclusive" powers in Section 92 "the Provincial Legislatures possess quasi-sovereign authority" (1982, p.73). This was the first recognition of the provinces as sovereign governments, and it signalled the realization of the federal principle in the constitution.

In a series of judgements, Lord Haldane moved to reduce the "peace, order, and good government" clause from a general power to an emergency clause. In 1925, he ruled that federal jurisdiction must be confined to the powers enumerated in Section 91, except in cases arising out of some extraordinary peril to the national life of

Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive provincial competency. Such cases may be dealt with under the words at the commencement of section 91, conferring general powers in relation to peace, order, and good government (1982, p.87-88).

Lord Haldane indicated that the prime test for determining the validity of legislation employed by the POGG clause under the circumstances of national emergency was the intent of the legislation. If the legislation was intended as a temporary remedy for a specific problem, it could be considered as emergency legislation. If the legislation was intended to be permanent, Haldane ruled that it could not be considered emergency legislation under the POGG clause.

While the emergency doctrine established by Haldane might have been logical within its own construction, it was not entirely consistent with past decisions of the Judicial Committee, notably the Russell versus the Queen case of 1882. Although the Privy Council was not bound by its previous decisions, the principle of *stare decisis* (judicial consistency) was so deeply rooted in British legal tradition that the Council tended strictly to follow precedent (Browne 1967, p.15). Lord Haldane thus rather amusingly attempted to reconcile his emergency doctrine with the liberal interpretation of the "peace, order, and good government" clause in the Russell case:

Their Lordships think that the decision in Russell versus the Queen can only be supported today, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of section 91, but on the assumption of the Board, apparently made at the time of deciding the case of Russell versus the Queen, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing

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10 Haldane made this ruling in the case of Toronto Electric Commissioners versus Snider (A.C. 396; II Olmsted 394).

11 See, the 1922 case concerning the Board of Commerce Act (1919) and the Fair Prices Act (1919), as well as the Fort Frances Pulp and Power Company versus Manitoba Free Press case in 1923.
that the National Parliament was called on to intervene to protect the
nation from disaster. *An epidemic of pestilence* might conceivably
have been regarded as analogous (1982, p.88; emphasis added).

It would have been easier for Haldane to have broken the tradition of *stare decisis* and repudiate the
Russell decision, but Canada's constitutional history is richer due to his legal imagination!

In a process that spanned almost forty years, the JCPC reduced the general power implied
in the Peace, Order, and Good Government clause to an emergency clause. Legislation enacted
under the POGG clause was subsequently required to address an acute problem and the legislation
could only be intended as a temporary provision. It was the opinion of the JCPC that any other
interpretation would completely overwhelm the jurisdictional powers of the provinces. It seems only
just that the expressly delegated power of "property and civil rights" should prevail over a preamble
clause, otherwise the power of the provinces would have been totally emasculated. While the
government of Canada was displeased with the rulings of the court, the decisions of the court have
prevailed in this matter. In short, the court succeeded in reversing one violation of the federal
principle enshrined in the BNA Act. The JCPC, however, was not finished with the BNA Act,
although later decisions have not had a lasting impact on the structure of Canadian federalism,
especially in regard to intergovernmental fiscal relations.

While Québec was not displeased with the direction of Privy Council decisions, English
Canadians were relieved when Viscount Haldane retired from the bench. There was a hope, after
his restrictive interpretation of the federal government's power, that the Privy Council might begin
to offer more "balanced" judgements. English Canadian nationalists started to believe there hopes
might be realized after a series of decisions by Lord Sankey. In the famous *persons* case, in which
the Judicial Committee recognized women as "persons" and thus entitled to be appointed to the
Senate, Lord Sankey repudiated "a narrow and technical construction" of the British North America Act, and argued instead that the constitution must be viewed as "a living tree capable of growth and expansion within its natural limits." In accordance with this philosophy, Sankey ruled in the early 1930s that aeronautics and radio communications, matters that could not have been imagined by the Fathers of Confederation, were federal responsibilities. After forty years of Privy Council decisions in favour of the provinces, many English Canadians started to believe that the federal government would begin to regain powers. These hopes, however, were quickly dashed when the JCPC overturned the government's Employment and Social Insurance Act in 1937 (see, Chapter 7).

The sum total of the Privy Council's decisions served to make the Canadian constitution more federal. While the leading Fathers of Confederation had declared they were creating a federal, rather than a legislative union, the British North America Act contained numerous violations of the federal principle. The decisions of the Privy Council did not affect such provisions as reservation or disallowance -- those were properly legal, if non-federal, aspects of the B.N.A. Act -- but the law lords did work to interpret the division of powers according to the federal principle. If the constitution were to be federal, as was indicated in the preamble of the BNA Act, the JCPC ruled that the two orders of government should be sovereign in their spheres of jurisdiction.

By the late 1930s many English Canadians were outraged by the decisions of the Privy Council; they felt that the Council's decisions undermined the intentions of the Fathers of Confederation. Some argued that the Privy Council regarded the Act as a simple British Statute, not a constitution (Kennedy 1938, p.405), while others suggested imperial motives to the court's rulings.

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12 Sankey argued that aeronautics was a federal responsibility because it was regulated by international treaty and Section 132 of the BNA Act indicates that the federal government has exclusive jurisdiction as concerns international treaties. In the radio case, Sankey ruled that radio communication was not dissimilar to telegraph communication and was thus a federal responsibility under section 92.10(a).
While "[i]t has long been a custom in English Canada to denounce the Privy Council for its provincial bias," Pierre Trudeau has noted, "it should perhaps be considered that if the law lords had not leaned in that direction, Québec separatism might not be a threat today: it might be an accomplished fact" (Trudeau 1968, p.198).

Alan Cairns has dismantled the arguments against the JCPC with surgical precision. In a memorable and oft quoted passage, Cairns argued,

> [i]t is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise not have taken (Cairns 1988, p.58).

Cairns suggested instead that the Judicial Committee followed trends in Canadian political development, notably the vigorous provincial rights movement initiated in Ontario and supported by Québec. "The critics of the Judicial Committee," Cairns remarked, "were moved more by the passions of nationalism and desires for centralization than by federalism" (Cairns 1988, p.78).

**The Tremblay Report: A Critique of Canadian Federalism**

While the JCPC endeavored to insert the federal principle in the division of powers, the federal government found it could maintain its dominance by exploiting its superior fiscal position (see, Chapter 7), much to the displeasure of the government of Québec. The premier of Québec, Maurice Duplessis, repeatedly opposed the federal government's post-war reconstruction project because it frequently encroached on areas of provincial jurisdiction. When the federal government decided to extend direct funding to universities in 1953, Duplessis appointed a Royal Commission
on "constitutional problems," chaired by Judge Thomas Tremblay. The evidence suggests that Duplessis desired "a brief report that could be used in his war with the St. Laurent government" (Coleman 1984, p.74). The Commission, instead, deliberated for three years and produced a four-volume report. Notwithstanding the decidedly conservative Catholic social thought that frames the Report, it contains a powerful critique of Canadian federalism. The Report follows in the tradition established by Dorion and Mercier, although it is much more substantial and considered.

The Commission noted that federalism was adopted to meet the concerns of French Canadians. More specifically, it contended, "the 1867 Constitution made the Province of Québec, which was already historically its natural focus, the French Canadian centre par excellence, and the accredited guardian of French Canadian civilization" (Québec 1956b, p.66). The Commissioners suggested that at Confederation "[t]here was no question of victor or vanquished, nor of a superior or inferior race; both were to be associates and partners, with each possessing equal rights with respect to the survival of their ethnic groups in the Canadian union. It has been in this sense that the Province of Québec has always interpreted and understood the spirit, and, therefore, the nature of Confederation" (Québec 1956b, p.143).

The Commission suggested that Québec could pursue one of three political options -- separatism, unitarianism, or federalism -- but, it insisted, "[t]he immense majority of the population of Québec is still persuaded that federalism, provided the various governments well understood its spirit and practice it in honesty and justice, still remains today as the political system which is best suited and most adaptable to the Canadian reality" (Québec 1956b, p.95). The commissioners were

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13 Although the Commission was chaired by Judge Thomas Tremblay, the Report's intellectual rigour was provided by Esdras Minville, who wrote the section on culture, and Père Richard Arès, who wrote the history and federalism sections (Coleman 1984, p.75). The other members of the Commission were Paul Henri Guimont, Honoré Parent, and John P. Rowat.
concerned, however, that "to fulfil the particular mission with which the Province of Québec is charged, two conditions are required -- liberty and security" (Québec 1956a, p.70). In short, the Commission argued, Québec required a guarantee of sovereignty in its areas of jurisdiction.

The Commissioners sought to frame the politics of Québec within the context of Catholic social thought. They developed a conservative corporatist image of society upon a Christian concept of man, the principle of subsidiarity, the idea of a common good, and a recognition of the variety and complexity of social life (Québec 1956b, p.113). These principles were to constitute the fundamental premises of Québec society. In addition, the Commission articulated the philosophical bases of federalism as "the pluralist and decentralized organization of the political order, the juridical recognition of local and regional autonomies, and the union of national groups rather than their unification" (Québec 1956b, p.121). It added poetically, "[f]ederalism's ideal is not unification but union, not assimilation but association, not uniformity but diversity, not standardization but the vitality of all the members of its social and political body" (Québec 1956b, p.131).

The Commission proceeded from a classical definition of federalism based substantially on Dicey and Wheare. They wrote, "we may define the federative system properly so-called as being the system of association between states in which the exercise of state power is shared between two orders of government, coordinate but not subordinate one to the other, each enjoying supreme power within the sphere of activity assigned to it by the constitution" (Québec 1956b, p.102). At another point, the Commission described Québec as a "state" within a federation and "sovereign" within its sphere of jurisdiction (Québec 1956b, p.178).

The Commission identified at the outset that there are two critical issues in the establishment of any federal system -- the division of powers and division of revenue sources (Québec 1956a,
p.23). The commissioners had little quarrel with the division of powers enshrined in the British North America Act but they had grave concerns about the division of revenue sources and they thus focused their attention on this question. Revenue, the commissioners argued, is a vital element of federalism. It was their considered opinion that "there can be no federalism without autonomy of the state's constituent parts, and no sovereignty of the various governments without fiscal and financial autonomy" (Québec 1956d, p.294). They argued that the system of subsidies enshrined in the constitution at confederation was a deviation from the federal principle because it did not provide the provinces fiscal autonomy. They recognized, however, that federal subsidies were necessary to complete the federation agreement and they were content to conclude these subsidies may be considered as "an expedient and as a compromise necessitated at the time" (Québec 1956a, p.29).

In the period 1867 to 1939, the Commission identified several divergent trends. In sum, they felt there was considerable constitutional development in this period, but little progress in the fiscal realm. It was their opinion, writing in the mid-1950s, that "the provinces long ago won their autonomy on the political and juridical plane, but they never enjoyed a sound financial and fiscal basis" (Québec 1956a, p.181). The Great Depression and the Second World War, they feared, were responsible for a new era of federal assertiveness or what they described as "a rebirth and recrudescence of the old Macdonaldian imperialism" (Québec 1956a, p.125). The post-war threat to provincial autonomy, the Commission asserted, arises solely from the fiscal policies of the central government, in particular the assumption of all direct taxes. The commissioners had serious concerns regarding the recommendations of the Royal Commission on Dominion-Provincial Relations, also known as the Rowell-Sirois Commission (see, Chapter 7). The Tremblay Commission complained that the federal commission, "[i]nstead of suggesting a guarantee of a sound
basis for the fiscal and financial autonomy of the provincial legislatures...recommended a still greater concentration of fiscal powers in the hands of the central government" (Québec 1956a, p.136).

The Tremblay Commission argued that "fear of another depression or another war -- both depression and war being the traditional enemies of federalism -- served as pretexts to the central government for holding on to the positions it had won, and even to take over others at the expense of the provinces" (Québec 1956a, p.168). The Tremblay Commission was especially alarmed by Keynesian economics. The Commission asserted that in the late 1930s "[t]he federal capital began to swarm with Keynesian economists" (Québec 1956b, p.262). The Commission argued, "neither of the two political conclusions of the Keynesian economists seems to us sufficiently proved, namely a) that traditional federalism means the prevalence of economic instability and b) that with fiscal centralization economic stability in Canada is assured" (Québec 1956b, p.304).

The Tremblay Commission was also deeply concerned that the philosophy of Keynesian economics was inimical to the conservative Catholic social order in Québec. The Commission argued, "all this social policy of foreign inspiration constitutes a constant temptation for it to give up its way of life and cannot fail to work towards its assimilation" (Québec 1956b, p.310). Within five years of the Report's publication, the people of Québec began to shed this conservative outlook and the government of the province began an unprecedented process of state-building. The Tremblay Commission Report was thus considered by many to be almost immediately anachronistic. The conservative perspective of the commissioners, however, does not detract from their analysis of federalism. Moreover, Québec still desires autonomy. Whereas it initially desired autonomy to avoid the creation of a welfare state from outside, it has subsequently desired autonomy to create its own welfare state free from external interference. Federal theory does not address the content of
autonomy; either rationale for provincial autonomy is justifiable.

Social policy, the Commission argued, was logically and constitutionally a provincial prerogative. They argued, "[a]s for social policy, it seems to us that, in a federation composed of elements which are heterogeneous, from the cultural and religious point of view, it should not depend on the central authority. The Fathers of Confederation understood this perfectly well and it is, perhaps, on this point that the centralization policy of recent years has sabotaged their work most cruelly" (Québec 1956b, p.327). Put another way, they said, "never since Confederation have the ideas so cherished by Macdonald for a strong and powerful central government, subordinating the provincial legislatures like so many larger municipal institutions, been so close to realization as they have been in the past ten years" (Québec 1956b, p.171).

The commissioners summarized the federal transformation of Canada in a clever passage that turned Kenneth Wheare on his head:

> It has been customary to say, with Professor Wheare, that Canada has a constitution which is only quasi-federative but a truly federative government. For our part, we believe the judicial interpretations, conventions and constitutional usages, as well as governmental practices up until the war of 1939, gave the Canadian constitutional system a clearly federative character, but as much can hardly be said of the post-war regime, especially when the central government's initiatives regarding the fiscal agreements, the Supreme Court, the Privy Council and constitutional amendments are taken into account (Québec 1956b, p.170-1).

Wheare was correct that the Canadian constitution was quasi-federal but he may well have overestimated the influence of judicial decisions rendering the constitution more federal. After the war, the central government tended to ignore the recently interpreted federal constitution and resumed its traditional quasi-federal practices through fiscal mechanisms. Wheare may have made this analysis himself had he witnessed the full development of post-war Canadian federalism.
Unlike much contemporary opinion in Québec, which has abandoned federalism in favour of independence and full sovereignty, the Tremblay Commission retained a faith in federalism, despite grave reservations. "We believe," they pleaded, "that, in spite of everything, the British North America Act remains, in its very essence, a federative constitution" (Québec 1956b, p.160-1). They argued forcefully that "[t]he decisive reason why a federative system was chosen in 1867 was that Lower Canada had social and cultural values to protect which were different from those of the other provinces. That reason still holds good today, and it still requires there be a maintenance of federalism and a federalism which leaves Québec with full control of its social and cultural policy" (Québec 1956b, p.309). And they stated clearly, "[a]t the crossroads where it is now situated, the Province of Québec still maintains its original choice; it wants neither unitarism or separatism, but it declares itself still faithfully attached to federalism. It refuses, however, to be satisfied with a surface federalism, which is only for show, like a theatre decoration, even if it is presented to it under the seductive name of the new Canadian federalism" (Québec 1956b, p.327).

The Commission thus consequently recommended that "only a frank return to the Constitution can conciliate the principles enumerated above with the practical exigencies of Canadian politics today. We, therefore, recommend to the government of Québec that it should invite the federal government and the governments of the other provinces, as constituent parts of the state, to undertake jointly a readaptation of the public administration according to the spirit of federalism" (Québec 1956d, p.293). This meant first a return to the provinces of social policy areas ceded to the federal government, namely veterans assistance, family allowances, old age pensions, and unemployment insurance (Québec 1956d, p.296). More importantly, they recommended the allocation of exclusive tax fields to each order of government. In short, following the constitution,
the provinces should be granted an exclusive right to all direct taxation on individuals and institutions, while the federal government "should have sole access to taxes on goods and on the circulation of goods" including taxes on tobacco, alcohol, gasoline and entertainment (Québec 1956d, p.295).\footnote{The Commission recognized that this would leave the central government with a revenue shortfall. They suggested this could be ameliorated by spending cuts or less preferably by the provinces renting the federal government 25% of income taxes (Québec 1956d, p.296). They also recognized that their recommendations would have a detrimental affect in the poorer maritime provinces and thus they advocated a constitutional amendment to guarantee equalization payments to the less prosperous provinces.}

The Tremblay Report, following the legacies of Dorion and Mercier, provided a powerful critique of Canadian federalism. The conservative Catholic social thought meticulously developed by the Commission is clearly outdated, swept away by the Quiet Revolution, but that does not obscure its analysis of federalism, which remains as vital today as it was in the mid-1950s. While polls continue to indicate that "renewed federalism" is still the preferred option of a majority of Québécois, federalism may no longer be a sufficient political arrangement for Québec. Just a decade after the Tremblay Report was published, separatist political parties emerged in Québec, and the terms of the political debate in the province were fundamentally and permanently altered. If the federal government was unwilling to share sovereignty according to the federal principle, the separatist parties argued that Québec would have to assume full sovereignty. Thirty years later, the structure of Canadian federalism remains essentially unaltered. Since the Tremblay Commission, federalism as a political objective may thus have been irrevocably lost.

Conclusion

With regard to the federal principle, the Canadian constitution is ambiguous. Canada is federal in form, but the federal principle was not enshrined in the constitution. As Macdonald
wished, federalism in Canada did not create a system of government with divided sovereignty. In Switzerland, political practice has flowed from the federal principle enshrined in Article 3 of the Swiss constitution. In Canada, where the federal principle was not enshrined in the constitution, the spirit of federalism has frequently been absent in political practice. Federalism without divided sovereignty will likely be insufficient to hold a multinational federation together, as Québec-Canada conundrum demonstrates.

The British North America Act contained significant violations of the federal principle. The wide swaths of power allocated in Section 91, prefaced by the Peace, Order, and Good Government clause, had the potential to overwhelm the jurisdictions of the provinces enumerated in Section 92; the declaratory power further eroded provincial autonomy, even in provincial spheres of jurisdiction; and the powers of disallowance and reservation were egregious violations of the federal principle. These were not simply hypothetical violations of the federal principle; the federal government routinely employed these provisions in the constitution to control the provinces.

While only one of these deficiencies (the POGG clause) was addressed by the JCPC, most scholars have been willing to concede that Canada is federal in form. Even Wheare, who is often accused of applying the federal principle too stringently, concluded that "although Canada has not a federal constitution, it has a federal government" (Wheare 1963, p.20). From this ambiguous situation comes his well-known description of Canada as a "quasi-federal" country. This may, in fact, represent a generous description of the B.N.A. Act. Peter Hogg, one of Canada's foremost constitutional experts, has written that "[i]n the early years of confederation, the relationship between the new national government and the provinces was if anything understated by the term quasi-federal; it was more akin to a colonial relationship" (Hogg 1985, p.88). Put in those terms, it is not
surprising that there has always been significant opposition to the constitution in Québec.

Political leaders from Québec have always been troubled by the absence of the federal principle in the constitution. In the confederation debates, Antoine Aimé Dorion relentlessly criticized the BNA Act and forty percent of the French Canadian representatives in the Canadian legislature voted against the constitution. Honoré Mercier renewed these attacks when he became the premier of Québec in 1886. As the JCPC began to make Canada more federal, opposition to the constitution in Québec became muted but, when the federal government reasserted its dominance during and after the war through its spending power, the government of Québec objected vigorously. The Tremblay Report of 1956 represents the most sustained critique of Canadian federalism ever written. The federal government, however, chose to ignore the recommendations of the Tremblay Commission. The politics of separatism has subsequently arisen in Québec.

The blatant violations of the federal principle in the constitution dissipated in the early 1940s. They are thus too far removed from the advent of separatist politics in Québec in the 1960s to be a persuasive explanatory, or independent, variable. In the decades following the war, however, the government of Canada concocted an elaborate new power: the federal spending power. The development of the federal spending power is correlated with the rise of Québec separatism. The federal spending power, which appears to be a serious violation of the federal principle, flows from a constitution that never enshrined the federal principle. In this sense, the constitution is an antecedent to the politics of Québec separatism. The pattern of opposition to the federal state exhibited in Québec has existed since confederation and this stems, at least in part, from a constitution that did not enshrine the federal principle. The federal spending power will be examined more in Chapter Seven, and the more recent constitutional debates will be discussed in Chapter Ten.
Chapter 5

The Indian Constitution:

Quasi-Federalism in Action
India is a quintessential federal society. With two major religious traditions, numerous minor traditions, more than a dozen official languages, thousands of castes, and almost a billion people, India has an unprecedented array of diversity. Many of these diversities are territorially situated. Language groups, in particular, are largely confined to specific geographic areas. Both the Moghul and British rulers found that India could only be governed with separate administrative units. The British in particular moved India towards federalism with the Government of India Act 1919, and especially the Government of India Act 1935. After independence, Indian political leaders had to decide how to govern India. There seems to have been little doubt that India would maintain the federal aspects of the 1935 constitution. After the long struggle for independence there was a strong sense of Indian identity, but regional distinctions were still deeply ingrained in the psyches of the people. Federalism was thus the most expedient form of government for India's social demography. After the constitution of 1950, India was not only a federal society but also a federal political system, or at the very least a quasi-federal system.

Federalism is thus not just an administrative convenience in India; it is an instrumentality designed to reconcile contending political identities -- an Indian identity on the one hand, and a state-based linguistic, or religious, identity on the other hand. The constitution, however, contains a number of provisions that violate the federal principle. These quasi-federal provisions undermine state sovereignty. The states, in fact, are constitutionally subordinate to the central government. A number of the nationalities around the periphery of India resent the lack of sovereignty accorded to the states in the federation. Political conflict was minimized and contained when the Congress party controlled both orders of government. Since the fragmentation of the party system in the late 1960s, severe political violence has erupted in certain parts of India. Unlike Canada, the Indian party
system has been unable to contain this conflict. India has thus had to endure a number of violent secessionist conflicts. In short, the multinational character of the Indian federation appears to have collided with the country's quasi-federal constitutional structure.

**From Colonialism to Federalism**

It has been argued that India's great empires were federal in character (Bombwall 1967, p.33). While the Moghuls did establish an administrative apparatus based on *subas* (provinces) and *zillas* (districts), these sub-divisions were not sovereign in any given areas; the Moghul system of administration was consequently not federal. When the British conquered India, they largely adopted the Moghul system. Although the British initiated a process of devolution and began to transfer power incrementally to Indian hands in a series of governmental acts after the Mutiny of 1857, they did not disturb the unitary principle of India's administration (Chanda 1965, p.19).¹

While the Government of India Act of 1909 provided for somewhat more local representation, it involved only a very modest degree of administrative devolution. The Act was not really federal and it did not provide responsible government (Pylee 1965, p.73). The Government of India Act of 1919 introduced a more substantial proto-federal system. The 1919 Act was premised on three major principles: 1) popular local government; 2) semi-popular provincial governments with a degree of independence from the centre; and 3) an Indian Legislative Council enlarged with popular representation, although still responsible to the British parliament (Pylee 1965, p.73).

¹ Under the Crown, India was governed by the British Parliament. The Secretary of State for India, a member of the cabinet, assumed direct responsibility for the administration of the Indian government. His agent in India was the Governor-General or Viceroy who, in turn, relied upon his Governors, Lieutenant-Governors, and Chief Commissioners at the provincial level. For a brief description of the various regulatory acts imposed by Britain between 1793 and 1935 see, Alan Gledhill (1951) *The Republic of India: The Development of its Laws and Constitution*, London: Stevens and Sons Limited, p.19-25. See also, M. V. Pylee (1965) *Constitutional Government in India, New York: Asia Publishing House*, p.47-73.
p.75). At the provincial level, the Lieutenant-Governor was empowered with a wide list of "reserved subjects," while the legislature could consider a range of "transferred subjects" (Pylee 1965, p.78). This model of governance was referred to as "dyarchy." Although provincial legislation still had to receive the assent of the Governor-General and the Secretary of State for India, the state legislature was granted a modest range of separate powers and the ability to legislate autonomously. In this respect, an incipient variety of federalism was born in India.

The Government of India Act of 1919 was not sufficient to quell demands for responsible government. By the late 1920s, it was clear that a new constitutional order was required. In 1929, the Viceroy of India, Lord Irwin, proposed an all-India Round Table Conference to consider the possibility of a new federal constitution with dominion status. Before the first Round Table Conference convened, however, the government of Britain appeared to waver on its promise of dominion status. The Indian National Congress immediately decided to withdraw from the conference. The Round Table nevertheless assembled in London from the middle of November 1930 through to the end of January 1931 to discuss "whether the future constitution of India should be on a federal or unitary basis" (Government of Great Britain 1931, p.7). Despite the genuine and well-intentioned efforts of the delegates, the future of India could not be decided without the participation of the Congress party. As V. P. Menon later quipped, "a round table conference to evolve a constitution for India without the participation of the Congress was like enacting Hamlet without the Prince of Denmark" (Menon 1956, p.29).

The Congress did participate in the second Round Table Conference, in September 1931, with Gandhi as its sole representative. At the start of the conference, Gandhi distributed an eight-point memorandum. The final point stipulated, "[t]he future constitution of the country shall be
Gandhi, however, had little interest in devising a federal constitution with dominion status. He had two other objectives at the Second Round Table Conference. He wanted to force the British to negotiate India's independence and to position the Congress as the only representative party of India. He emphatically stated, "I say the Congress claim is registered as complete independence" (Government of Great Britain 1932, p.394). He said, furthermore, "Congress alone claims to represent the whole of India...What a great difference it would be today if this claim on behalf of the Congress was recognized" (Government of Great Britain 1932, p.390). At the end of his speech, Gandhi announced that he would not participate in future negotiations. The Second Round Table Conference thus concluded without an agreement. Prime Minister Ramsey Macdonald closed the conference insisting that it had not been a failure but warning that Britain would unilaterally impose a new constitution if the various Indian parties were unable to reach an amicable agreement (Government of Great Britain 1932, p.418). A third Round Table conference, held in November 1932 and boycotted by the Congress, also ended without a constitutional agreement.

After the failure of the Round Table conferences, the British Government acted on its threat and unilaterally introduced a new constitution for India. The Government of India Act 1935 was an enormously complex document. It was an authoritarian colonial constitution with a highly

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2 Gandhi's memorandum indicates that the eight points were drawn from the Motilal Nehru Report of 1928 (Government of Great Britain 1931, p.65). Nehru's report represents the first demand by the Congress for a federal political structure.

3 The Government of India Act was introduced to the British parliament in December 1934 and it received Royal assent in August 1935.
asymmetrical proto-federal structure. The Seventh Schedule of the Act elaborated an extensive division of powers. The central government was accorded 59 subjects, provincial governments 54, and 36 items were relegated to a concurrent list (Bombwall 1967, p.209-210). Inasmuch as there was a division of legislative powers, one could say the constitution was federal but, under the terms of the 1935 Act, sovereignty was retained by the crown through the Governor-General. Pylee remarks that "[a]fter Dyarchy was abandoned in the Provinces on account of its failure, it was curious that such a system was recommended for the Centre under the Act of 1935" (Pylee 1965, p.104). In this latter respect, the Act was not federal and it did not provide India responsible government.

The 1935 Act, moreover, was never fully implemented. First, the princes refused to accede to the federation. The princes apparently feared that their sovereignty would not be respected, especially by the Congress, if they joined the proposed federation. Other integral aspects of the Act also never came to fruition. A central legislature was not elected until a Constituent Assembly was formed in December 1946 to prepare for independence. Provincial legislatures were elected in 1937 but, when the Congress resigned in the fall of 1939, the facade of provincial autonomy was exposed.

The Government of India Act 1935, however, moved India in a federal direction. With India's enormous diversity, the British evidently decided that federalism was the most efficacious

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4 While the eleven British provinces were to be accorded uniform powers, the powers of the princely states were to be determined on a case by case basis according to the terms of accession negotiated with the Governor-General. There were over five-hundred princely states and the British government had resolved that the federation would come into existence when half the princes had joined. Thus, if the constitution had evolved according to plan, there would have been more than two-hundred and fifty units in the federation, each with a different legal relationship to the centre.

5 This quasi-federal constitution was also only quasi-democratic. The rather innocuous federal legislature was to be a curious body of elected provincial politicians and appointed representatives from the princely states that joined federation. At the regional level, be British provinces were to have popularly elected legislatures but the princes were free to rule from their courts. Bombwall has asserted forcefully that "[h]ad these disparate units been forced into a union, the result would have been a travesty of both federalism and democracy" (Bombwall 1967, p.198).

6 The Motilal Nehru report "had made it clear that the states would not be welcomed into an all-India federation unless their internal administration was adequately reformed" (Bombwall 1967, p.198).
form of government. Thus, despite its shortcomings, the 1935 Act, "established the principle of federalism for the subcontinent" (Hardgrave 1986, p.113). However, as Granville Austin has noted,

[n]o matter how substantial the devolution of authority to the provinces under the 1919 Government of India Act or how apparently federal the provisions of the 1935 Act, or to what extent Indians held office in either the federal or provincial governments, power was centralized and always in British hands (Austin 1966, p.188-9).

The British, of course, did not relinquish power until they departed India on August 15, 1947.

In the summer of 1946, a Constituent Assembly was elected indirectly by the provincial legislatures but it did not begin its work in earnest until after independence. The Constituent Assembly was dominated by the Congress party. The Congress won 203 of the 212 "general" seats, plus 4 Muslim and 1 Sikh seats, for a total of 208 out of 296 Assembly seats. The Muslim League won all but 7 seats reserved for Muslims, and the remaining sixteen seats went to other parties (Austin 1966, p.9). The Congress controlled 70% of the seats after the Assembly election and over 90% after partition, when the Muslim League departed. Without the Muslim League, the Constituent Assembly was for all intents and purposes a Congress party assembly (Austin 1966, p.2).

The Congress "high command" -- especially Jawaharlal Nehru, Vallabhbhai Patel, Rajendra Prasad, and Maulana Azad -- dominated the proceedings of the Assembly. Nehru was prime minister; Patel was deputy-prime minister and home minister; Azad, who was President of the Congress from 1940 to 1945, was the minister of education; and Prasad was the President of the Constituent Assembly. Austin asserts that these four men "constituted an oligarchy within the Assembly. Their honour was unquestioned, their wisdom hardly less so. In their god-like status,

7 The Congress Working Committee, the "high command," orchestrated the selection of most delegates (Austin 1966, p.11-12). While the Assembly was chosen by the state legislatures, the members did not act as delegations from their respective states as was the case in the United States, Canada, and Australia. In short, the dominance of the Congress party superseded this federal facade.
they may have been feared; they were certainly respected" (Austin 1966, p.21; emphasis added). Nehru and Patel, the idealist and pragmatist respectively, were particularly influential on the Assembly's proceedings. Austin argues that "[t]he blend in the constitution of idealistic provisions and articles of a practical, administrative, and technical nature is perhaps the best evidence of the joint influence of these two men" (Austin 1966, p.315).

Dr. B. R. Ambedkar was the only influential non-Congress member of the Assembly. Ambedkar was an untouchable, and a long-time leader of India's untouchable community. Although he was a fierce critic of the Congress, Nehru invited him to join the cabinet and the Congress elected him as chairman of the drafting committee. Ambedkar later claimed,

I came into the Constituent Assembly with no greater aspiration than to safeguard the interests of the Scheduled Castes. I had not the remotest idea that I would be called upon to undertake more responsible functions. I was therefore greatly surprised when the Assembly elected me to the Drafting Committee. I was more than surprised when the Drafting Committee elected me to be its Chairman (GOI 1949b, p.973-4).

Ambedkar has subsequently become known as the "architect" of India's constitution.

After the Drafting Committee was formed, the Assembly's constitutional advisor, Sir Bengal Rau, was asked to prepare a draft constitution. Rau drafted a constitution consisting of 243 Articles and 13 Schedules in less than two months. From October 1947 through to February 1948, the Drafting Committee revised Rau's draft and presented it to the Assembly with 315 Articles and 8 Schedules. Ambedkar's primary task was to steer the constitution through the Constituent

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8 Ambedkar had openly feuded with Gandhi since the Second Round Table Conference in 1932 (see Ambedkar 1939, p.150-1). Gandhi was a neo-traditionalist who wished to sanitize the caste system; Ambedkar was a modernist who fought to abolish the caste system.
The Constituent Assembly did not debate grand political principles. The ratification process was largely a technical discussion about the meaning of each article and clause. This was due to the dominant position of the Congress Party in the Assembly. On November 26, 1949, after two years of tedious debate, the Constituent Assembly ratified an essentially federal constitution. The final version of the constitution contained 395 Articles and 8 Schedules (Pylee 1965, p.138). About 250 articles were taken from the Government of India Act 1935 "verbatim or substantially intact" (Rudolph and Rudolph 1987, p.72). The constitution took effect on January 26, 1950.

In the new constitution, the longest in the world, India was to have two levels of government, central and regional (states), each elected directly by adult franchise. The constitution included an elaborate and detailed division of powers. There was a long list of federal powers, an extensive list of concurrent jurisdictions, and a shorter but not insignificant list of state powers. After Independence, India's leaders came to appreciate the federal imperative. As the British discovered, India's structural diversity could not be governed by any other system of government.

When Ambedkar presented the Draft Constitution to the Constituent Assembly in November 1948, he argued that the proposed constitution conformed to a classical definition of federalism. He

9 While Ambedkar is commonly referred to as the "architect" of the Indian constitution, Rajendra Prasad has argued that Rau ought to be considered more properly the "main architect" of the constitution (1963, p.xi). As it was Ambedkar's job to steer the constitution through the Constituent Assembly, Prasad has perhaps more accurately described Ambedkar as the constitution's "pilot" (1963, p.vi) See the forward by Prasad to India's Constitution in the Making, by Sir Bengal Rau, edited by B. Shiva Rao (1963).

10 Ambedkar stated to the Assembly the day before the Constitution was ratified that the "possibility of chaos was reduced to nil by the existence of the Congress Party inside the Assembly which brought into its proceedings a sense of order and discipline. It is because of the discipline of the Congress Party that the Drafting Committee was able to pilot the Constitution in the Assembly with the sure knowledge as to the fate of each article and each amendment" (GOI 1949b, p.974).

11 The division of powers quite clearly tilted towards the centre. List One of the Seventh Schedule of the Indian constitution allocated ninety-seven heads to the centre, List Two provided the states sixty-six heads, and List Three itemized forty-seven concurrent powers.
told the Constituent Assembly,

a Federal Constitution is marked: (1) by the existence of a Central polity and subsidiary polities side by side, and (2) by each being sovereign in the field assigned to it. In other words, Federation means the establishment of a Dual Polity. The Draft Constitution is [a] Federal Constitution inasmuch as it established what may be called a Dual Polity. This Dual Polity under the proposed Constitution will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution (GOI 1948/9, p.33; emphasis added).

Ambedkar concluded that the Constitution was similar in principle to the American Constitution.

One year later, however, as the Constitutional debate drew to a close, Ambedkar subtly changed his position. In response to criticism that the Draft Constitution was too centralized, Ambedkar argued that "[t]he chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution" (GOI 1949b, p.976; emphasis added). Ambedkar thus dropped the pretence that the Indian states were sovereign in their spheres of jurisdiction, saying only that there was a division of political authority between the centre and the states. The constitution quite clearly reserved sovereignty for the central government.

Ambedkar, in fact, acknowledged that the central government was "given the power to override the States," under certain specified conditions. Ambedkar declared, "the Draft Constitution can be both unitary as well as federal according to the requirements of time and circumstances" (GOI 1948/9, p.35; emphasis added). On the eve of ratification, Ambedkar sought to assuage the concerns of the critics by stressing that "these overriding powers do not form the normal features of

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12 Ambedkar explained that "[i]n normal times, [the constitution] is framed to work as a federal system. But in times of war it is so designed as to make it work as though it was a unitary system" (GOI 1948/9, p.35).
the Constitution. Their use and operation are expressly confined to emergencies only" (GOI 1949b, p.977). These provisions, as we shall see below, constitute a negation of the federal principle. In short, Ambedkar indicated that Indian federalism was only of a fair weather variety.

**India's Constitution: Deviations from the Federal Principle**

The Indian constitution is clearly federal in form. There are two democratically elected orders of government in India, each with a range of constitutionally specified powers. The constitution, however, also contains a number of provisions that violate the federal principle. In the matters of state formation (Articles 2 and 3), legislative relations between centre and states (Articles 249-256), the state governor's power to reserve legislation for presidential assent (Articles 200 and 201), and the considerable emergency powers available to the Union government (Articles 352-360), the constitution violates the federal principle. As such, the states do not have the degree of sovereignty that would be expected in a truly federal system.\(^{13}\)

**Articles 2 and 3: State Formation and Reorganization**

For federalism to be meaningful, the integrity of the constituent units, the centre *and* the states, must be guaranteed. The constitution proclaimed that India was the sum total of the states, union territories, and "such other territories as may be acquired" (Article 1). During the Constituent Assembly Debates, Ambedkar was emphatic that the constitution envisaged India as an "indestructible" union. While the integrity of India as a whole was guaranteed, the states were not constitutionally protected.

\(^{13}\) The federal principle is also violated by the presence of a single Electoral Commission, an integrated federal-state administrative structure, and a single integrated judicial system. And finally, there is a single citizenship for all Indians; there is no state citizenship, nor do the states have their own constitutions. Ambedkar acknowledged these quasi-federal provisions, when he introduced the constitution to the Constituent Assembly in November 1948 (GOI 1948/9, p.33-37).
In addition to the admission or establishment of new states (Article 2), Parliament is also granted the power to alter the areas, boundaries, and names of existing states. Article 3 declares,

Parliament may by law, (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; (b) increase the areas of any State; (c) diminish the area of any State; (d) alter the boundaries of any State; (e) alter the name of any State.

Notwithstanding the Fifth Amendment (1955), the constitution empowers the central Parliament to add, delete, or alter states without a constitutional amendment or approval of the affected states. Wheare identifies these articles as violations of the federal principle (Wheare 1963, p.27).

It is not unreasonable to expect the territorial reorganization of new states but in federal countries special care must be taken to proceed prudently. In the United States, the admission of new states is detailed in Article Four, Section Three. Congress is empowered to admit new states into the Union "but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." Even states formed from federal territory could only be accomplished if it did not prejudice claims made by an existing state.

In Canada, special provisions were added to the British North America Act to facilitate the future addition of British colonies and territories to the Canadian union. While the Indian central government has not unduly exploited Articles 2 and 3 (Austin 1966, p.237; Brass 1990, p.149ff), the continued presence of these Articles in the Constitution serves to remind the states of their subordinate status in the Union. As such, the spirit of federalism is not fully respected.

Articles 245-258: Legislative Relations

Although the Indian constitution has a long and elaborate division of powers, the states are
not accorded sovereignty in their respective spheres of jurisdiction. This is evident from Part XI of the constitution, which describes the legislative relations between the Union and the States.\textsuperscript{14} The first deviation from the federal principle is found in the division of powers itself. Article 246 is constructed so as to allow Union supremacy. Clauses 1 and 2 of Article 246 empowers parliament to enact legislation with respect to Union and Concurrent powers, "notwithstanding" the power of the states to legislate in their spheres of jurisdiction. By contrast, the power of the states to legislate in their sphere of jurisdiction, granted by Clause 3 of Article 246, is permitted "subject to" the power of the Union government to legislate with respect to Union and concurrent powers. This construction "implies that where there is an irreconcilable conflict or overlapping as between entries in the three lists, the legislative power conferred on Parliament under clauses 1 and 2 shall predominate over that of the State Legislatures" (GOI 1988a, p.26).

The Rule of Union Supremacy is buttressed by the Rule of Repugnancy. Article 254 states,

\[ \text{[i]f any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament...the law made by the Legislature of the State shall, to the extent of the repugnancy, be void (GOI 1991, p.69).} \]

The explicit rule of repugnancy clarifies any ambiguity in the division of powers scheme stipulated in Article 246 and it represents a considerable infringement on the states to legislate in their allotted sphere of jurisdiction. The scheme of union supremacy is completed by Article 248, which vests all residual powers in the central government.

If the division of powers is constructed in such a manner as to leave the operation of the federal principle in considerable doubt, Articles 249 through to 253, which stipulate the exceptions

\[ \text{\textsuperscript{14} Articles 245, 246, 248, and 254 in conjunction with the Seventh Schedule constitute the core distribution of powers.} \]
to the normal division of powers, leave no question that the federal principle is compromised in the Indian constitution. Article 249 allows the central government to enact legislation with respect to matters on the state list in supposed instances of national interest. The central government can assume this power with a two-thirds majority vote of the Rajya Sabha. The resolution must state which power is being assumed, and it is only valid for a period of one year, plus six months after the expiration of the resolution, although it is renewable for another year upon an additional resolution of the upper house of Parliament. The "national interest," however, is not defined or operationalized.

Article 249 was intended to permit the central government to intervene in state matters in unusual circumstances. It was justified by the provision requiring the Council of States to enact such legislation. It was argued that if the Council of States agreed to derogate powers to the central government for a period of one year, there was no violation of the federal principle. This theory, however, stumble on two objective realities. First, Rajya Sabha members do not vote as state delegations; there is little, if any, consultation between the Council of States and the state governments. Second, the Rajya Sabha is governed by the dictates of party politics. It is particularly easy to see how this provision could be abused in a one-party dominant position. If the Rajya Sabha was truly a council of states, Article 249 might not contravene the federal principle but, as it stands, this special provision is not federal. In fact, it has been argued that Article 249 "reduces the states into glorified municipalities" (Kurian and Varughese 1981, p.15).15

The federal government is provided other entrees into the area of state legislation by Articles

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15 The Sarkaria Commission has noted that Article 249 has been used only sparingly. It was employed in 1950 to limit black-marketeering and again in 1951 to assist the rehabilitation of refugees after partition. The power lay dormant for thirty-five years until it was resurrected to facilitate the restoration of peace in Punjab. On that occasion, six items were brought into the union sphere from the state list, but "[n]o legislation, in pursuance of the resolution, dated August 13, 1986, of the Rajya Sabha was passed by Parliament" (GOI 1988, p.67).
250 through 253. The federal parliament is granted the authority to legislate on all state matters while a proclamation of emergency is in effect (see Article 250 and 352). The emergency provisions, as we shall see below, constitute a fundamental violation of the federal principle and have been subject to considerable misuse. Article 251 was inserted to clarify that the rule of repugnancy remains in effect while the federal parliament legislates on matters on the state list under the provisions of Articles 249 and 250. Two or more states may request that the federal government assume responsibility for legislation of certain matters on the state list (Article 252). Any legislation so enacted by the federal government is amendable or repealable by the federal parliament but not by the state legislatures in question. Finally, Article 253 allows the federal government to legislate on state matters if the laws are the result of international treaties signed by the government of India.\textsuperscript{16}

The constitution also contains special provisions and sanctions to ensure state compliance. Article 256 stipulates that "[t]he executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament...and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose" (GOI 1991, p.70). Article 365, moreover, empowers the President to dismiss a state government if, in his judgement, a state government has failed to comply with the directions of the Union government.\textsuperscript{17}

\textsuperscript{16} Article 253 was likely included in the constitution to avoid the fate experienced by the federal government of Canada in the infamous Labour Conventions Case of 1937 when the JCPC ruled that the federal government did not have the authority to legislate in areas of provincial jurisdiction in the process of treaty implementation. Lord Atkin's decision "rendered the power of enforcing treaties thoroughly subject to the general division of powers in Canadian federalism. In effect this means that Canada cannot become a party to an international agreement which requires legislative action beyond the ambit of section 91 unless the prior approval of the provinces is first secured" (Russell 1982, p.123).

\textsuperscript{17} Article 365 states, "[w]here any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."
The two major commissions that have studied centre-state relations in India have reached opposite conclusions. The Administrative Reforms Commission concluded that "[t]he autonomy implicit in the division of powers, on which basically the federal character of the Union rests, can thus be seen as a functional devolution rather than as a conferment of sovereign rights" (GOI 1968, p.6). Twenty years later, however, the Sarkaria Commission concluded that Articles 256 and 365 "are vital for ensuring proper and harmonious functioning of Union-State relations in accordance with the constitution. They do not derogate from the federal principle, rather give effect to it" (GOI 1988, p.107). The latter conclusion, however, does not conform to most accepted definitions of the federal principle or to the objective reality of centre-state relations in India. A number of the states have protested the violations of the federal principle in the Indian constitution. These violations have proved to be a source of considerable tension in centre-state relations.

Articles 200 and 201: Reservation of Bills by State Governor for Union Consideration

The state Governor, although largely a symbolic position, has frequently been a controversial figure in centre-state relations in India. The Governor is situated as 1) the constitutional head of the state apparatus, 2) "as a vital link between the Union government and the state government," and 3) as an "agent" of the Union government during times of crises (GOI 1988, p.118). As long as state politics is stable, the governor is rather inconspicuous but, in times of instability, the governor is placed in a tenuous position in centre-state relations. In sum,

[t]he burden of the complaint against the behaviour of Governors, in general, is that they are unable to shed their political inclinations, predilections and prejudices while dealing with different political parties within the state. As a result, sometimes the decisions they take in their discretion appears as partisan and intended to promote the interests of the ruling party in the Union Government (GOI 1988, p.118).
Once again, the constitution envisages only a fair-weather variety of federalism.

The governors are appointed by the president, upon the advice of the prime minister, to act as a constitutional head of state. The dependence of the Governor on the President, read the confidence of the union cabinet, weakens the Governor and strains the federal principle further. Certain conventions have arisen surrounding the appointment of governors such that "the person who is selected as the Governor of a State is normally an outsider, a resident of another state, one who has had no political entanglements within the state" (Pylee 1965, p.513). These conventions are supposed to enhance the impartiality of the governor but in fact they serve to weaken state autonomy: the governor has allegiance only to the president and not to the state.

The governor is also intended to be a link to the centre and to act as an agent of the centre when necessary. All governors submit to the president a bi-weekly report of political developments in their state. The chief minister of the state usually receives a copy of these reports. It is in this capacity as a link and agent of the centre that the Administrative Reforms Commission concluded that "[t]he Constitution thus specifically provides for a departure from the strict federal principle and it is relevant to observe that this departure is not fortuitous or casual" (GOI 1968, p.272).  

Most of the duties of a state governor are strictly formal. They do, however, retain considerable discretionary powers. In the main, state governors 1) appoint chief ministers, 2) dismiss state ministries, 3) dissolve state legislatures, 4) and provide advice, suggestions, and warnings to the state government. The first three of these duties are decided by the vicissitudes of electoral

18 The Sarkaria Commission evidently did not consider the governor's bi-weekly reports to be a violation of the federal principle. The Commission concluded, "[w]e do not see any reason to recommend a change in the well-established practice of Governors sending fortnightly reports to the President, with copies thereof to the Chief Minister. However, we are of the view that it would not be constitutionally proper to make it obligatory for the Governor to send a copy of the report to the Chief Minister" (GOI 1988, p.132).
mathematics and are generally not followed by controversy. Two additional duties, however, have been highly controversial. Governors are obliged to provide assent to all state legislation before it can be enacted into law but they may, at their discretion, reserve state legislation for presidential assent. Second, as will be discussed momentarily, the governor plays a critical role in the imposition of President's rule in a state.

The final step of the state legislative process is to receive the assent of the governor. Under the provisions of Article 200, the governor has four options: 1) the bill may receive assent; 2) assent may be denied; 3) the bill, if it is not a money bill, may be returned to the legislature for further consideration or amendment according to the recommendations of the governor; and 4) the governor may reserve the bill for presidential assent. With regard to the latter scenario, Article 200 states, the governor "shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill" (GOI 1991, p.51). The President may or may not give assent to the bill or he may return it to the legislature for further consideration, in accordance with the provisions in Article 201.

As the President is a constitutional head of state, he acts only on the advice of his Council of Ministers, or more specifically the recommendations of the Prime Minister. Thus the effect of Article 200 is to provide the Union government the power to veto state legislation. As such, the reservation of state legislation by the Governor for presidential consideration is a clear violation of the federal principle. The Administrative Reform Commission acknowledged that "a wide interpretation leading to a large number of Bills being reserved for the President's consideration would be contrary to the federal spirit of the Constitution" (GOI 1968, p.277).
The Sarkaria Commission claimed to accept the ARC assessment (GOI 1988, p.149), but it also argued,

> [o]ur constitution is not cast in a tight [federal] mould. It is *sui generis*. It harnesses the federal principle to the needs of a strong centre. The various provisions of the constitution which require state bills relating to certain matters to be referred to the President for consideration or assent are a part and parcel of this scheme of checks and balances adopted by our constitution (GOI 1988, p.146).

The Sarkaria Commission argued that the main utility of Article 200 is that it ensures a "uniformity and harmony in the exercise of legislative power of the Union and State Legislatures with respect to the basic aspects of a matter in the Concurrent List" (GOI 1988, p.147). If this were true, Article 200 would instruct the governor to reserve only legislation emanating from the concurrent list. Article 200, however, is framed much more broadly to allow the governor to assess the constitutional validity of *each* piece of state legislation.

The number of bills reserved by governors for presidential consideration is staggering. The Sarkaria Commission reports that during the period from 1977 through to the end of 1985, 1,130 state bills were reserved for the consideration of the President (GOI 1988, p.152). Presidential assent was received in 1,039 cases; 5 bills were returned to their respective legislatures for further consideration, and 55 cases were still pending. In total, 31 bills did not receive presidential assent. While most of the reserved legislation has eventually received presidential assent, this process considerably delays the state legislative process.

The role of the governor and the power to reserve legislation appear to follow the Canadian model. Pylee asserts that "[t]he Canadian constitution which has a strong centre seems to have particularly influenced the Drafting Committee in this connection" (Pylee 1965, p.512). The practice of reservation and disallowance in Canada ceased in the early 1940s, about seventy-five years after
independence. India is just now reaching its fiftieth anniversary of independence, but the number of bills being reserved in India is much greater than in Canada. In Canada, from 1867 through to 1939, 107 bills were disallowed and 57 more bills were reserved, for a total of 164 bills, whereas over one thousand bills were reserved in India between the mid-1970s and the mid-1980s.

In keeping with the tone of its entire report, the Sarkaria Commission was unwilling to recommend substantive changes to the practice of reservation. The Commission recommended instead that the Union executive should consider the merits or demerits of a state bill from "all angles," including whether the bill is constitutional and in harmony with Union legislation. It urged that bills should be reserved only "in rare and exceptional cases" where bills are "patently unconstitutional," or "ex-facie" beyond the competence of the state legislature, or "manifestly derogate" from the constitution so as "to endanger the sovereignty, unity and integrity of the nation," or "clearly violate Fundamental Rights" (GOI 1988, p.157). In this respect, the Sarkaria Commission embraced the recommendation made by the Administrative Reforms Commissions in the 1960s. The consideration of state legislation by the central executive, however, is an infringement of state sovereignty and it continues to be a source of tension in centre-state relations.


The various emergency provisions represent the most egregious violations of the federal principle in the Indian constitution. Indeed, these provisions empower the Union government to transform India from a federal to a unitary state. The emergency provisions cover three basic scenarios, national emergencies of an internal or external nature (Articles 352-354), the political

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19 The ARC recommended that Article 200 should be "interpreted as enabling Presidential intervention only in special circumstances, such as those in which there is a clear violation of some fundamental right or a patent unconstitutionality on some other ground, or where the legitimate interests of another state or its citizens are affected" (GOI 1968, p.277).
collapse of a state (Articles 356-357), and financial crises (Article 360). National emergencies have been declared on three occasions, once controversially; Article 356 has been employed numerous times and has become highly controversial; Article 360 has never been utilized and consequently it has little political significance.

The President is empowered by Article 352, upon the recommendation of the Council of Ministers, to make a Proclamation of Emergency, if he is satisfied that "a grave emergency exists," either by "external aggression or armed rebellion."\(^{20}\) The effect of an emergency proclamation is outlined in Articles 353 and 354. Article 353 empowers the Union Parliament to "make laws with respect to any matter," notwithstanding the constitutional division of powers.\(^{21}\) The state executive, moreover, is expected to become subservient to the Union executive. While a proclamation of emergency is in operation, the President may, by Article 353, alter the division of revenues "as he thinks fit." In short, federalism ceases to exist under a proclamation of emergency.

National emergencies have been declared on three occasions, twice reasonably and once questionably. The first emergency was proclaimed in 1962, when China annexed large portions of Indian territory, precipitating a short war. This proclamation was still in effect when war ensued with Pakistan in 1965. A second emergency was proclaimed in 1971, after the start of the third war with Pakistan. There is no evidence that centre-state relations were disturbed by these emergency declarations. In short, the central government exercised its power properly and responsibly during these externally precipitated crises.

\(^{20}\) The phrase "armed rebellion" was substituted for "internal disturbance" by the Forty-fourth Amendment Act (1978). This amendment was initiated by the Janata government after the constitutionally questionable imposition of Emergency Rule by Indira Gandhi for supposed "internal disturbances."

\(^{21}\) The Sarkaria Commission explains that "[a] Proclamation of Emergency has the effect of converting the State List into [the] Concurrent List; and therefore, if Parliament legislates on any subject in the State List, the State laws, to the extent of repugnancy, shall be null and void and the law by Parliament shall prevail" (GOI 1988, p.11).
The third proclamation of emergency was much more problematic. In June 1975, Indira Gandhi persuaded the President, to proclaim a national emergency to allow her to contain supposed "internal disturbances." Political instability was undoubtedly plaguing parts of India, especially Gujarat and Bihar, but it seems that Mrs. Gandhi declared the emergency for partisan political purposes, namely to reverse her criminal convictions for electoral fraud and to incarcerate her political opponents. The legality of this emergency proclamation is also open to question. First, the proclamation from 1971 was still legally in effect; second, it appears Mrs. Gandhi did not consult her cabinet, thus the President was not acting on the advice of his Council of Ministers; and third, it is not at all clear that the objective conditions warranted a proclamation of emergency. Mrs. Gandhi deftly preempted all legal challenges shortly after the emergency declaration by having Parliament pass the 38th amendment, which made the actions of the President and Prime Minister in these matters non-justiciable. In sum, this third declaration of emergency was constitutionally dubious. Indeed, it threatened the democratic fabric of India.

The federal principle has much more frequently been violated by Article 356, which empowers the President to dismiss a state government, if, in his judgement, the constitutional machinery in the state has failed. Article 356 reads,

> If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation (a) assume to himself all or any of the functions of the Government of the State...(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament (GOI 1991, p.101).

The Sarkaria Commission has suggested that the constitutional machinery of a state may be thought to have failed when there is a 1) political crisis, 2) internal disturbance, 3) physical breakdown, or
4) non-compliance with constitutional directions of the Union executive (GOI 1988, p.171). In these instances, the Commission states, it would be proper for the President to employ Article 356.

The state Governor is mandated to inform the President when there has been a failure of the constitutional machinery in the state. "In that context," Pylee asserts, the Governor "is the President's advisor on the spot" (Pylee 1965, p.515). The Governor has substantial discretionary power in this matter. The Governor may or may not seek the advice of the Chief Minister. If the Chief Minister informed the Governor that the state was no longer governable and requested the imposition of President's rule, the Governor would certainly be obliged to report that to the President. But the Governor may well advise the President to invoke Article 356 over the objections of the Chief Minister. Indeed, the Governor's flow of political loyalty and constitutional obligation, in these circumstances, is towards the President. The burden of state criticism concerning Article 356 is that governors have recommended the imposition of President's Rule without first exhausting all other constitutional remedies and that they have acted in an overtly partisan matter (GOI 1988, p.119). 22

Article 356 is illustrative of two points. First, it is a clear violation of the federal principle. The political sovereignty of the state is entirely in the hands of the Union executive. Second, it demonstrates Ambedkar's admonition that a constitution is certain to fail if "those who are called to work it happen to be a bad lot" (GOI 1949b, p.975). The frequency of President's Rule has increased with the decline of political leadership. Between 1950 and 1964, the Nehru years, Article 356 was employed 8 times; from 1965 to 1969, it was utilized 9 times; from 1970 to 1974, it was used 19 times; from 1975 to 1979, it was called into effect 21 times; and from 1980 to 1987, it was effected on 18 occasions (GOI 1988, p.165). In 1977, the new Janata government dismissed nine Congress

state governments for the most partisan reasons and, in 1980, Mrs. Gandhi returned the favour and
dismissed those nine Janata governments.

Article 356 is a remnant of colonial rule; it was lifted from Section 93 of the Government of
India Act 1935. It also is an anomaly among federal countries. The Sarkaria Commission report
audaciously likens Article 356 to Article 16 of the Swiss Constitution. The Commission states,

[a]rticle 16 of the Constitution of Switzerland (1874) gives unlimited
powers to the Federal Council to intervene, on its own initiative, in
case of internal disorder where the government of the threatened
Canton is not in a position to summon assistance from the other
Cantonal Governments, or if the disorder endangers the safety of
Switzerland (GOI 1988, p.169; emphasis added).

The Sarkaria Commission wilfully, or ignorantly, misrepresented the nature of the Swiss
constitution. In the event of internal troubles or external dangers, Article 16 of the Swiss
constitution obliges Cantonal governments to "immediately inform the Federal Council in order to
enable it to take appropriate measures within the limits of its competence." If the Cantonal
government is unable to summon assistance, the federal government may intervene on its own
initiative. In the event of a federal intervention, however, "[t]he Confederation shall guarantee the
Cantons their sovereignty within the limits set forth in Article 3." The federal principle is thus
scrupulously observed in Switzerland, even during times of internal disturbances.

The framers of the Indian constitution were no doubt right to be concerned about internal
disturbances and the possible breakdown of a state political system. India was and continues to be
a poor, developing country; independence was achieved only with enormous political upheaval;
political crises were consequently inevitable. The remedy to such problems, however, was
developed without regard to the federal principle. Union assistance to a state is acceptable, if
requested from the state government. This does not constitute a violation of the federal principle.
The federal government of Canada intervened in the Québec FLQ crisis, for example, only after assistance was requested by the government of Québec.

Article 356 is a poorly constructed and crude mechanism designed to ensure Union supremacy in the Indian federation. The Sarkaria Commission on Centre-State relations was tepid in its criticism of this provision. On one hand, the Commission urged that "Article 356 should be used very sparingly, in extreme cases, as a measure of last resort, when all available alternatives fail to prevent or rectify a breakdown of constitutional machinery in the State" (GOI 1988, p.179). On the other hand, it argued, "[w]e are firmly of the view that Article 356 should remain as [the] ultimate Constitutional weapon" to ensure the unity and integrity of the country (GOI 1988, p.177). State governments have objected strenuously to the use of Article 356 in the last two decades. While the central government has resorted to Article 356 less frequently in the last few years, it remains the most serious violation of the federal principle in the Indian constitution.

Constitutional Development in India

Constitutional development in India, like other federations, has proceeded along a number of planes: 1) judicial interpretation; 2) constitutional amendment, and 3) ad hoc precedents. Judicial interpretation has had few consequences for federalism in India and, while the constitution has been amended frequently, amendments have not fundamentally altered the federal framework in the country. Ad hoc developments, however, have been of considerable importance, most notably the linguistic reorganization of India's states. The federal principle does not speak to linguistic

23 The Commission elaborated, "there are real dangers that regionalism, linguistic chauvinism, communalism, casteism, etc. may foul the atmosphere to a point where secessionist thoughts start pervading the body politic. It is, therefore, necessary to preserve the overriding powers of the Union to enable it to deal with such situations and ensure that the government in the State[s] is carried on in accordance with the provisions of the Constitution" (GOI 1988, p.177).
reorganization, but the formation of linguistic states strengthened the integrity of the states and consequently created nationalist demands for autonomy or (partial) sovereignty.

**Judicial Interpretation**

The Supreme Court of India, sitting at the apex of an integrated federal-state judicial system, is truly supreme. The Supreme Court is the final arbiter of the Constitution, the laws of the Union, state, and local governments, and it settles disputes between the Union and the states and between the states. In short, "[t]he law declared by the Supreme Court is binding on every Court in India" (Pylee 1965, p.468). While the Supreme Court has decided a number of fundamental rights cases, there have been few division of power cases (Pylee 1965, p.12-13). The constitution is so detailed on matters of jurisdictional allocation, coupled with explicit Union supremacy in the division of powers, that little dispute has risen in this regard. As such, "the number of cases in this field has been small and comparatively insignificant in contrast to any other federal system" (Pylee 1965, p.500).

**Constitutional Amendment**

The constitution contains three amendment mechanisms. First, where an article of the constitution includes the proviso, "until Parliament otherwise provides," amendment may occur by a simple majority vote in Parliament. Second, most amendments can be enacted by a special majority of two-thirds of parliament. Third, where an amendment will affect the federal structure of the constitution, the approval of half the state legislatures is required, in addition to the two-thirds
majority vote in parliament.\textsuperscript{24}

The Constitution has been frequently amended. From 1950 through to 1987, there were 56 amendments, affecting almost 300 articles and schedules. A further 11 amendments were added before the end of 1990. The balance between rigidity and flexibility is the key to a well-constructed constitutional amending formula. The obvious malleability of the Indian constitution makes it impossible to accept the conclusion of the Sarkaria Commission that the amending process was designed with "sedulous care" by the founding fathers (GOI 1988, p.87).

Despite the numerous amendments to the constitution, the federal principle, such as it is in the Indian constitution, has remained relatively unaffected. The 56 amendments to the constitution up to 1987 may be classified according to the following loose typology: 1) state reorganization (17 amendments); 2) scheduled castes and tribes (4 amendments); 3) division of powers (3 amendments);\textsuperscript{25} 4) fundamental rights (10 amendments); 5) parliament (6 amendments); 6) administrative reforms (3 amendments); 7) court reform (4 amendments); 8) schedule 9 (5 amendments); 9) other (4 amendments).\textsuperscript{26} The division of powers was also affected by the Seventh

\textsuperscript{24} Article 368 (2) stipulates that state approval must be obtained for amendments to the following sections of the constitution: election of the president (Articles 54, 55); power of the union executive (Article 73); power of the state executive (Article 162); the High Courts (Article 241); the governor (chapter 4 of part 5); the state courts (chapter 5 of part 6); legislative relations (chapter 1 of part 11); the division of powers (seventh schedule); the representation of states in Parliament; changes to the amending formula (Article 368).

\textsuperscript{25} Over the years, three items were added to the Union List, and one was removed, while four items were subtracted from the State List, and five heads were added to the Concurrent List. In total, the number of powers for the central government have increased from 97 to 99; state powers have decreased from 66 to 62; and the number of concurrent powers has increased from 47 to 52.

\textsuperscript{26} The typology must necessarily be loose because often many articles are affected by a single amendment; one must then assign the amendment to the most appropriate category. State reorganizations (amendments 5, 7, 9, 10, 12, 13, 14, 18, 22, 27, 32, 36, 37, 49, 53, 55, 56); reservations (amendments 8, 23, 45, 51); division of powers (amendments 3, 6, 46); fundamental rights (amendments 1, 16, 17, 25, 38, 39, 42, 43, 44, 48); parliament (amendments 2, 11, 31, 33, 35, 52); administrative (amendments 28, 41, 50); courts (amendments 15, 19, 20, 54); schedule nine (4, 29, 34, 40, 47); other (21, 24, 26, 30). This typology has been developed from information provided by the Sarkaria Commission (GOI 1988, p.93-6; Annexure II.3).
Amendment, the States Reorganization Act, and the draconian omnibus Forty-Second Amendment initiated by Mrs. Gandhi after the Proclamation of Emergency in June 1975.27 In sum, the quasi-federal provisions of the constitution were certainly not redressed by these amendments. In fact, these provisions were strengthened. Power has thus continued to aggregate at the centre, often in violation of the federal principle.

Linguistic States

While the integration of the princely states reduced political diversity in India, there was a simultaneous federalization of the country. In many parts of India, there were movements, stemming directly from India's character as a federal society, for the creation of linguistic states (Roy 1962). The Congress Party had supported the notion of linguistic states, at least indirectly, since the turn of the century, and in 1920 the party formally adopted the principle as policy (GOI 1955, p.12). Moreover, in 1921 the Congress reorganized its entire organization to correspond to the linguistic demographics of the country, regardless of the British administrative structure. In essence, the Congress became a federal organization based on linguistic units. Over the next twenty-five years the party reaffirmed its commitment to linguistic states. In 1928 the (Motilal) Nehru Committee supported the principle; in 1938 the Congress Working Committee reiterated that the party was still committed to linguistic states; and the party supported linguistic states in its election manifesto of 1946 (GOI 1955, p.14).

27 "There was talk of a new constitution, but this was shelved in 1976 in favour of the Forty-Second Amendment. The most sweeping of the constitutional changes brought during the emergency, it affected 59 clauses of the constitution and was designed to further diminish the power of the courts and to secure parliamentary -- that is, the Prime Minister's -- supremacy. Among its most controversial provisions, the Supreme Court was denied the power of judicial review over amendments affecting the basic structure of the constitution" (Hardgrave and Kochanek 1986, p.216). While the Forty-Second Amendment strained the democratic principles, the worst features of this constitutional change were reversed by the Forty-Fourth Amendment initiated by the Janata Government after Mrs. Gandhi lost the post-emergency election in 1977.
Immediately after independence, however, the Congress Party, highly sensitive to balkanization after the experience of partition, attempted to avoid, or at least postpone, the creation of linguistic states. The Drafting Committee of the Constituent Assembly appointed a Linguistic Provinces Commission, also known as the Dar Commission. In its report of December 1948, it advised against a linguistic reorganization of states. In the same month, the Congress Party appointed its own Linguistic Provinces Committee, chaired by Jawaharlal Nehru and Vallabhbhai Patel, and in April 1949 they too opposed the creation of linguistic states. In the estimation of the JVP committee, the old Congress policy for linguistic states was made without due regard to "the practical application of the principle" (quoted in GOI 1955, p.16). At this time, the Committee concluded, "primary consideration must be the security, unity and economic prosperity of India and every separatist and disruptive tendency should be rigorously discouraged" (quoted in GOI 1955, p.16). The Committee did concede, however, that in the future "the principle might be applied only to well-defined areas about which there was mutual agreement" (quoted in GOI 1955, p.16).

In 1953, after considerable linguistic conflict in Andhra Pradesh, the government established the States Reorganization Commission (SRC). In 1956 the SRC issued its report and it provided only tepid support for linguistic reorganization. The Commission noted that "[a] federal union, such as ours, presupposes that the units are something more than mere creatures of administrative convenience. The constituent states in a federal republic must each possess a minimum degree of homogeneity to ensure the emotional response which is necessary for the working of democratic

28 The Committee also included Pattabhi Sitaramayya, and it was known by the initials of each member's first name, hence the JVP Committee.

29 A serious agitation erupted in 1952 for the creation of a Telegu-speaking state of Andhra Pradesh. The central government resisted the demand but, after a prominent Telegu leader died in a political fast, the centre reneged and created the new state of Andhra in 1953. In 1956, the Telegu-speaking districts of Hyderabad were added to Andhra to create the contemporary state of Andhra Pradesh (Reddy 1976).
institutions" (GOI 1955, p.35). State identity, the Commission suggested, could be attained with linguistic reorganization. It warned, however, that linguistic states might "blur, if not to obliterate, the feeling of national unity, by the emphasis it places on local culture, language, and history" (GOI 1955, p.39). The states, it noted, were not sovereign and thus had no claim to "territorial inviolability" (GOI 1955, p.74). "The first essential objective of any scheme of reorganisation," the Commission opined, "must be the unity and security of India" (GOI 1955, p.30).30

In the end, the Commission suggested it would be proper "to recognize linguistic homogeneity as an important factor conducive to administrative convenience and efficiency but not to consider it as an exclusive and binding principle, over-riding all other considerations" (GOI 1955, p.46). The Commission suggested, further, that states reorganization should be determined case by case by consideration of "the totality of circumstances." In short, the Commission avoided a definitive position and returned the problem to the government for a political solution. Although the States Reorganization Act was passed by Parliament in 1956, the centre was usually reluctant to undertake reorganization. Although Andhra Pradesh was formed in 1953, the government did not agree to partition Bombay into Maharashtra and Gujarat until 1960 and Punjab was not reorganized for another six years, and only then after considerable grassroots agitation.

The federal principle does not speak directly to the question of linguistic states. The formation of linguistic states, however, enhanced the sociological integrity of the states. Language groups are the constituent units of Indian society.31 Caste groupings, for example, extend only so

30 The Commission argued, "[t]he only rational approach to the problem, in our opinion, will be that the Indian Union should have primary constituent units having equal status and a uniform relationship with the Centre, except where, for any strategic, security or other compelling reasons, it is not practicable to integrate any small area with the territories of a full-fledged unit" (GOI 1955, p.67; emphasis added).

31 Religion, geography, and a shared political history may be the constitutive elements of an all-India civisme.
far as linguistic borders before giving way to different caste arrangements. After reorganization, a number of states assumed distinct national identities, which reinforced the federal imperative. As such, pressure mounted to recognize the essential sovereignty of the states. When the central government refused to recognize the sovereignty of the states, the stage was set for political conflict. After the formation of linguistic states, India possessed the political structure of a multinational federal character but only a quasi-federal constitution. This was an untenable political situation.

**Quasi-Federalism in India**

In sum, the Indian constitution is federal in form, but it is not wholly federal in substance. In the matters of state formation (Articles 2 and 3), legislative relations between centre and states (Articles 249-256), the state governor's power to reserve legislation for presidential assent (Articles 200 and 201), and the considerable emergency powers available to the Union government (Articles 352-360), the constitution violates the federal principle. As such, wrote Wheare, "it can only be concluded that the Constitution is quasi-federal" (Wheare 1963, p.27). He argued, moreover, that "in practice the government, like the Constitution of India, is [also] quasi-federal, not strictly federal" (Wheare 1963, p.28). He hastened to add that this should not be interpreted as a criticism, for "[a] quasi-federal system may well be most appropriate for India" (Wheare 1963, p.28).

The description of India as quasi-federal elicited an emotional response in some quarters. S. P. Aiyer has written,

"Professor Wheare in his study of *Federal Government* found the Indian system a hard case, difficult to classify in the traditional schemata of governments. In his anxiety to impose some order on a bewildering range of facts he took easy resort to the expression "Quasi-federal." In doing this he paved the way for misunderstanding which has persisted in recent writings on Indian federalism. The use of this phrase by Wheare was just escapism. As a concept in
constitutional law it has no value whatsoever. Nor is it a convenient tool for analysis. The term is vague and does not indicate the degree of departure from what one might consider to be pure federalism (Aiyer 1965, p.114-5).

Alexandrowicz, who provided the inspiration for Aiyer's derisive treatment of Wheare, argued that "in the expression 'quasi-federal' the word 'quasi' hints at a deviation from the federal principle without indicating what kind of special position a particular quasi-federation occupies between a unitary State and a federation proper" (Alexandrowicz 1957, p.159).

The meaning of the word "quasi," however, is perfectly clear; it is the Latin expression for "as if" or "almost." Alexandrowicz, in fact, acknowledges that the word "quasi" is clear and meaningful when applied to such notions as "quasi-judicial" or "quasi-legislative" (Alexandrowicz 1957, p.158). The constitution of India is described as quasi-federal to indicate that the states do not fully possess sovereignty in their spheres of jurisdiction and that this constitutes a violation of the federal principle. It is incumbent upon the commentator to describe the extent of this violation, as was done above.

Wheare's description of the Indian constitution as quasi-federal was not inappropriate.33

32 Alexandrowicz is highly inconsistent in his description of India's federal system. He argues, "[i]t may be suggested that federations established from above for administrative convenience only be termed 'administrative federations.' They are in fact federations with practically undivided sovereignty..." (1957, p.159). He continues, "India is a case sui generis. Though the federation was created from above, the local states enjoyed the right of real parliamentary government whatever the distribution of powers between them and the centre" (1957, p.159). Ten pages later, however, he asserts, "[i]nstead of defining [India] by the vague term of quasi-federal, it seems more accurate to exclude [India] from the category of administrative federations and to consider her a federation with vertically divided sovereignty" (1957, p.169). In a single chapter, he thus describes India as an administrative federation, a sui generis case and a classical federation. His final conclusion cannot be empirically substantiated.

33 It should be noted that the official reviews of centre-state relations in India have reached the same conclusion as Wheare. The Administrative Reforms Commission conceded, "[t]he Indian polity is federal in form but lacks much of the substance of a classical federation" (GOI 1968, p.3). Twenty-years later, the Commission on Centre-State Relations, chaired by Justice Sarkaria, concluded "the constitution, as it emerged from the Constituent Assembly in 1949, has important federal features but it cannot be called federal in the classical sense" (GOI 1988, p.8). Some Indian academics have also made similar arguments. Krishna Murkerji, for example, argued that India is "definitely unfederal" (Murkerji 1954, p.117).
Indeed, the constitution of India never once employs the term "federal." Instead, the country is referred to as a Union. Thus, it is not a federal constitution in law, despite the federal form of the political structure. The point of the analysis is not to demonstrate that the Indian constitution violates a textbook definition of federalism. It is here contended that the lack of attention to the federal principle has generated political conflict in India. Federalism may be a useful instrumentality to reconcile competing nationalisms and to ameliorate separatist tendencies but, with insufficient sovereignty accorded to the states, India has been unable to contain the various nationalist pressures that have emerged around the country.

**Explaning Quasi-Federalism in India**

Before continuing, it is important to examine why India adopted a quasi-federal system. A number of interrelated variables can explain this outcome. First, the Constituent Assembly relied heavily on the 1935 Government Act, which had been written by the British in such a manner as to maintain firm central control. The rapid transition to independence left the Indian leadership little alternative but to rely on a ready-made constitution. The presence of an extremely strong nationalist movement, the Congress Party, which faced little opposition after independence, also contributed to the construction of a quasi-federal constitution.

India's leaders, moreover, were not predisposed towards federalism. Nehru was ideologically committed to central economic planning, which tends not to be compatible with the federal principle. Ambedkar was similarly predisposed against federalism. He first expressed his ambivalence towards federalism at the First Round Table Conference in 1931 and a few years later, he stated, "I am not
opposed to a Federal form of government. I confess I have a partiality for a Unitary form of government. I think India needs it. But I also realize that a Federal form of government is inevitable if there is to be Provincial Autonomy" (Ambedkar 1939, p.155). Ambedkar later told the Constituent Assembly, "[h]owever much you may deny powers to the Centre, it is difficult to prevent the Centre from becoming strong. Conditions in the modern world are such that centralization of powers is inevitable" (GOI 1948/9, p.42).

Indian federalism, furthermore, was not a bargain between sovereign or even semi-sovereign states, as in other federations. Prior to independence, the states were administrative units of the British Raj, with little national integrity. There was consequently little demand for state rights. Ambedkar told the Constituent Assembly,

> I do not know why the word union was used in the Canadian constitution. But I can tell you why the Drafting Committee has used it. The Drafting Committee wanted to make clear that though India was to be a federation, the federation was *not the result of an agreement by the states to join a federation*, and that the federation not being the result of an agreement, no state has the right to secede from it. The Federation is a Union because it is indestructible (GOI 1948/9, p.43; emphasis added).

Austin eloquently described the Constituent Assembly as "members of a family, who for the first time in possession of their own house, [had to] find a way to live together in it" (Austin 1966, p.192).

India's leaders were also very concerned about the immediate threats to the Indian state -- millions of refugees as a result of partition, a war with Pakistan over Kashmir, troubles in the former princely states of Hyderabad and Junagadh, a communist insurgency in Telengana, and widespread famine. In short, in order to maintain, or perhaps more accurately create, unity, stability, security and prosperity, the Constituent Assembly was determined to adopt a form of federalism that essentially denied the states any sovereignty. With the legacy of partition marked indelibly on the
soul of the nation, India's leaders were unwilling to divide and share sovereignty with the states. Thus, contrary to Riker's theory, internal and external threats did not lead to the creation of federalism in India. In fact, these threats pushed India away from federalism towards a unitary system of government. Indeed, Sir Ivor Jennings remarked, "it is somewhat remarkable that the Constituent Assembly maintained the strictly federal principle at all...having gone so far in the direction of a unitary constitution, it is surprising that it did not go further" (Jennings 1953, p.63).

Conclusion

India is a country characterized by a plethora of distinct cultural communities, many of which are territorially situated. As such, India may be considered a federal society. Although India's leaders were inclined towards a unitary form of government, the sheer diversity of India made federalism imperative. Federalism was the only instrumentality that could unite the various communities in the country. The multinational character of India has been strengthened since independence, especially by the creation of linguistic states. Federalism, however, can only reconcile contending nationalisms and prevent separatism if sovereignty is shared between the central government and the constituent states. The Indian states, contrary to the federal principle, have never been accorded sovereignty in their spheres of jurisdiction.

The Indian constitution contains distinct deviations from the federal principle. The territorial integrity of the states is not even guaranteed. Although the constitution details a division of powers, it is constructed so as to ensure Union supremacy. Union laws prevail over state laws and the states are constitutionally obliged to follow Union directives; if they do not, the Union has an impressive array of sanctions that can be applied to the states, including the dismissal of duly elected state governments. The states, as we shall see in a later chapter, do not have independent or sufficient
sources of revenue. For these reasons, the Indian constitution may be described as quasi-federal; the Indian political system is federal in form but, as the states do not possess sovereignty in their spheres of jurisdiction, the constitution is not federal in substance.

Although Nehru was not particularly disposed towards federalism, the quasi-federal constitution worked reasonably well when the Congress Party was dominant in the Union and state governments. The constitution, however, has proven less effective, perhaps even inadequate, subsequent to the profound social and political changes experienced by India in the past thirty years. The formation of linguistic states, in particular, emphasized the multinational character of the Indian federation. It could have been anticipated that when these dormant nationalities awoke, especially in the non-Hindi periphery, they would begin to demand autonomy or the partial sovereignty that could be expected from federalism. When the Congress party system began to fragment after 1967 and regional parties assumed power in some states, demands for autonomy were indeed raised. The Union government, however, tended to react to such demands with hostility and inflexibility, no one more so than Indira Gandhi, as we shall see in a later chapter. In short, the Union government employed the quasi-federal provisions of the constitution to maintain the supremacy of the central government. Political practice has thus mirrored the quasi-federal constitution. This may explain why India has endured more serious and violent secessionist conflicts than Switzerland and Canada.
Part IV

Fiscal Systems in Multinational Federations
If the federal principle guaranteeing sovereignty to each order of government is to be meaningful in practice, each order of government must have an independent source of revenue sufficient to meet its constitutional obligations. A federal system will likely be more stable if each order of government taps separate tax sources, instead of competing for the same resources. If the units are dependent on the federal government for revenue or if the federal government is spending money in areas of state jurisdiction, the fiscal system may be described as quasi-federal. In multinational federations, the erosion of state fiscal autonomy has the potential to provoke nationalist resentment and consequently destabilize the country.

Fiscal relations in Switzerland follow from the general proposition of Article 3 of the constitution. There is an almost total separation of revenue sources between the federal and cantonal governments. The federal government, as with its jurisdictional powers, is entitled only to revenue sources expressly delegated to it. Article 3, coupled with the constitutional amendment process, has prevented the federal government from invading cantonal areas of taxation. In short, the cantons have maintained their fiscal sovereignty and, where the federal principle has been violated, the people have given their consent. All changes therefore have a high degree of legitimacy.

The three pillars of Canadian fiscal federalism -- tax rental agreements, conditional grants, and the federal spending power -- are all violations of the federal principle. The province of Québec objected to the development of these pillars and it has attempted to extricate itself from these arrangements at almost every turn. Unlike Switzerland, moreover, the federal government and the provinces compete for the same revenue sources -- income, corporate, and sales taxes. There has thus been considerable conflict over the allocation of these sources.

The structure of centre-state fiscal relations in India is such that the states have insufficient
resources to meet their constitutional obligations. Successive Finance Commissions have devolved more and more taxes to the states but the states continue to have insufficient revenue to meet their expenditures. Indeed, as the states have been forced to borrow from the central government to meet their revenue-expenditure gap, they have become considerably indebted to the centre. In short, fiscal dependence on the centre has worsened over the past fifty years. Much of this can be attributed to the processes of economic planning, especially the extra-constitutional and extra-parliamentary role played by the Planning Commission. In sum, India's fiscal relations, as with its legislative relations, violate the federal principle, much to the displeasure of almost all the states.
Chapter 6

Fiscal Federalism in Switzerland:

Tax Diversity in Action
Fiscal relations in Switzerland follow from the premise that the cantons are sovereign in all matters that have not been ceded to the federal government (Article 3 of the constitution). The fiscal powers of the federal government are expressly delegated by the constitution. As with jurisdictional powers, the federal government is obliged to procure a constitutional amendment to acquire new fiscal powers or even to alter the rates of the most important taxes. The Swiss people have been very hesitant to approve new federal taxes, although they have allowed the federal government to impose "temporary" tax measures. In fact, since the Second World War a substantial portion of the federal government's revenue has been obtained from these "temporary" sources. The constitution and the people have thus limited the size of the federal government. The federal government consequently has not possessed markedly superior fiscal resources in relation to the cantons, contrary to the situations that have pertained in Canada and India. The federal government in Switzerland has thus not been in a position to violate unilaterally the federal principle.

The Swiss constitution was designed initially to provide each order of government separate revenue sources, in accordance with the federal principle. This design served Switzerland well until World War I, when the revenue of the federal government fell precipitously just as defense costs soared. The Depression and the Second World War similarly placed the federal government in a financial predicament. In an effort to meet its financial requirements in the 1930s and 1940s, the central government seriously infringed upon cantonal fiscal sovereignty. A new respect for the constitution after the war, however, served to restore the sovereignty of the cantons in good measure.

The federal principle suggests that there ought to be a strict separation of revenue sources for each order of government. Most federal countries have not been able to maintain the separate resources, if they ever did. Fiscal relations in Switzerland have been described as a "tax jungle"
(Bird 1986, p.45), but the federal government and the cantons have, in fact, maintained a significant degree of revenue separation. Switzerland illustrates that, with respect for the federal principle and a concerted political effort, separate revenue pools can be maintained. Switzerland demonstrates, furthermore, that the creation of the welfare state need not make the federal principle obsolete.

The federal principle in Switzerland, however, is today not followed exactly, contrary to expectations. There is now a surprising degree of intergovernmental integration in Switzerland. It is sometimes difficult to determine if the federal principle is always in effect. The *substance* of Swiss federalism now, however, is less important than the *processes* by which these arrangements were achieved. Swiss fiscal relations and social policy were reached after considerable intergovernmental negotiation, followed by constitutional amendments approved by the people. The process of Swiss federalism, which requires a high degree of social support and cross cultural consensus, has ensured that occasional violations of the federal principle have a high degree of legitimacy.

**The Constitution and the Division of Fiscal Resources**

The Swiss constitution delegates the federal government's fiscal resources, and reserves all remaining sources to the cantons. The Swiss constitution (Article 41 *ter*) also stipulates the level of the most important federal taxes (the direct tax and the sales tax). The federal government therefore cannot acquire new fiscal resources or increase its taxation rates without first procuring a constitutional amendment, which requires public ratification with the concomitant double majority (see Chapter 3). Furthermore, any amendment to an ordinary law is subject to an optional referendum, requiring only a simple majority. "In practice, this means that any change in tax schedules and rates must be approved, tacitly at least, by taxpayers" (OECD 1987/8, p.66). These
unique constitutional and legislative arrangements mean that "Switzerland is probably the only country in the world where the nation itself decides how much tax it is prepared to pay....and the manner in which the various taxes are to be imposed and the revenue spent" (Dafflon 1977, p.72).

As a general rule, the federal government is assigned specific indirect taxes, while the cantons rely primarily on direct taxes. In the constitution of 1848, the cantons agreed to create a free trade area, while the total revision of 1874 completed the development of a single economic unit. With confederation, the cantons ceded the power to impose customs duties to the federal government, as well as postage revenue. From 1848 to 1874, the confederation was required "to compensate the cantons fully for the revenue losses which they incurred through the elimination of internal customs duties and the reassignment of postal revenues. The federal government was left with scarcely 20% of the revenues allocated to it" (Bieri 1979, p.21-1). While the revision of 1874 liberated the federal government from paying compensation to the cantons, the cantons retained their fiscal supremacy. After 1874, "[a]bout three-quarters of the Federal income was derived from customs duties, and around half the expenditure was on the Federal Army" (Hughes 1954, p.49). Other federal revenue sources are summarized in Article 42 of the constitution (see, Appendix 2).

In the constitutions of 1848 and 1874, Article 42 (f) provided that contributions from the cantons could be a source of federal revenue. Hughes has argued that this provision reinforced the fiscal sovereignty of the cantons guaranteed in Article 3 and indicated beyond a shadow of a doubt that the cantons were to possess steuerhoheit, "fiscal supremacy." Hughes argues, furthermore, that maintenance of the steuerhoheit was the quid pro quo for the termination of federal compensation to the cantons in lieu of customs duties (Hughes 1954, p.48). Cantonal contributions to the federal government were only made once, in 1849, just one year after confederation. This provision was a
holdover from Switzerland's *confederal* history and it is unique among contemporary federations.

Article 3 of the Swiss constitution guarantees the sovereignty of the cantons in jurisdictional and fiscal matters. The cantons thus have the right to tax all sources not expressly reserved for the federal government or otherwise limited by the constitution.\(^1\) The Swiss constitution thus stands in marked contrast to the British North America Act in Canada, where the provinces are allocated specified taxes and the federal government may raise revenue by "any mode or system of taxation." The structure of the Canadian constitution granted the federal government access to direct taxation, the largest potential source of revenue for the provinces. In Switzerland, the cantons turned to direct taxation after the constitutional revision of 1874, when federal compensation for the appropriation of customs duties was terminated, and they have permitted only "temporary" federal encroachment upon this revenue pool (see below). Cantonal fiscal sovereignty, coupled with cantonal responsibility for local government, has led to a wide variety of taxes in Switzerland. This may not have led to the most *economically* rational system of taxation, but it has almost certainly provided Switzerland a high degree of *political* stability. Any losses of economic efficiency have almost certainly been offset by the attendant political stability.

**The Evolution of Swiss Fiscal Federalism: Controlling the Leviathan**

The initial division of fiscal resources in the constitution served Switzerland well until the start of World War I. When open hostilities ensued between the great powers, the federal

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\(^1\) Bird notes the salient exceptions to cantonal taxing power. Individuals cannot be taxed by two cantons (Article 46.2); the cantons cannot provide tax shelters for citizens from other cantons (Article 42 *quater*); Article 31 prevents tax on inter-cantonal trade; the Confederation has an almost exclusive power to conclude international treaties, which may affect cantonal taxing (Article 8); and the Swiss National Bank and other federal institutions and property are exempt from cantonal taxation while, conversely, cantonal property is exempt from federal tax (Article 39.5). See, Bird (1986, p.27).
government suffered at once an acute drop in customs revenue from declining continental trade and a significant increase in defense spending. The Great Depression and the Second World War similarly strained the financial capacity of the Swiss government. The development of social welfare in the post war era has also been expensive. Federal government spending has soared by leaps and bounds over the course of the century (see Table 6.1). The federal government has thus constantly struggled to raise sufficient revenue to meet its rising obligations. All the while, it has been constrained by the constitution and the people.

Table 6.1: Growth of Federal Expenditure (Swiss Francs)

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910</td>
<td>100 million</td>
</tr>
<tr>
<td>1913</td>
<td>200 million</td>
</tr>
<tr>
<td>1914</td>
<td>300 million</td>
</tr>
<tr>
<td>1918</td>
<td>500 million</td>
</tr>
<tr>
<td>1940</td>
<td>1 billion</td>
</tr>
<tr>
<td>1942</td>
<td>2 billion</td>
</tr>
<tr>
<td>1961</td>
<td>3 billion</td>
</tr>
<tr>
<td>1963</td>
<td>4 billion</td>
</tr>
<tr>
<td>1966</td>
<td>6 billion</td>
</tr>
<tr>
<td>1997</td>
<td>44 billion</td>
</tr>
</tbody>
</table>


The government of Switzerland increased most of its taxes when World War I began but these were insufficient to offset the drop in customs duties and to meet the new defense expenditures. Structural reform was required to meet the immediate exigencies of the war. In June 1915, the people approved a constitutional amendment granting the federal government a "temporary war tax"

² The figures supplied by Coddington appear to be unadjusted for inflation and economic growth. He was simply trying to demonstrate the staggering growth of expenditure in actual terms, and the alarm it generated amongst the Swiss people. Bieri similarly report that between 1960 and 1974 that total government expenditure (federal, cantons, and municipal) increased a massive 454% in actual prices (1979, p.29-30). The growth of federal expenditure appears more incremental when measured against GNP. Dafflon indicates that between 1954 and 1970, federal expenditure increased from 6.7% of GNP to 7.5%.
on wealth and business income. This one-time measure was the first direct tax levied by the federal government (Hughes 1954, p.49). The following year the Federal Council made use of the "full powers" acquired from Parliament at the outset of the war (see Chapter 3) and "imposed a special tax on war profits for the years 1915 to 1920, ten per cent to be returned to the cantons" (Codding 1979, p.68). In 1917, the constitution was amended again to provide the federal government permanent recourse to stamp duties, which "were levied on the issue and turnover of securities, bills of exchange, insurance premium receipts and, from 1921 onwards, freight documents and interest coupons" (Bieri 1979, p.22). These changes modestly improved the financial position of the federal government but they were not sufficient to ensure its long term financial viability.

After World War I, an effort was made to improve the financial capability of the federal government. In 1919, "a constitutional initiative was offered which would have given the Confederation a permanent income tax and a property tax. These taxes were decisively defeated when presented to the people" (Codding 1979, p.69). In view of the federal government's precarious financial position, however, the people agreed to renew the early "temporary war tax" to amortize the costs incurred during the war. This tax was collected between 1921 and 1932, with 20% returned to the cantons. In 1925, the constitution was amended to provide the federal government revenue from the manufacture and sale of tobacco and brandy. These changes improved the finances of the federal government and by 1928 it "was even showing a surplus on the annual balance of accounts" (Hughes 1954, p.49).

Just when the federal government obtained its financial equilibrium, the world was beset by the worst economic crisis in history. The Depression hit Switzerland "as the temporary war tax came to its end. Further, revenue from customs, the stamp tax, and the military exemption tax began to
fall at the moment the Confederation was faced with additional expenditures to fight the crisis" (Codding 1979, p.69). In response to its deteriorating financial position in 1933, the federal government announced a new fiscal program and implemented a crisis levy. Bieri explains,

*[i]n contrast to the earlier direct war taxes, the crisis levy was designed as a general income tax and a supplementary wealth tax. In order to weaken opposition from the Canton representatives in parliament against this new direct federal tax, the Cantons were allocated 40% of the yield (Bieri 1979, p.24).

At the same time, stamp duties and the alcohol tax were raised and a beer tax was introduced in 1935 (Codding 1979, p.69). Customs duties were increased in the second fiscal program in 1936 (Bieri 1979, p.24). In 1938, the people agreed to extend the crisis contribution tax until 1941 and, in 1939, they gave the federal government permission to create a sales tax (Codding 1979, p.70).

The fiscal measures adopted to combat the ravages of the Depression were enacted with urgent arrêtés. There is little distinction between laws and arrêtés. While laws possess "a greater dignity" than arrêtés, the main differences between the two are procedural (Hughes 1954, p.100). Arrêtés are easier to enact and those declared to be "urgent" were not subject, prior to 1949, to the optional legislative referendum (Article 89 of the Swiss constitution). The federal government thus came to favour arrêtés for its emergency fiscal legislation. The exploitation of this procedure effectively sheltered federal legislation from popular or cantonal challenge. The federal government was thus free to enact what would otherwise be considered unconstitutional legislation. (The Federal Tribunal, recall, is not competent to review the constitutionality of federal legislation). In the fiscal program, parliament appropriated a cantonal tax and granted the Federal Council certain other taxing powers. While this arrêté was completely legal, "[t]he double breach of the Constitution in peacetime -- amendment of a basic constitutional rule by the [Federal] Assembly alone, and the declaration
of 'urgency' -- was unprecedented" (Hughes 1954, p.49-50). The fiscal crisis of the Depression, and thereafter the Second World War, seriously threatened to undermine cantonal sovereignty.

On the eve of World War II, parliament, as it did in World War I, granted the Federal Council "full powers" to defend Switzerland's borders and neutrality. The Federal Council was thus empowered to employ almost any means to obtain funds necessary for the defense of the country (Codding 1979, p.70). The "full powers" decree, coupled with the dubious use of urgent arrêtés, effectively suspended the constitution for the duration of the war. The external threats facing Switzerland were real and serious, but the means sought to defend the country risked permanently destroying the federal principle and the Swiss way of life.

In the course of the war, a series of new taxes were imposed by the federal government, while others were increased. The military exemption tax, for example, was doubled. New taxes included a war profits tax, a luxury tax, and a tax on interest and dividends (Codding 1979, p.70). The two most important new taxes were the temporary "national defense tax" and a business turnover tax, or wholesale sales tax. After the war, these "temporary" war taxes became integral sources of revenue for the federal government. For a time, it seemed that the federal government might dominate the confederation, at the expense of cantonal sovereignty. Bieri has noted that "in 1948 the federal government received roughly 60 per cent of its revenue from sources to which it was not entitled under the Constitution" (Bieri 1979, p.26). After the war, however, the constitution was restored, and it has effectively constrained the expansion, and potential domination, of the federal government.3

3 Bird notes that although the federal government in Switzerland has been able to maintain its "temporary" taxes, the "ability of the people and the cantons, to restrict the taxing power of the Confederation, however, has prevented the federal government from reaping the sort of revenue bonanza the income tax provided for the federal government in post-war Canada" (1986, p.41).
The first order of business was to prevent the exploitation of arrêtés. As early as 1939, a constitutional amendment restricted the meaning of "urgency" and an amendment in 1949 imposed time limits upon urgent arrêtés. Under Article 89 bis, adopted by constitutional amendment in 1949, normal arrêtés are subject to the optional legislative referendum, while emergency arrêtés are limited to only one year, at which time they are subject to an optional referendum. An urgent decree rejected by the people cannot be reenacted, but they can be extended beyond one year, if the people approve. In sum, "[s]ince 1949, therefore, direct democracy is no longer bypassed by the urgency clause, merely suspended for one year" (Linder 1994, p.121).

While defense spending decreased after 1945, total federal expenditure continued to increase at almost astronomical rates (see Table 6.1 above). The federal government was desperate to expand its sources of revenue and stabilize its finances but the Swiss people have steadfastly refused to alter the basic structure of Swiss federalism and permanently grant the federal government the taxes it accumulated during the war. The Swiss have settled on what Cooding (1979) has termed the "temporary solution." The OECD estimated in 1970 that the federal government obtained about 40 per cent of its revenue from "temporary" sources (OECD 1970, p.41), mostly the national defense tax and the wholesale sales tax (see below). While the federal government has succeeded in meeting increased post-war expenditures, it has had to endure the ignominy of "living from hand to mouth in the matter of federal finances" (Hughes 1954, p.50). The "institutionalization" of "temporary" taxes has prevented the federal government from assuming a position of dominance in the

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4 The wording of Article 89 bis is peculiar. According the translation made by Hughes, it reads in part, "Federal arrêtés enacted under the urgency procedure which infringe the Constitution must be sanctioned by the people and the Cantons during the year following their adoption by the Federal Assembly. If they are not so sanctioned then they go out of force at the end of this period, and cannot be re-enacted" (1954, p.103). It would seem that this clause empowers the Federal government to enact unconstitutional legislation, albeit only for a period of one year.
confederation.

Since the end of World War II, the federal government has struggled to secure its finances. Four broad trends may be delineated (see Table 6.2). First, the federal government's efforts to amend the constitution and secure a permanent federal direct (income) tax ended in failure. The federal government thus had to rely on the roll-over of the "temporary" direct tax and wholesale tax. In the 1970s, the federal government sought to increase its most salient taxes, with some success, but always coupled with stringent spending controls. In the late 1970s, the federal government moved to replace the wholesale tax with a value added tax but this was defeated by the people on three occasions before it was finally accepted in 1994.

Table 6.2: Referendums on Federal Taxes

1. Failed Constitutional Amendments for the Federal Direct Tax

June 4, 1950
December 6, 1953
November 15, 1970

2. Roll-Over of National Defense Tax and Wholesale Tax

December 1950 (until 1954)
October 1954 (until 1958)
May 1958 (until 1964)
December 1963 (until 1974)
June 1971 (until 1982) (defense tax renamed 'federal direct tax')
November 1981 (until 1994)
November 1993 (until 2006) (wholesale tax replaced by 'value added tax')

3. Tax Increases and Spending Controls

December 8, 1974 (tax increase rejected; spending control accepted)
June 8, 1975 (tax increase accepted; spending control accepted)
December 4, 1977 (balanced federal budget accepted in facultative referendum)

5 The following constitutional initiatives also failed in popular referenda; taxation of public enterprises (July 1951), federal sales tax (April 1952), and higher taxes on large incomes (December 1977).
4. Attempts to Secure Constitutional Amendment for Value Added Tax

June 12, 1977 failed
June 20, 1979 failed
June 2, 1991 failed
November 28, 1993 passed

The federal government debated the question of a permanent direct tax for five years after the war before it held a referendum on the subject. The vote failed by a margin of two to one. It seems that the "opponents of the proposal were not convinced that the level of expenses of the government would continue to be so high; and even if they did they were not convinced that a substantial change in the federal structure, as this proposal entailed, was appropriate" (Codding 1979, p.71).

After this failure, the new director of the Department of Finance, Federal Councillor Max Weber, made a concerted effort to secure a constitutional amendment that would have granted the federal government a permanent income tax. In the referendum of December 1953, the proposal failed decisively; only three cantons voted in favour of the amendment. This failure prompted the resignation of Max Weber, "one of the few times in Swiss history that a member of the Swiss executive council has resigned for political reasons during his term of office" (Codding 1979, p.72).

After each of these referendum failures, the federal government asked the voters to roll-over the national defense tax, as a "temporary" tax measure. The voters obliged in 1950 and 1954, rolling-over the national defense tax until 1959. In 1958 and 1963, the federal government did not even bother to ask for a permanent direct tax; again, it just asked the voters to roll the defense tax over. In the latter referendum, the electorate agreed to extend this "temporary" tax for a period of ten years, until 1974. Federal expenditures, particularly social welfare, continued to escalate through
the 1960s, again placing the federal government in a precarious financial position.

The federal government made one last effort to secure a direct income tax. In the referendum of November 1970, a popular majority finally supported the proposal but it only found support in nine of the twenty-two cantons; thus, it failed. Opponents of the federal direct tax argued that the proposal was a violation of the federal principle, and that it would allow the federal government to dominate the cantons. The opposition slogan was "[d]irect taxes for the cantons and indirect taxes for the Confederation" (Codding 1979, p.73). As the federal direct tax would fundamentally alter the structure of Swiss federalism, it is perhaps not surprising that the proposal failed to obtain a "federalist" majority in the referendum. The federal government has finally accepted the verdict of the voters and it has ceased its efforts to secure a permanent direct tax.

After this final failure to procure a permanent direct tax, the federal government asked the voters again to extend the "temporary" taxes until 1982. The 1971 referendum "included an increase in income tax on higher incomes and a general increase in the turnover tax. In addition, the name of the federal defense tax was officially changed to the federal direct tax (impôt fédérale direct)" although it is still commonly referred to as the national defense tax (Codding 1979, p.74). The financial crisis of 1970 placed enormous pressure on the federal government. In 1974, the government asked the voters to approve a one-third increase in the turnover tax and large increases in personal and corporate income tax for the higher bracket groups. In exchange, the federal government offered to place stringent controls on spending. In the subsequent referendum, the voters approved the controls on spending but rejected raising taxes. The federal government was severely constrained by a terrible economic crisis and its desperate need for revenue. Just one year after the last referendum, the government returned to the people pleading for permission to raise
taxes. It required an "almost superhuman effort" from the Federal Councillor for Finance and Customs to convince the people to accept the government's financial plan and, even still, it was only a grudging acceptance (Codding 1979, p.76-7). Again, the government promised to impose controls on new spending as the *quid pro quo* for voter acceptance of higher taxes.\(^6\)

By the end of the 1970s, two things were clear. First, the people were not going to permit a federal direct tax. The Federal Department of Finance consequently concluded that it would have to improve its collection of indirect taxes. It thus sought to replace the turnover tax, or wholesale sales tax, with a value added tax (*taxe sur la valeur ajoutée, ou TVA*). The old wholesale tax was initially adopted in 1941, as a part of the government's war-time financial plan. By the 1970s, the wholesale tax was financially unsatisfactory. Two related problems emerged. First, there was the *taxe occulte* or hidden tax. The tax applied to business inputs that were "hidden" in the price paid by the consumer, and there was a consequent "cascading" of tax as the product moved through each stage of production (Due 1989, p.704). Second, most European countries had shifted to value added taxes, "which involved virtually no cascading, [and] raised concerns about the effect of the *taxe occulte* on the competitiveness of Swiss industry" (Due 1989, p.695).

Despite the sound economic rationale for a value added tax and the government's financial desperation, the often cantankerous and always tax conscious Swiss voters rejected the proposed value added tax *three* times, in 1977, 1979, and 1991. Finally, in November 1993, the Swiss people voted in favour of a new value added tax. In the estimation of John Due, "[c]oncern about the government deficit seems to have been the most important reason for voter approval; also the defects

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\(^6\) The government promised that "any new law which provides for a new expense or one which results in an increase in the federal budget over the previous year must obtain the approval of an absolute majority of the two houses of Parliament," as opposed to a simple majority of MPs present and voting. "Although this proposal had passed in 1974, it was tied to the financial provisions which lost; consequently it was put on the ballot again" (Codding 1979, p.77).
in the old tax, particularly cascading, were increasingly recognized; and finally the relationship of Switzerland to the European Community encourages the use of the value-added form of tax" (Due 1994, p.1295). The voters, in fact, endorsed a rate increase from 6.2% to 6.5%. The new rate is incorporated in the constitution, meaning it cannot be altered without an amendment and consequent referendum. It is estimated that the new tax will add approximately half a billion Swiss francs to the central fisc per annum (Due 1994, p.1301). While the new value added tax significantly improves the government's fiscal position, it will have to be renewed by popular referendum in 2006, along with the "temporary" direct federal tax.

While the government may not enjoy its financial insecurity, it seems that the Swiss people favour the "temporary" nature of the federal fiscal system. For one thing, it ensures low taxes. As it stands, the rates of the direct federal tax and the value added tax are enshrined in the constitution. But, "[i]f the federal income tax were to become a permanent part of the Constitution, changes, including the raising of the rate, could be made by federal law subject to challenge only by the people" (Codding 1979, p.81). Put another way, when the federal government wants to raise these taxes it must go to the people and secure a constitutional amendment but, if the federal government was granted these taxes permanently, the people would have to present a petition with 50,000 signatures before they could challenge the tax increases. It is thus likely that the "temporary solution" will continue, with the federal government coming "to the people at regular intervals with a request that the temporary income tax be renewed and increased to save the Confederation from

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7 In fact, "[t]wo rates are provided: a basic figure of 6.5 percent and a reduced rate of 2 percent. The reduced rate applies to goods regarded as basic necessities, including specified foods, medicaments, books and journals and a few other items. Parliament has the right to impose an additional 1 percent for the social security system if required, if the fund runs short of money" (Due 1994, p.1296). Due notes, furthermore, the coverage of the Swiss value added tax is "significantly less than that of the Canadian goods and services tax (GST)."
bankruptcy" (Codding 1979, p.81).³

A part of the Swiss reticence towards federal taxation undoubtedly stems from a desire to maintain generally low taxes. The Swiss have shown repeatedly that they will retain the status quo until the federal government can demonstrate beyond a reasonable doubt that new taxes are absolutely necessary for the financial survival of the government (Bird 1986, p.241; Codding 1979, p.81). However, one should not conclude that direct democracy frustrates the emergence of a socially responsive state. "The lesson," Bird suggests, "is that the complex Swiss system is likely necessary in Switzerland, given its extreme cultural, linguistic, and religious diversity, to achieve the same results [as other advanced industrial and democratic federations], albeit more gradually and over a longer period of time" (Bird 1986, p.241).

The solid Swiss belief in the sovereignty of the cantons also contributes to the Swiss desire to control the central leviathan. The federal principle was enshrined explicitly in the constitution and "[i]n no other country....does the importance of constitutional rules seem more important than in Switzerland, given the detailed nature of the Swiss constitution and its cumbersome amendment procedure" (Bird 1986, p.241). The constitution and the people have successfully prevented the federal government from financially dominating the federation. In stark contrast to Canada and India, the Swiss federal government has not been able to bull its way into cantonal jurisdictions with its spending power. Without secure finances, its spending power is anaemic. The sovereignty of the cantons has thus been maintained.

³ The proposed new constitution provides the federal government a direct income tax (Article 119) and the value added tax (Article 121) in perpetuity. The draft constitution, however, is careful to stipulate the rates of taxation (11.5% for direct taxation and 6.5% for the VAT). Any changes in these rates of taxation would thus require a constitutional amendment. It is yet to be seen if the Swiss people will accept this compromise arrangement.
The Swiss Tax Picture: Substantial Separability of Revenue Sources

What is the current picture of Swiss fiscal federalism after nearly a century of ad hoc development? If the federal principle were in effect one would expect a) a near total separation of fiscal resources between the two orders of government and, b) each order of government would have sufficient resources to meet its jurisdictional obligations. While Swiss fiscal arrangements are not quite this neat any more, they still largely correspond to the federal principle. All three orders of government more or less raise sufficient revenue to meet their spending requirements (see Table 6.3). Government spending patterns, moreover, reflect a fairly clear division of tasks between the three orders of government (see, Appendix 3, OECD Table, 1987/8, p.65).

Table 6.3: Division of Revenue and Spending

<table>
<thead>
<tr>
<th>Share of Total Revenue</th>
<th>Share of Total Spending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>35%</td>
</tr>
<tr>
<td>Canton</td>
<td>34%</td>
</tr>
<tr>
<td>Local</td>
<td>31%</td>
</tr>
</tbody>
</table>

(Source: Bird 1986, p.37; p.43).

After 150 years of federal history the most notable feature of fiscal federalism in Switzerland is the near complete separation of revenue sources between the federal and cantonal governments. The federal government still relies largely on indirect taxes, while the cantonal governments continue to rely almost exclusively on direct taxes (see, Appendices 4 and 5). Richard Bird has described Switzerland as a "tax jungle," but this jungle primarily entwines the cantons and local governments, not the cantons and the federal governments, the two sovereign orders of government.⁹

⁹ Bird notes that the "[m]unicipal (or district) income taxes generally take the form of surcharges based on the cantonal tax laws, although municipalities determine their own tax rates. The Swiss cantonal-local income tax relationship is thus much closer to the Canadian federal-provincial set up than is the Swiss federal-cantonal system" (Bird 1987, p.51).
Income tax is the only notable area of overlap between the federal government and the cantons. The federal direct tax has become an important source of revenue for the central government.\textsuperscript{10} By 1987, income tax had surpassed customs duties as the second largest source of revenue for the federal government after the turnover tax.\textsuperscript{11} The federal share of income tax, however, only amounted to 14.7% of the total collected by the three orders of government. If corporate tax is included in the total, the federal share is still only 17.1% of the total collected by the three orders of government. In contrast to Canada, income tax, including the federal direct tax, continues to be collected by the cantons and the federal direct tax is still constitutionally a "temporary" tax. Cantonal sovereignty is thus maintained in the field of direct income taxation.

Cantonal tax sovereignty has led to enormous tax diversity in Switzerland. "Apart from a few guidelines set out in the federal Constitution...the Cantons are completely free in the structuring of their tax systems" (Bieri 1979, p.51). Bieri states, furthermore, "in no other industrialized nation has the legal structure allowed so much freedom for the lower levels [of government] in the shaping of their tax systems" (Bieri 1979, p.50). In addition to the cantons, there are over 3,000 local governments, with significant taxing power. In short, "[r]egional diversity remains the outstanding characteristic of the Swiss tax system. In contrast, the Canadian scene appears blandly homogeneous

\textsuperscript{10} Richard Bird notes that the post-war growth in revenue was generated mostly from direct taxes in both Switzerland and Canada. Between 1950 and 1979, direct taxes accounted for 55% of revenue growth in Switzerland, and 49% in Canada. Bird adds, however, "in Switzerland, the resulting revenues accrued mainly to the subnational levels of government. The fact that the cantons and municipalities together collected 81% of the total increase in direct taxes from 1950 to 1979, while for the same period of time the provinces collected only 54% of the smaller increase in this source of revenue...goes a long way to explain the much greater increase in intergovernmental transfer payments in Canada in this period" (Bird 1987, p.39).

\textsuperscript{11} The turnover tax accounted for 31.8% of federal revenue; income tax 15.3 percent, while customs duties provided for 15.2% of federal revenue. Corporate tax accounted for 6.6% of federal revenue. In 1987, "temporary" taxes -- income tax, corporate tax, and the turnover tax -- accounted for 53.7% of the central government's revenue (OECD 1989/90, p.108).
even in the face of much recent concern about tax 'disharmony'" (Bird 1986, p.41). The Swiss case demonstrates that local tax sovereignty works. In fact, as the only truly stable multinational federation, it suggests that cantonal tax sovereignty is imperative.

In the two main fiscal indicators of the federal principle, separability of revenue sources and sufficiency of revenue, Switzerland conforms largely to the federal principle. Deviations from the federal principle have occurred only after extensive intergovernmental negotiation and the constitution has had to be amended accordingly, with the incumbent popular referendums. Violations of the federal principle, therefore, have maintained a high degree of legitimacy. Switzerland has thus enjoyed unprecedented political stability for a multinational federation.

The Post-War State: The Federal Principle Under Pressure

While political practice in Switzerland closely follows the federal principle, it does not conform to it exactly. As with other federal states, new economic and political objectives have led to an expansion of central spending with a concomitant requisite for increased revenue. This trend has placed pressure on the federal principle in a couple of notable areas, namely, revenue sharing, social policy, fiscal equalization, and conditional grants. These trends peaked in the mid to late 1970s and have subsequently levelled off, or perhaps even decreased.

Revenue Sharing

Christopher Hughes observes that the federal government in Switzerland frequently offers the cantons financial subsidies to obtain their acquiescence to federal initiatives, even though these incentives further strain the central fisc and force it to seek new revenue sources (Hughes 1954, p.101). Revenue sharing is as old as the constitution itself -- between 1848 and 1974, the federal
government paid the cantons compensation for the loss of customs duties -- but the modern system of revenue sharing is based on the financial settlement of June 1959, as revised from time to time.

The division of revenue is, in most cases, enshrined in the constitution in the relevant tax articles. Others (division of the military tax and custom fines) are encoded in normal law. Seven sources of revenue are shared, according to the following table.

Table 6.4: Intergovernmental Revenue Sharing

<table>
<thead>
<tr>
<th>Revenue Source</th>
<th>Cantonal Share</th>
<th>Distribution Formula</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Direct Tax</td>
<td>30%</td>
<td>5/6 in proportion to yield</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1/6 population and fiscal capacity</td>
</tr>
<tr>
<td>Withholding Tax</td>
<td>12%</td>
<td>1/2 population and 1/2 fiscal capacity</td>
</tr>
<tr>
<td>Federal Stamp Duties</td>
<td>20%</td>
<td>population</td>
</tr>
<tr>
<td>Alcohol Taxes</td>
<td>50%</td>
<td>population</td>
</tr>
<tr>
<td>Military Exemption Tax</td>
<td>20%</td>
<td>derivation of yield</td>
</tr>
<tr>
<td>National Bank Profits</td>
<td>2/3 profits</td>
<td>population</td>
</tr>
<tr>
<td>Customs Fines</td>
<td>1/3 fines</td>
<td>place of origin</td>
</tr>
</tbody>
</table>

(Sources: Dafflon 1977, p.139; Bieri 1979, p.61).

The cantonal share of most of these taxes is allocated as compensation, although in relation to the federal direct tax and withholding tax there is an equalization component, as can be seen from the distribution formula. In two instances, the federal direct tax and the military exemption tax, the cantonal share is in part to defray administrative costs. In regard to customs duties and the sale of alcohol, the cantons are rewarded for their cooperation in these areas (Dafflon 1977, p.139).12

While revenue sharing complicates fiscal relations in Switzerland, shared revenue is a relatively small component of cantonal revenue. Bieri indicates that shared revenue netted the cantons just over one billion Swiss francs in 1974, or about 6.2% of the total cantonal revenue of

12 The OECD reports that the cantonal share "in the yield on stamp duties and net income from taxes on spirits was abolished definitively on 1st January 1986" (OECD 1987/8, p.69).
16.4 billion Swiss francs (Bieri 1979, p.49; p.61). These sums are not insignificant but they are not sufficient to cause cantonal dependency on federal revenue sources. The federal principle is thus modified but not compromised by this degree of revenue sharing.

**Equalization**

The Swiss cantons vary considerably in size and fiscal capacity. Zurich is the largest canton with a population just over one million, followed by Berne with a population just under one million. At the other end of the spectrum, Appenzell Inner-Rhodes has a population of only 14,000 people. The disparities of wealth are also large. The seven richest cantons produce two-thirds of the Swiss GNP (Bogdanor 1988, p.76). The per capita income of the richest canton, Zug, is 50,348 Swiss francs, more than twice that of the poorest canton, Obwalden (23,8849 Swiss francs). The all-Swiss average per capita income is 31,441 francs (OECD 1987/8, p.67). The economic disparities in Switzerland have led to the perverse situation in which the richest canton with the greatest financial capacity maintains the lowest personal and corporate income taxes, while the canton with the lowest fiscal capacity (Jura) has the highest personal tax burden in the country (OECD 1987/8, p.67).

The poorer cantons tend to be isolated in mountainous regions and are sparsely populated. They thus have relatively high per capita costs, and relatively low fiscal resources. In short, these poor cantons are unable to generate the revenue necessary to be financially self-sufficient and they have come to "rely on the federal government redistributing substantial amounts of income in their favour" (OECD 1987/8, p.68). In as much as the poor cantons are unable to raise sufficient revenue

13 The OECD estimates that "[t]he cantons' share of federal revenue in 1983 represented only 7.1 per cent of federal expenditure, or 5.5 per cent of the cantons' revenue" (OECD 1987/8, p.69).

14 Wolf Linder has noted amusingly that the city of Zurich employs 18,000 officials, more than the entire population of Appenzell Inner-Rhodes (Linder 1994, p.50).
to meet their jurisdictional obligations, the federal principle is violated. With the exception of Jura, the cantons are the products of a different age. They all have cherished histories, and it is inconceivable that cantonal boundaries will be altered to satisfy contemporary economic rationality.\textsuperscript{15}

The problem of financial disparity was recognized in the 1950s, and the constitution was amended in 1958 to recognize the principle of equalization. Article 42 ter reads,

\begin{quote}
[i]The Confederation shall encourage financial equalization among the cantons. In particular, appropriate consideration shall be given to the financial resources of the cantons and to the situation of mountainous regions whenever federal subsidies are granted.
\end{quote}

In the following year, the Federal Assembly adopted the fiscal equalization law. The first step towards equalization was to redistribute one-sixth of the federal direct tax to the cantons according to population and fiscal capacity (see above). A more elaborate index has been developed subsequently, although the details need not concern us here (see, Bird 1986, p.68-73). In short, the cantonal share of federal resources and subsidies "is calculated according to a composite index that comprises the following four elements: per capita cantonal income, the tax base, the inverse of the tax burden index, and the proportion of mountainous areas in the canton (OECD 1987/8, p.69).

The principle of equalization does not necessarily violate the federal principle. Indeed, it would seem to flow from the stated aim of the confederation to promote the "common prosperity" of the "confederates" (Article 2). The implementation of equalization policies, however, potentially grants the federal government considerable power to manipulate intergovernmental fiscal relations,

\textsuperscript{15} A recent article in the Swiss Review: The Magazine for the Swiss Abroad, distributed by the Department of Foreign Affairs and Swiss Embassies, discusses the possibility of reformulating the constituent units of the Swiss confederation to correspond to the seven economic regions of the country, already identified by the Federal Statistics Office for the purposes of data collection and analysis. The author acknowledges, however, "for the moment there will be no change in a Switzerland which has 26 largely autonomous cantons." See, René Lenzin, (1998) "Economic Areas Instead of Cantons? Fixed Structures -- Flexible Practices," Swiss Review, 2/98, p.4-6.
which may in turn risk the federal principle. Considerable debate has ensued in Switzerland over the question of equalization. While the rich cantons are frequently reluctant to see their hard earned wealth transferred to less wealthy cantons, the poorer cantons generally support the principle of equalization. The poorer cantons, however, do not wish to see their political sovereignty impinged, so they tend to favour "unconditional" grants. The federal government, on the other hand, prefers conditional grants, so as to maintain budget responsibility. For the most part, equalization payments tend to come from shared revenue sources, particularly the direct federal tax and the withholding tax (Dafflon 1977, p.140), and they tend to be unconditional in nature. Bird describes the Canadian equalization effort as "strong" and Switzerland's as "weak," but he also notes the Swiss cantons have more influence on federal policy makers in this regard (Bird 1986, p.216). Equalization may not be as extensive in Switzerland, but it has better maintained the federal principle.

Social Policy

The social welfare state in Switzerland is not as extensive as it is in the richer European countries but it is broadly comparable to Canada and the United States.\(^{16}\) With its mix of public and private initiatives it is perhaps more like the latter than the former in substance but not necessarily in extent or comprehensiveness. Social security started earlier in Switzerland, in comparison to Canada, but it has evolved more slowly and in a more \textit{ad hoc} manner. As in Canada, the development of social insurance in Switzerland altered the structure of Swiss federalism. The Swiss

\(^{16}\) Richard Bird reports that "[t]he consolidated spending of the Swiss public sector, excluding enterprises, amounted to 34% of GNP in 1980, compared with 41% for the (approximately) comparable figure in Canada" (1986, p.35). The OECD has estimated that the federal government in Switzerland spends about 14% of GDP on "social protection" while the federal government in Canada spends about 15%. While many of the European countries allocate a greater proportion of GDP to social expenditure, Switzerland is comparable to Anglo-Saxon countries in this regard, including such unitary states as the United Kingdom (16.4%) and New Zealand (15.2%). Australia comes in at 12.8%, and the United States at 13.4% (OECD 1994, p.57-8).
determination to proceed with policy implementation only after the achievement of intergovernmental consensus and formal constitutional amendment, however, minimized strain in Switzerland's federal relations. The constitutional referendum process, furthermore, ensured that federal social legislation had a high degree of legitimacy, even if the federal principle was violated on occasion.

The constitution of 1848 did not expressly grant the federal government jurisdiction over social insurance, and it was not a matter of cantonal concern at that time. The revised constitution of 1874, however, guaranteed the "freedom of trade and industry" throughout the Confederation (Article 31.1). Although Article 31.2 provided that "[c]antonal regulations concerning the exercise of trade and industry....remain[s] unaffected," Article 34 made labour relations a federal matter. The federal government was thus accorded an entrée into the domain of social welfare. The Factory Act of 1877 was the federal government's first piece of social legislation. The Sickness and Accident Insurance Act followed in 1911, but the real impetus for social legislation was the Great Depression.

The government of Switzerland intervened in the economy as it had never done before, "regulating the marketing of goods, placing restrictions on credit and currency transactions, and granting loans and subsidies to certain particularly affected sectors of the economy" (Codding 1961, p.136). Federal economic intervention was reinforced by the exigencies of World War II. While there was an urgent need for the federal government to introduce special industrial and social legislation during the Depression and the War, "[m]uch of the action taken was unconstitutional, or at least extra-constitutional, relying upon broad emergency legislation or the power to make urgent

17 Codding adds that the Factory Act was revised in 1914 and 1919, and supplemented with legislation concerning minimum working age, home labour, and weekly rest, such that "the Swiss have evolved a fairly advanced national labour code" (Codding 1961, p.138).
arrêtés" (Codding 1961, p.136). This highly federal country was sliding rapidly towards quasi-federalism. If the quasi-federalism of the 1930s and 1940s had become institutionalized, it is quite possible that Switzerland would not have enjoyed its post-war stability.

After the war, however, Switzerland moved quickly to revise the constitution and restore the federal principle. As discussed above, Article 89 was amended to prevent the abuse of urgent arrêtés, and to introduce popular review of such legislation. Furthermore, a series of amendments, known collectively as the "economic articles," were ratified on July 6, 1947, albeit with only a slim majority (53% of the popular vote, and 13 of 22 cantons).\(^\text{18}\) Article 31\(^\text{bis}\), reflecting the new economic reality, accorded the federal government jurisdiction in social welfare. The new article reads,

\[
\text{[w]ithin the limits of its constitutional powers, the Confederation shall take measures to promote the general welfare and the economic security of its citizens.}
\]

This was not a general welfare clause; the admonition within the limits of its constitutional powers indicates that the federal government must procure a constitutional amendment before it can legislate in policy fields. For additional clarity, and to protect the interests of all concerned parties, Article 32 was amended to read as follows:

1. Provisions mentioned in articles 31 \textit{bis}, 31 \textit{ter}, paragraph 2, 31 \textit{quater} and 31 \textit{quinquies}, may only be enacted through federal laws or federal decrees on which a popular vote can be requested. In the case of emergencies occurring during periods of economic disturbances article 89, paragraph 3 [now Article 89 \textit{bis}] shall remain applicable.
2. The Cantons shall be consulted prior to the enactment of executory legislation. As a rule, the execution of the federal regulations shall be entrusted to them [the cantons].

\(^{18}\) The economic articles include "Articles 31, 31 \textit{bis}, \textit{ter}, \textit{quater}, and \textit{quinquies}, 32, 34 \textit{ter}, a verbal amendment of 34 \textit{quater}, and the repeal of Article 6 of the Transitory Provisions" (Hughes 1954, p.33).
3. Interested economic organisations shall be consulted prior to the enactment of executory legislation and may be called upon to cooperate in the application of executory regulations.

While Hughes describes the economic articles as "a large extension of Federal legislative competence" (Hughes 1954, p.33), the articles were carefully constructed so as to constrain the federal government to its expressly delegated constitutional powers. Moreover, the principles of consultation and subsidiarity were entrenched in the constitution. The economic articles thus ensured that the Swiss welfare state developed only in accordance with the constitution and with a high degree of legitimacy.

The Swiss social security system is enormously complex; it entails three orders of government, and a considerable role for the private sector.19 "The complexity of the system," states the OECD,

is reflected in the large number of "independent" bodies. At the time of writing there were no less than 105 State old-age insurance equalization funds, 18, 400 pension and provident funds, 450 health insurance funds, two Confederation accident/insurance schemes, almost 60 unemployment funds and 26 cantonal allowance equalization funds, in addition to private funds (1987/8, p.88).

The most important piece of social legislation is the Old-Age and Survivor's Insurance Scheme. The OECD estimates that this plan accounts for over half of all social expenditure in Switzerland (OECD 1987/8, p.71). The constitutional authority for this scheme was obtained in 1925 (Article 34 quater), but legislation was not approved by the public until July 6, 1947, when the other "economic articles"

were ratified. The federal government obtained the constitutional authority to regulate health insurance in 1890 (Article 34 \textit{bis}), but the first sickness plan was not introduced until 1912, followed by the accident insurance plan in 1918. These plans were intended to protect workers; general health coverage has only been obtained in the past thirty years. Today, about "98 per cent of the resident population is insured at least for medical attention and prescriptions" (OECD 1987/8, p.91). Health insurance remains largely private, and regulated by the cantons. The federal government obtained the constitutional authority for unemployment in 1947 (Article 34 \textit{ter}), as part of the economic articles but, before 1977, "unemployment insurance was voluntary and only 30 per cent of the labour force was covered" (OECD 1987/8, p.93). Unemployment insurance is now mandatory for all workers. The federal government obtained constitutional authority for family protection in 1945 (Article 34 \textit{quinquies}), but the cantons have assumed sole responsibility for family allowance plans, supplemented with a federal subsidy.

In sum, the federal government obtained the necessary constitutional authority to oversee the development of a welfare state by 1947, but it took another forty years to translate that authority to a comprehensive welfare system. While general welfare is regulated at the federal level (OECD 1987/8, p.88), "the definition of minimum standard requirements is vague in most cases" (Dafflon 1977, p.157).20 The cantons and communes thus "enjoy a large measure of autonomy in financial decision-making" (OECD 1987/8, p.88).21

Wolf Linder suggests that the development of the Swiss welfare system reflects the Swiss

\textsuperscript{20} In some instances, primary education for example, "national standards" are included in the constitution. In contrast to Canada, where "national standards" are frequently determined unilaterally by the federal government, such standards in the Swiss constitution are the product of extensive intergovernmental negotiation and public ratification. These standards thus do not generate the same sort of resentment that is witnessed in Canada, especially Québec.

\textsuperscript{21} The OECD reports that "the cantons and communes have responsibility for social assistance" (OECD 1987/8, p.88).
belief in the principle of subsidiarity, "which means that functions are attributed to the lowest level possible" (Linder 1994, p.56). The principle of subsidiarity, he elaborates, means that public intervention and public help should only occur in situations where private means would not suffice to achieve a goal. Furthermore, if a public programme is necessary, the Swiss look to the institution closest to its clients. Consequently, cantonal programmes are feasible only when local programmes do not suffice, and only if a task exceeds the capacity of the cantons do the cantons relinquish power to the federation (Linder 1994, p.56).

In fact, even when the federal government assumes a new power, "the implementation of federal programmes is delegated to the cantons and the communes whenever possible" (Linder 1994, p.56).

The development of the Swiss welfare state has thus not served to subordinate the cantons to the federal government. Federal equilibrium has thus been maintained. Moreover, however haphazard and unsatisfactory the system might seem to an outsider, the process of direct democracy has ensured that Switzerland has a system of welfare that is satisfactory to a large majority of Swiss. Social policies in Switzerland were approved by the people and the cantons were consequently appeased. Switzerland thus demonstrates the federal principle is not necessarily an obstacle to modern social programming. In Canada, as we shall see, post-war reconstruction policies were effected by the sheer fiscal power of the federal government, much to the consternation of Québec.

**Federal Transfers and Conditional Grants**

In most, if not all, advanced industrial federations, the post-war expansion of the state and the emergence of social welfare placed considerable financial pressures on both orders of government. In most instances, the central government had better access to new sources of revenue, while local governments struggled to meet rising expenses. In Switzerland, as we have seen, the federal government was seriously constrained in its quest for new sources of revenue by the
As in other federations, the cantons have had to rely on fiscal transfers from the central government to finance their new legislative obligations.

Fiscal transfers in Switzerland, as in other federations, are of four sorts: revenue sharing, unconditional grants, conditional grants, and reimbursements. Revenue sharing has been discussed above and, in Switzerland, unconditional grants are employed only between the cantons and local governments, and not at all between the federal government and cantons (Bird 1986, p.56). This stands in striking contrast to Canada where the provinces have been able to pressure the federal government to allocate unconditional grants. In Switzerland, conditional grants and reimbursements are utilized to supplement intergovernmental revenue sharing and to provide the cantons adequate financial resources to meet their jurisdictional obligations.

Reimbursements are not theoretically problematic. The federal government has delegated a number of tasks to the cantons, and federal reimbursements simply cover the costs of these tasks, although there is also an "equalization" component to these transfers (Bird 1986, p.58). In certain instances, national highways for example, the cantons are expected to finance part of the cost, as they benefit from the expenditure. Bird suggests that "[i]n some ways, these reimbursements resemble conditional grants" (Bird 1986, p.58). Although the cantons have no discretion in the disbursement of these transfers, these funds finance tasks outside cantonal jurisdiction. Federal reimbursements thus do not encroach upon the sovereignty of the cantons.

Conditional grants are more problematic. In this form of fiscal transfer, the federal government provides the cantons grants for specific purposes that fall within cantonal areas of jurisdiction. Conditional grants may thus compromise cantonal sovereignty. Dafflon indicates, however, that conditional grants in Switzerland have been initiated by the cantons, unlike conditional...
grants in other countries, including Canada. He writes,

[f]ederal subventions are not allocated automatically but when demanded by subcentral jurisdictions and they cover only part of the total costs of the aided functions. The allocation of grants-in-aid 'on demand' signifies that it is not the federation which assesses the need of subnational jurisdictions with regard to certain services, but that it is left to the cantons and municipalities to initiate the demand according to their own individual budgeting (Dafflon 1977, p.157).

While this sort of arrangement would be in keeping with the Swiss belief in subsidiarity and the federal principle, it is not reported by others who are knowledgeable about Swiss fiscal relations. Federal standards for cantonal programs, however, do appear to be weak (Dafflon 1977, p.157).

The magnitude of federal fiscal transfers, and especially of conditional grants, is difficult to assess. While the numbers ought to be readily available from the Finance Department or Federal Statistical Office, each study seems to vary slightly. Most studies, however, show the same trend. Fiscal transfers, including conditional grants, peaked (as a percentage of cantonal revenue) in the first half of the 1970s and have subsequently subsided. Richard Bird provides the neatest longitudinal study of federal transfers (see Table 6.5).

Table 6.5: Federal Fiscal Transfers to the Cantons

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax Sharing</td>
<td>132 (8.85%)</td>
<td>134 (4.85%)</td>
<td>461 (4.96%)</td>
<td>1,261 (5.81%)</td>
</tr>
<tr>
<td>Conditional</td>
<td>147 (9.86%)</td>
<td>233 (8.44%)</td>
<td>998 (10.75%)</td>
<td>2,024 (9.33%)</td>
</tr>
<tr>
<td>Reimbursements</td>
<td>28 (1.88%)</td>
<td>119 (4.31%)</td>
<td>918 (9.89%)</td>
<td>1,184 (5.46%)</td>
</tr>
<tr>
<td>Total</td>
<td>307 (20.6%)</td>
<td>486 (17.6%)</td>
<td>2,377 (25.6%)</td>
<td>4,469 (20.6%)</td>
</tr>
</tbody>
</table>

(Source: Bird 1986, p.46).

See, Dafflon (1977), Bieri (1979), Bird (1986), OECD (1989/90). Dafflon does not seem to distinguish between conditional grants and reimbursements (Dafflon 1977, p.70), although he does seem to at other points (see, p.136). The OECD only provides the sum total of federal transfers, without distinguishing between the three types. Bieri does distinguish between the three forms of transfer, but only provides data for one year (1974).
The Swiss figures for conditional grants are roughly comparable to Canada, as long as the old Established Financing Program is considered as a conditional program (Watts 1996, p.45). The effect of conditional grants on cantonal decision-making is not clear. Dafflon acknowledges that between 1954 and 1970 cantonal dependence on federal transfers increased significantly but, he states, "this gives no indication of the increase of federal control over cantonal budget choices" (Dafflon 1977, p.71). While it is hard to imagine that the sovereignty of the cantons has not been compromised, it seems that conditional financing in Switzerland has not been as destabilizing as in Canada.

Conclusion

The two great wars and the Depression placed as much economic and political pressure on Switzerland as any other federation. The federal government met the immediate exigencies of war and economic crisis with a systematic exploitation of the constitution's emergency provisions. The sovereignty of the cantons was in genuine danger of becoming an historical artifact. After World War II, however, the federal principle was restored. Thereafter, the constitution and the people effectively constrained the federal government from acquiring new revenue sources. In short, Article 3, which guarantees the sovereignty of the cantons, successfully prevented the federal government from invading cantonal areas of jurisdiction and taxation in the long term.

The desire for new social legislation and the perpetual quest for adequate financial resources has complicated intergovernmental fiscal relations in Switzerland since the end of World War II. While the cantons have retained constitutional sovereignty in the realm of income taxation, the people have permitted the federal government to collect a small direct tax on a "temporary" basis. Switzerland thus does not have a strict separation of fiscal resources, as is demanded by the federal
principle. However, in contrast to Canada, where the main sources of revenue (income taxes and sales taxes) are divided almost equally between the two orders of government, Switzerland has maintained a substantially greater separation of resources. The federal government and cantons in Switzerland thus do not compete for the same resources to the extent that happens in Canada.

The federal government in Switzerland has not been totally emasculated, far from it. As the relative importance of customs duties has declined, the federal government has been able to survive financially on the transitory taxes granted by the people, most especially the new value added tax, but also the direct tax. Indeed, the federal government has been in a position to provide the cantons significant transfer payments to defray the costs of federally delegated tasks and to assist the cantons in financing their own constitutional responsibilities.

There is now a certain degree of intergovernmental inter-dependence in Switzerland. At its peak in the 1970s, it was thought that Switzerland needed a new, more integrated, constitution to reflect current government practice. The draft constitution of 1977, however, was shelved without ever being taken to a popular vote (see Chapter 3). Since the late 1970s, a new appreciation of federalism has emerged in Switzerland, as people begin again to realize the political efficacy of federalism. The drafters of the new proposed constitution have been careful to enshrine the federal principle in fiscal matters.

Despite the obvious success of federalism in Switzerland, Swiss experts in fiscal federalism are not particularly satisfied with current arrangements, especially those that violate the federal principle. Bieri concluded his study of Swiss fiscal federalism by recommending a greater separation of fiscal resources as between the two orders of government, and a reduction of conditional grants from the federal government to the cantons (Bieri 1979, p.89-93). Dafflon is more sceptical about
the feasibility of maintaining separate fiscal resources (Dafflon 1977, p.82), but he suggests that more cooperation and coordination are required to ensure the smooth functioning of Swiss fiscal relations. Instead of trying to maintain the absolute independence of the two orders of government, he suggests that "[f]or cooperative federalism to succeed, decisions must be taken on an equal status basis" (Dafflon 1977, p.183; emphasis original). He continues,

> [t]he inference of this rule is that if cooperation of all those concerned is ensured in planning the 'special' policies on an equal-status basis, a waiver of absolute independence is not asking too much. There is a crucial difference between this approach, whereby the reduction of independence is caused by a process of joint decision for national public policies, and a solution in which it would correspond to the establishment of subservience to federal decisions for public policies (Dafflon 1977, p.183).

From a Canadian perspective, these debates are astonishing. All too often it is assumed in Canada that a strict separation of fiscal resources is simply impossible, therefore it is not even debated. Furthermore, most Canadians would regard Swiss fiscal relations as the epitome of cooperative federalism, yet Swiss experts are demanding even greater harmony.

Canadians also tend to be sceptical about the degree of tax diversity that flows from cantonal fiscal sovereignty. However, "Swiss experience to date with its complex and confusing tax system demonstrates that a fiscal system can work with far greater local diversity than now exists in Canada" (Bird 1986, p.65; emphasis original). The Swiss case demonstrates, among other things, that the federal principle is not detrimental to modern fiscal policy and social programming. There may well be economic costs to the Swiss system of cantonal fiscal sovereignty, but there are also significant political rewards. Switzerland, for one, is not suffering the same sort of perpetual separatist crisis that exists in Canada, to the detriment of the Canadian, and especially Québec, economy.
In sum, cantonal fiscal sovereignty has worked well. As Richard Bird eloquently concluded,

[fi]ederalism has not only economic objectives but also important political-legal goals and, in Switzerland as in Canada, a socio-cultural aspect as well. The example of Switzerland shows that at least one country has been willing to pay a much higher price than has Canada in terms of tax complexity and constraints on federal fiscal power to achieve the latter aims, while at the same time running a public sector that is not only almost as big as Canada's but is even more dependent on highly visible direct taxes (Bird 1986, p.67).

In short, Switzerland managed to respect the federal principle as it developed a modern welfare state. In the post-World War II transformation of the state, the Swiss wisely enshrined the principle of subsidiarity in Article 32 of the constitution, which indicates that the cantons will be consulted prior to the enactment of federal legislation and they will in most instances be responsible for the execution of federal legislation. The much vaunted principle of subsidiarity may be reduced to a very basic maxim: "The system operates as it does because higher authorities leave lower ones alone" (Steinberg 1996, p.87). The post-war social legislation and taxation regimes, furthermore, have received the direct or tacit support of the people in a process of constitutional change that requires a large degree of cross cultural consensus. This has undoubtedly helped ensure multinational stability.
Chapter 7

Fiscal Federalism in Canada:

Québec Opt Out
Fiscal relations in Canada have been quasi-federal from the outset. The provinces have never had sufficient revenue to fulfil their constitutional obligations; they have consequently had to rely on fiscal transfers from the federal government. In the early years after Confederation, the federal government provided half the revenue for the provinces of Ontario and Québec, 80% for Nova Scotia, and 90% for New Brunswick (Buck 1949, p.12). In short, "[t]he original system of grants by the Dominion was established by bargain rather than by following any systematic plan" (Buck 1949, p.12). The structural imbalance in Canadian fiscal federalism placed great strain on federal-provincial relations and nearly prompted the secession of Nova Scotia shortly after confederation.

After the Second World War, intergovernmental fiscal arrangements in Canada became increasingly byzantine, as the Canadian state was transformed into a Keynesian state. The three pillars of Canadian fiscal federalism -- tax sharing agreements, conditional grants, and the federal spending power -- were developed in the inter-war years and they remain in place today, at least in modified form. All three pillars constitute violations of the federal principle, and the province of Québec has attempted to extricate itself from these arrangements at every turn. While many Canadians outside Québec extol the flexibility of Canadian fiscal arrangements, these arrangements may have fanned the flames of separatism in Québec.

**Federal-Provincial Tax Sharing Agreements**

The constitution allocated the federal government the power to generate revenue by any mode of taxation (Section 91.3). At Confederation, the federal government acquired customs and excise duties from the three founding colonies, which accounted for 80% of provincial revenue (GOC 1940a, p.44). The federal government also assumed responsibility for provincial debts. In return, the federal government provided the provinces an annual financial subsidy equivalent to eighty cents
per capita, and a small flat grant to cover administrative costs. The provinces, however, were still left with insufficient revenue to meet their responsibilities. The only important source of provincial revenue was from public lands. The provinces could have surmounted their revenue deficit by imposing direct taxes, but this was contrary nineteenth century economic practice. In the twentieth century, direct taxes were appropriated by the federal government to finance World War One. Federal corporate and personal income taxes were initiated in 1915 and 1917 respectively. By 1921, the federal government received about one-third of its revenue from these taxes and, by 1939, income tax was the Dominion's largest source of revenue (Buck 1949, p.16, p.150).

The early dominion-provincial conferences were dominated by provincial efforts to extract more funding from the federal government. As the provinces began to exploit direct taxation, federal subsidies assumed a smaller proportion of provincial revenue. In 1913, however, the federal subsidy still totalled a substantial 28% of provincial revenue, down from 43% in 1896, and 58% in 1874 (GOC 1940a, p.86). Federal subsidies were transferred to the general revenue of the provinces to meet general budgetary needs. The federal government did not stipulate how these funds were to be utilized. The federal government was thus not interfering or legislating in areas of provincial jurisdiction. In this regard, the federal principle was not being violated, but it was still not a satisfactory arrangement.

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1 The Rowell-Sirois Commission concluded that although the provinces were accorded the power to levy direct taxes, "the discussions of the Confederation period indicate that the provincial governments were not expected to use it. Direct taxes were extremely unpopular; they had never been levied by the provinces, and...the nature of the economy made the administration of direct taxation except by municipalities very difficult" (p.44). British Columbia initiated direct taxation in 1873 by levying property taxes, succession taxes, and personal income tax. Quebec imposed a corporate tax in 1882. The other provinces did not initiate income or corporate taxes until the 1920s and 1930s but, by 1896, all the provinces had direct taxes, mostly succession duties. These accounted for about 10% of provincial revenue (GOC 1940a, p.64).

2 Anthony Birch succinctly summarized the pathology of Canadian fiscal federalism: "[f]rom the beginning of confederation the provinces were in the position of depending, for a larger part of their revenue, on the political pressure that they could assert at Ottawa. Not surprisingly, the achievement of Better Terms became a criterion of success for
The Second World War prompted the federal government to restructure Canada's fiscal system. The federal government and the provinces met in January 1941, ostensibly to discuss the Report of the Royal Commission on Dominion-Provincial Relations, but the premiers of Ontario, Alberta, and British Columbia refused to discuss what they called a "peace-time" document during the war. Before the conference disbanded, however, the federal minister of finance, James Ilsley, informed the provinces of the government's intention to restructure the country's fiscal system. He stated, "[t]he Dominion I anticipate will undoubtedly have to invade provincial tax fields such as succession duties. I think it will have to increase its rate in such fields of progressive taxation as the income tax; and if we do this, or either of them, it will mean a curtailment of provincial revenues" (GOC 1941, p.75). He stated further, "[w]e shall do it reluctantly, but do it we will, if necessary to win the war" (GOC 1941, p.75). Ilsley emphasized, "[t]here is no question of our power to do the things that are necessary. Under the British North America Act our taxing authority is not limited. Under the War Measures Act we may do what is necessary as a war measure" (GOC 1941, p.75).

In his April 1941 budget, Ilsley 'asked' the provinces to withdraw from the personal and corporate income tax fields until one year after the war. In fact, "he raised the Dominion's corporation and personal income rates to heights which made it quite difficult for the provinces to continue to add their own corporation and personal income taxes the Dominion levies" (Buck 1949, p.230).

By the end of 1941, all the provinces had "agreed" to vacate personal and corporate income tax fields for the duration of the war. With the addition of succession duty, the federal government provincial politicians. Inevitably, the tradition developed that the federal government was the enemy, and to claim more than was strictly necessary, to refuse any suggestion of conditions or control, and to emphasize the peculiar difficulties of its own province were the natural tactics expected of each provincial government" (1955, p.66).

3 Donald Creighton has argued that though the JCPC interpreted the Canadian constitution in favour of the provinces, it was careful to preserve imperial interests. "Thus," he contends, "the Dominion may be said to have acquired two federal constitutions: one for affairs in Canada and the other for wars in Europe" (1941, p.37).
possessed the three major direct tax fields, the only taxes constitutionally available to the provinces. In return, the Dominion provided each province a fixed annual grant equivalent to their 1940 revenue. In essence, the federal government "rented" the provincial tax fields. For all intents and purposes, "during the war, the Dominion enjoyed some of the advantages which a unitary state possesses in the field of taxation" (Buck 1949, p.234). The federal government, moreover, continued the war tax scheme, with only minor adjustments, after the cessation of hostilities. The provinces complicit in this erosion of the federal principle, with the exception of Québec.

In August 1945, the federal government convened a Dominion-Provincial Conference on Reconstruction. Mackenzie King opened the conference with reassuring words to the provinces:

> The federal government is not seeking to weaken the provinces, to centralize all the functions of government, to subordinate one government to another or to expand one government at the expense of others. Our aim is place the Dominion and every province in a position to discharge effectively and independently its appropriate functions. In other words, we believe that the sure road of Dominion-Provincial cooperation lies in the achievement in their own spheres of genuine autonomy for the provinces. By genuine autonomy, I mean effective financial independence, not only for the wealthier provinces but also for those less favourably situated (GOC 1946, p.5).

King's sincerity was challenged by George Drew, the premier of Ontario, and Maurice Duplessis.

Mr. Drew quickly focused attention on the primary structural flaw in Canadian federalism:

> There is one fundamental weakness in the British North America Act which lies at the root of many of our difficulties. While the legislative powers of the Dominion and Provincial governments were defined with reasonable clarity, the division of taxing powers was left in a much less satisfactory. The provinces were empowered to levy taxes in the field of direct taxation, as every one of us has so much reason to know, whereas the Dominion Government was authorized to raise money by any form of taxation. We therefore have the anomaly that, while the powers of the provincial governments have been extended by judicial interpretations of their statutory powers, the Dominion Government has found it necessary over the years to
occupy more and more the only field of taxation which was made
available to the provincial governments (GOC 1946, p.11).

These structural imbalances, described by Premier Drew, have still not been fully rectified.

Maurice Duplessis, who was returned to power the previous year, followed Drew. He
stressed that federalism was supposed to be a system of government with divided sovereignty, but
sovereignty is illusory, he insisted, without independent and sufficient sources of revenue. In a
refrain that he repeated often, Duplessis stated to the conference,

\[ \text{[o]ne of the essential prerogatives of sovereign states pertains to the}
\text{right of levying, by taxation, in the manner which they think best,}
moneys required for effective public administration and application
of laws enacted by Parliament...A federal system involving an
allocation of public powers among different federated states must
equally provide for a correlative allocation as to revenue sources...any
central government reserving to itself all revenue sources would, in
fact, reduce the provinces to legislative impotency. It would be an
easy matter to show that a province deprived of all revenues except
subsidiies paid by the central state, would cease to be a sovereign state
and become a sort of inferior governmental organization under the
tutelage of the authority upon which it depends (GOC 1946, p.355).\]

Duplessis seemed to suggest that the provinces should have an exclusive right to direct taxation. He
awkwardly stated, "the provinces, in which according to the letter of the law has been vested the
exclusive right of direct taxation, should have a priority right in such a field" (GOC 1946, p.356;
emphasis added).

At the follow-up conference, in April 1946, Duplessis expressed an apparent willingness to
collaborate with the federal government on a tax rental scheme for a limited period (GOC 1946,
p.415). He found himself, however, in a sniping match with James Ilsley, the federal finance
minister. Ilsley focused on Québec's apparent demand for an exclusive right to direct taxation (GOC
1946, p.508). Duplessis retorted "I did not say exclusive jurisdiction! I said priority" (GOC 1946,
To which Ilsley sarcastically responded, "[p]erhaps we are not very far apart at all. I do not know exactly what priority means" (GOC 1946, p.508). When Duplessis was granted the floor in the afternoon session, he took the opportunity to mock the federal minister:

This morning we heard from Mr. Ilsley, an eloquent speaker. We noticed that he was a little bit angry; he gave the impression that he had lost his temper just a tiny little bit...Mr. Chairman, as far as Quebec is concerned, I will forget this attitude of Mr. Ilsley; even more, we understand it, he is overworked, and he is doing his best; his responsibilities are very heavy, working day and night; he is worked to exhaustion -- to the point of convincing himself and trying to convince others that the federal proposals, which lead to centralization, do not lead to centralization -- a very exhausting job I will admit, and I understand quite well that a man called upon to do this job has reasons to be nervous and I fully realize it to be a nerve-wrecking job. I do not doubt for one minute his sincerity (GOC 1946, p.528-9).

It was not clear if Duplessis was ever committed to the principles of federalism, but he was given repeated opportunities to ridicule the quasi-federal proposals initiated by the federal government.

After considerable federal-provincial bickering, the first "Tax Rental Agreement" was reached in July 1947 and it more or less continued the tax arrangements devised during the war for another five years. The federal government maintained its priority right to impose income and corporate taxes. The provincial share of these taxes was restricted to a meagre 5% of the federal tax. The federal government also retained its succession tax, although half the revenue was transferred to the provinces. All taxes, moreover, were collected by the federal government, and allocated to the provinces by various formulas (Moore et al, 1966, p.28-9). Seven of the nine provinces, and later Newfoundland, accepted the agreement. Québec and Ontario, however, rejected the agreement. They argued that the arrangement violated the principles of federalism and responsible government. The first tax rental agreement thus established the 'right' of the provinces to "opt-out" of federal
The first ministers reconvened in December 1950, this time with Louis St. Laurent at the helm, to negotiate the next tax rental agreement. St. Laurent asserted that with Korean War looming over the Pacific, "it is obvious that the federal authorities will have no option but to impose direct taxes to a degree commensurate with the gravity of the situation" (GOC 1951, p.7). He added, remarkably, "the federal government also believes that under present conditions the public is apt to be better and more efficiently served if there is only one authority levying and collecting those taxes which have such an important effect upon our economic well-being" (GOC 1951, p.8; emphasis added). Mr. St. Laurent's statement, in short, negated the entire spirit and raison d'être of federalism.

The anti-federal position assumed by St. Laurent enabled Duplessis to portray himself paradoxically as a great Canadian patriot and defender of the constitution. In his address to the conference, Duplessis ruminated, "the Fathers of Confederation showed a lot of foresight when they decided....that the system of government that should prevail in Canada should be free from centralization and be based upon the fundamentals of democracy -- decentralization" (GOC 1951, p.25). He continued that the only "appropriate" system of government for Canada is one in which the two orders of government have, "in their own respective spheres, all the basic powers, legislative, financial and administrative, essential for carrying on a truly and real democratic and responsible government" (1951, p.25). It was not appropriate in a federal system, he argued, for the central government to replace the provincial tax system with subsidies. He noted, "Sir Wilfrid Laurier was

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4 Before the conference began to address the financial issues, Prime Minister St. Laurent granted the floor to Lester Pearson and Brooke Claxton, respectively the ministers for external affairs and defense, to brief the premiers on the war situation. This was viewed by the provinces as an attempt by the federal government to have them submit to the federal government's fiscal proposals. When Duplessis was later given the floor, he referred to the speeches delivered by Pearson and Claxton but he refrained from commenting, saying, "[a]s you know, I have a provincial mandate and I do not intend to encroach upon essentially federal matters" (GOC 1951, p.25).
a great leader...and he stated more than once that it was unsound for one government to levy taxes which were spent by another government" (1951, p.25). He acknowledged that federal subsidies were part of the Confederation bargain in 1867, but he argued "[t]he fact that the Fathers of Confederation felt that there should be federal subsidy in only two cases proves conclusively that it was their desire to give the provinces truly responsible government," which, he added, cannot exist without the power of taxation (1951, p.26). The obviously quasi-federal position adopted by St. Laurent allowed Duplessis to deftly exploit the legacy of the Fathers of Confederation, and Sir Wilfrid Laurier, to his own advantage.

The 1952 tax rental agreement was very similar to the 1947 agreement. The provincial share of income tax was raised to 10% and their share of corporate tax was set at 9%. The federal government continued to transfer to the provinces half the revenue generated from succession duties (Moore et al 1966, p.39). While Premier Frost of Ontario encouraged the other provinces to opt-out of the tax rental arrangements at the 1950 federal-provincial conference, he announced in 1952 that Ontario would join the next tax rental agreement, with the provision that it would continue to collect its own succession tax (Moore et al 1966, p.43). Duplessis reacted to the Ontario announcement by stating emphatically that "the position of Québec has not changed" (quoted in Moore et al 1966, p.43). Québec thus remained outside the 1952 tax rental agreement.

At the next first ministers conference, in October 1955, Prime Minister St. Laurent was more compromising. He noted that not all the provinces were "enthusiastic" about the tax sharing arrangements and he suggested that "[t]he Federal government has never contended that these agreements were a final, or a perfect, or a permanent answer to the problems in our fiscal relationships" (GOC 1955, p.16). In the final agreement, however, the federal government continued
to occupy the most lucrative tax fields. The provinces were provided 10% of the federal income tax (subsequently raised to 13%), 9% of the federal corporation tax, and 50% of succession duties, or an abatement of federal tax for an equivalent amount (Moore et al 1966, p.55).  

Eight provinces joined the 1957 arrangement. Ontario continued to impose its own succession and corporate taxes and rented only its income tax to the federal government. Once again, Québec remained steadfastly outside the agreement. It continued to impose and collect its own taxes. Duplessis reiterated his contention that "[t]he federal authority and the provincial authority are both sovereign within the limits of their attributions. With the exclusive right of legislating in certain matters there ought necessarily to go the corresponding right to impose taxes for these purposes" (GOC 1955, p.36).

Duplessis was entirely consistent in his position on federalism, the sovereignty of the provinces, and the concomitant need for independent and sufficient sources of provincial revenue. He argued, almost *ad nauseam,*

[t]he sovereignty and autonomy of the Provinces are diametrically opposed to federal tutelage...The exclusive rights of the Provinces in matters of social legislation, education, civil rights, etc, must be safeguarded in their entirety if confederation is to endure. The federal proposals as propounded and explained by the Federal Authorities are a serious and direct interference with the inalienable rights of all the Provinces (GOC 1946, p.365).

He insisted that Québec was "not asking for favours." In fact, he suggested that Québec was "echoing the sentiments of the founding Fathers and of the most illustrious Canadians when she

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5 The 1957 tax agreement also included an equalization formula to redistribute revenue to the provinces equivalent to the average per capita yield of the three main tax fields of the two wealthiest provinces. Equalization payments to the poorer provinces were paid separately and unconditionally. A new stabilization component was also added to the agreement in which the federal government guaranteed to provide the provinces at least 95% of the their previous year's revenue.
urge[d] the safeguarding of responsible government and the integral respect of Canadian federalism" (GOC 1955, p.40). This was the position Duplessis would adhere to for the duration of his tenure as premier, much to the consternation of the federal government.

It is not clear if Duplessis was really committed to the principles of federalism, although it is pretty evident that he just wanted Québec to be left alone within the Confederation. What is clear, however, is that the position of the government of Canada was sufficiently quasi-federal that Duplessis could present of Québec's concerns and objectives within a framework of classical federalism. The demand for sovereignty in areas of provincial jurisdiction was consistent with the demands of previous Québec leaders, particularly Dorion and Mercier. It was most fully articulated by the Tremblay Commission, which was appointed by Duplessis. Duplessis's successor, Jean Lesage, continued the campaign to increase Québec's revenue sources and he took aim at conditional grants, the means by which the federal government established programs in areas of provincial jurisdiction.

One of the first items of business for Premier Lesage was the federal-provincial conference, convened by Prime Minister Diefenbaker in Ottawa at the end of July 1960. Mr. Diefenbaker reviewed the fiscal arrangements between the two orders of government, outlined their shortcomings, and he repeated twice in his opening address that "[t]he federal system must be preserved and maintained without centralization" (GOC 1960, p.14). Lesage was determined to be better prepared, constructive, and cooperative than his predecessor, Maurice Duplessis. He was, simultaneously, adamant and cooperative. He insisted that "[f]ederalism in Canada...rests on the sovereignty of the Federal Parliament and of the Provincial Legislatures in their respective fields of jurisdiction. The respective sovereignty of the two spheres of government is the very foundation of Confederation"
And, like Mr. Duplessis, he insisted that the independent right of taxation is essential to the fulfilment of sovereignty (GOC 1960, p. 25). Lesage not only quoted from the Tremblay Report in his opening address, he distributed copies of the report to all the delegations at the conference (GOC 1960, p. 127).

As for the fiscal arrangements over the next five years, Lesage adopted a more conciliatory position than his predecessor. Whereas Duplessis had always called for an exclusive provincial rights to all forms of direct taxation, Lesage suggested the provinces assume only 25% of each of the income and corporate tax fields. As for the least significant tax, succession tax, he requested "the federal government to withdraw completely from the field of succession duties which concern property and civil rights. This field of taxation should belong exclusively to the provinces" (GOC 1960, p. 131). In his 1963 budget speech to the Québec legislature, just three days before the federal election, Lesage, who was also the minister of finance, reiterated his position:

> Whatever the result of the [federal] election, it will be absolutely necessary that the new government should give satisfaction to Québec. For the benefit of the federal administration to be elected on April 8th, I reiterate briefly that Québec requires, at the moment, as minimum fiscal powers: 25% of personal income tax, 25% of corporation income tax and 100% of succession duties. Furthermore we want equalization payments to be calculated on the basis of the yield of personal and corporation income tax in the province where it is the highest. These are, for the moment, minimum requirements (Lesage 1968, p. 219; emphasis original).

In short order, as the costs of the Quiet Revolution soared, Lesage's 25:25:100 tax sharing formula became a nationalist rallying cry in Québec.

In the 1962-1966 tax sharing agreement, the federal government moved to give the provinces more room in the income tax field by increasing the provincial share from 13% of the federal tax to 16% and by an extra point a year to 20% in 1966. Prime Minister Pearson, in fact, increased the
provincial share an extra 2% in each of the final two years of the agreement to bring the provincial portion up to 24%. The provinces would continue to receive 9% of the federal corporate tax. The federal government renamed its succession tax an estate tax and provided the provinces half of this revenue or an equivalent abatement. In 1964, Pearson increased the provincial share of estate taxes from 50% to 75%, although the additional 25% was not to be equalized (Moore et al. 1966, p.75). The agreement was also renamed from the Tax Sharing Arrangements Act to the Federal-Provincial Fiscal Arrangements Act. Most of the provinces accepted the 1962 tax sharing agreement in toto. Manitoba and Saskatchewan imposed slightly higher income and corporate taxes, and British Columbia decided to impose its own succession tax (Moore et al. 1966, p.75). Ontario continued to collect its own corporation taxes. Lesage did not get his cherished 25:25:100 tax sharing formula and thus Québec remained the only province fully outside the tax sharing agreement.

In the 1967 agreement, provincial income tax abatement increased from 24% to 28%; the provincial corporation tax abatement increased one point to 10%; provinces without their own succession duties received 75% of the federal estate tax (Burns 1977, p.52). The 1967 agreement also included an abatement for university education, 4% of income tax and 1% of corporation tax.

Table 7.1: Provincial Shares of Major Tax Fields in the Tax Sharing Agreements (1947-1967)

<table>
<thead>
<tr>
<th></th>
<th>Income Tax</th>
<th>Corporate Tax</th>
<th>Succession Taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1947</td>
<td>5%</td>
<td>5%</td>
<td>50%</td>
</tr>
<tr>
<td>1952</td>
<td>10%</td>
<td>9%</td>
<td>50%</td>
</tr>
<tr>
<td>1957</td>
<td>10/13%</td>
<td>9%</td>
<td>50%</td>
</tr>
<tr>
<td>1962</td>
<td>16-20/22/24%</td>
<td>9%</td>
<td>50/75%</td>
</tr>
<tr>
<td>1967</td>
<td>28%</td>
<td>10%</td>
<td>75%</td>
</tr>
</tbody>
</table>


6 Equalization payments were now guaranteed, and the federal government continued to guarantee the provinces a stable revenue of at least 95% of their previous year's revenue.
The 1972 agreement was substantially different in content, although not in principle. In the 1972 agreement the provinces were allowed to establish their own income tax rates, as long as it was based on the federal model. The federal government would in turn vacate the tax field by an equivalent amount. Income tax rates consequently varied from province to province. In short, "there were now two distinct taxing authorities in each province, though still, in most provinces, only one collection agency -- the federal government" (Perry 1997, p.273). The federal government also abandoned the estate and gift-tax fields "and in many cases the provinces stepped in to occupy the vacated fields" (Van Loon and Whittington 1987, p.292). It was hoped that these changes would increase provincial fiscal flexibility.7

The 1977 federal-provincial fiscal agreement was renamed the "Federal-Provincial Fiscal Arrangements and Established Programs Financing Act." The basic structure of this agreement remained the same, with the provinces allowed to establish their own income tax rates. Indeed, by this time, "other collection arrangements were becoming more important than the tax agreements, a change signified by the indefinite extension of the agreements in their existing form in 1977" (Perry 1997, p.95). The most significant aspect of this agreement concerned the Established Program Financing (EPF) arrangements, which "were intended to replace the older cost-sharing arrangements for medical and hospital insurance programs with a combination of an abatement of tax points and a block-funding formula" (Van Loon and Whittington 1987, p.292). The EPF arrangements were intended to ameliorate the concerns raised by conditional grants, which will be discussed below. After the 1977-1982 agreement, "the federal government would no longer offer additional tax room

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7 The equalization base increased to a basket of 20 revenue sources, increased to 21 sources in 1973. Moreover, in the 1972 agreement the federal government improved the stabilization package by guaranteeing the provinces 100% of the previous year's revenue (Burns 1977, p.55-6).
to the provinces. In fact, Ottawa was not in a position to offer the provinces additional resources in any form" (Perry 1997, p.99). In subsequent years, intergovernmental fiscal agreements "focused not on taxes but rather on equalization, stabilization, and established program financing. In the area of taxes, the emphasis in federal-provincial negotiations shifted from provincial demands for more tax room to increasingly technical discussions of the design of the system" (Perry 1997, p.99).

After the 1977 tax agreement, the provinces established their own income tax rates, although the federal government continued to collect the tax, except in Québec. Perry states that "Revenue Canada was, in effect, called upon to administer several different tax systems simultaneously" (Perry 1997, p.91). Although the provinces obtained greater latitude under the new arrangements, the principle of Canada's revenue system did not change. Perry explains:

[t]he federal government has been willing to accommodate the various provincial innovations because none of them affect the definition, fundamental to the existing collection agreements, of provincial tax as a tax on basic federal tax. The tax-on-tax approach limits provincial flexibility in designing income taxation to suit particular provincial needs but preserves the fundamental harmony of the joint federal-provincial system (Perry 1997, p.96).

"This approach," Perry concludes, "has not satisfied the provinces" (Perry 1997, p.96).

Intergovernmental fiscal relations in Canada stand in stark contrast to Switzerland. As Bird has noted, the federal-provincial tax-on-tax system is reminiscent of the canton-commune fiscal relationship in Switzerland (Bird 1987, p.51), which is not a relationship of sovereign governments. The federal government and the cantons in Switzerland, which are sovereign in their respective spheres of jurisdiction, maintain separate revenue pools. Where there is overlap in direct taxation, the cantons have retained their sovereignty and collect the tax on behalf of the federal government. This is manifestly not the case in Canada.
The structure of the Canadian constitution violates the federal principle. The federal government is permitted to raise revenue by *any* mode of taxation, while the provinces are only supposed to generate revenue from *direct* taxation. While the Fathers of Confederation may have envisioned that the federal government would only have collected *indirect* taxes, the constitution failed to create separate revenue pools for the two orders of government. The provinces were never accorded sovereignty in their constitutional spheres of jurisdiction, including taxation, and they were allocated insufficient sources of revenue to meet their constitutional responsibilities. These deficiencies remain to this day. Unlike the federal government in Switzerland, which has endured its fiscal limitations stoically, the federal government in Canada has expanded its fiscal capacities at the expense of the provinces in order to finance its social policy objectives. The government of Canada has not been inclined to tolerate the fiscal diversity that exists in Switzerland. Indeed, by contrast, Canadian fiscal relations appear "blandly homogeneous" (Bird 1987, p.41). This seems to negate the spirit of federalism, which is supposed to provide unity with diversity.

The structure of Canadian fiscal relations has generated considerable intergovernmental conflict, especially between the federal government and the province of Québec. The federal government and the provinces have had to compete for the same revenues. Both orders of government collect income taxes, corporate taxes, and sales taxes. This inevitably leads to conflict. The government of Québec, which is acutely cognizant of the strong nationalism in the province, has long resented the fiscal domination of the federal government. English Canadian nationalists tend to favour the establishment of a single, harmonized, tax system, with 'national' standards. Québec nationalists, on the other hand, have always wanted sufficient fiscal sovereignty to match their constitutional jurisdictions. The government of Canada has repeatedly denied this desire. Worse
still, the federal government's system of conditional grants has infringed on areas of provincial jurisdiction. As such, many Québec nationalists now reject federalism.

**Conditional Grants**

Prior to the twentieth century, all federal subsidies to the provinces were placed in general revenues and dispensed at the discretion of the provinces. Shortly after the turn of the century, the federal government initiated its first conditional grant. In this system of fiscal relations,

> [t]he funds are given to the provinces on condition that they spend equivalent or specified sums, maintain certain standards, and aim at specific objectives. The provinces undertake the actual administration of the activity and the federal government installs inspection and audit controls in an attempt to satisfy itself of proper application of the funds. This involves the establishment of fixed administrative relationships between the provinces and the Dominion and creates a problem of Dominion-Provincial cooperation (Corry 1939, p.9).

Conditional grants do not rectify the structural problem of insufficient revenue for the provinces, and it creates an opportunity for the central government to assume de facto legislative power in areas where it is not accorded constitutional authority. In short, conditional grants in Canada have made a poorly structured federation less federal.

The first conditional grant in Canada was created in 1913, for agricultural instruction. In 1918, after the First World War, conditional grants were provided for employment services, especially for veterans, and the following year grants were provided for highway construction, technical education, and the prevention of venereal disease. "These grants," however, "were either experimental or were given under extraordinary circumstances. Most of them were given but for a limited period of time" (GOC 1940a, p.131).

The propriety of conditional grants was debated vigorously in the 1920s. While some
supported the use of conditional grants as a means to improve provincial services, the opponents were concerned about fiscal propriety and the federal principle. The latter argued,

a government which spends public funds should bear the full responsibility of levying the taxes necessary to provide the money. They also emphasized that a harmonious federalism depended on the Dominion respecting the untrammelled independence of the provinces in their own sphere. They argued that attempts to ensure careful spending of federal funds would involve the Dominion in a dangerous interference with the autonomy of the provinces (GOC 1940a, p.131).

In short, the opponents of conditional grants were adherents of classical federalism and responsible government. This was the dominant view in the twenties, and consequently "the system of conditional grants was not extended and the subventions for agricultural instruction, highways, and technical education were allowed to lapse" (GOC 1940a, p.131).

Public pressure for social programs, however, increased during the 1920s, and especially in the 1930s. Pressure mounted first for an old age pension scheme. The First World War took the lives of so many young men, and permanently injured so many more, that the state was left with "an increasing number of needy aged who would otherwise have been supported by their sons" (GOC 1940b, p.17). While old-age security was constitutionally a provincial responsibility, the provinces feared that they did not have sufficient revenues to fund such an expensive program. Thus, in 1927, the federal government offered to assume financially responsibility for half the cost of old-age pensions, if the provinces agreed to supply and pay for the administration of such a plan. The poorer provinces still could not afford a pension plan, and the federal contribution to the program thus rose in 1930 to 75%. In 1930, the provinces contributed $6.1 million dollars to the pension scheme, while the Dominion contributed $5.6 (GOC 1940b, p.17). In sum, "without acquiring additional jurisdiction, the Dominion assumed heavy financial responsibilities for a costly function regarded
by the Dominion and the provinces alike as a provincial responsibility" (GOC 1940b, p.17).

The Great Depression forced all levels of government to provide unemployment relief, although each government attempted to evade responsibility. The provinces "tended to disclaim responsibility for unemployment relief on the plea that it was a municipal responsibility" (Grauer 1939, p.17), but the municipalities were even less able to finance such a costly program. The federal government consequently intervened and, it soon provided the most funds for unemployment relief (see, Table 7.2). The federal government, however, "made it clear that it had no constitutional obligation to share the costs of relief but was doing so simply because of the severity of the problem" (Grauer 1939, p.17). The federal government viewed this intervention as temporary, and was therefore only willing to enter agreements on an annual basis (Grauer 1939, p.37).

Table 7.2: Government Spending on Unemployment Relief (millions of dollars)

<table>
<thead>
<tr>
<th></th>
<th>Dominion</th>
<th>Provinces</th>
<th>Municipalities</th>
</tr>
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<tbody>
<tr>
<td>1930/1</td>
<td>3</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>1931/2</td>
<td>44</td>
<td>29</td>
<td>20</td>
</tr>
<tr>
<td>1932/3</td>
<td>49</td>
<td>26</td>
<td>19</td>
</tr>
<tr>
<td>1933/4</td>
<td>37</td>
<td>42</td>
<td>22</td>
</tr>
<tr>
<td>1934/5</td>
<td>64</td>
<td>57</td>
<td>21</td>
</tr>
<tr>
<td>1935/6</td>
<td>73</td>
<td>40</td>
<td>22</td>
</tr>
<tr>
<td>1936/7</td>
<td>66</td>
<td>38</td>
<td>29</td>
</tr>
<tr>
<td>total</td>
<td>336</td>
<td>241</td>
<td>136</td>
</tr>
</tbody>
</table>
(Source: Grauer 1939, p.16)

The old age pension scheme and assistance for unemployment relief were the only conditional grants in operation in the 1930s. The initial enthusiasm for conditional grants began to wane, when problems emerged with the implementation of the programs. Both orders of government quickly began to feel that "it would be better for one or the other to have complete jurisdiction and, if necessary, added financial resources to carry out its responsibilities" (Grauer 1939, p.40). The propriety of conditional grants was considered in detail by the Royal Commission on Dominion-
Provincial Relations.

The Rowell-Sirois Commission concluded that the experiment with conditional grants had been a failure. The Commission argued that the practice of conditional grants was, on the one hand, inimical to the federal structure of Canada and, on the other hand, not congruent with the principles of responsible government. The Commission stated,

> [t]he Dominion in respect to conditional subsidies had to impose either such rigid and detailed conditions (often unsuitable to local conditions), involving such minute inspection and regulation as to be a major infringement on provincial autonomy and practical only in a unitary state, or general conditions which were only nominally observed and no real check on any irresponsible expenditure (GOC 1940b, p.126).

The Commission argued it was very difficult to determine if the provinces were fulfilling the conditions of the grants they received. The federal audit did little to instil fiscal responsibility or ensure program performance.

Even as the inefficiency of conditional grants became more apparent, federal expenditure for conditional grants increased. In 1937, the federal government provided the provinces $14 million in statutory subsidies, $7 million in special subsidies, and a staggering $82 million for conditional grants, for a total of $103 million (GOC 1940b, p.126). Provincial revenue from other sources totalled $226 million. The various federal subsidies thus nearly equalled half of provincial revenue from other sources, and conditional grants alone accounted for about a quarter of all provincial revenue ($329 million). The Rowell-Sirois Commission argued, "[t]his enormous increase in expenditures for functions hitherto regarded as almost wholly the responsibility of the provinces (and their municipalities) has been primarily responsible for the breakdown in the fiscal independence of many municipalities and certain provinces during the past decade" (GOC 1940b, p.15).
The Commission surmised, "we are satisfied that for permanent purposes, the conditional grant, as it works under Canadian conditions, is an inherently unsatisfactory device" (GOC 1940a, p.259). The Commission also questioned the efficacy of concurrent jurisdiction:

The experience with conditional grants leads us to doubt whether joint administration of activities by the Dominion and province is ever a satisfactory way of surmounting constitutional difficulties. Where legislative power over a particular subject matter is divided, it is ordinarily desirable that these powers should be pooled under the control of a single government in order to secure unified effort in administration (GOC 1940a, p.259).

The Commission consequently recommended the discontinuation of conditional grants, and a partial redistribution of jurisdictional responsibility for social welfare.8

The Commission recommended that social services financed by individual contributions should be a Dominion concern. It thus recommended the transfer of unemployment relief and the old-age pension scheme to the exclusive domain of the federal government. The Commission's rationale was as follows: since unemployment insurance and old-age pension contributions were implemented as payroll taxes, companies would claim they were suffering a competitive disadvantage if some provinces were so taxed and others were not and "[i]f competitive disadvantage in any province became sufficiently serious, its industries might migrate to sheltered provinces" (1940, p.II-35). The Commission left welfare, family benefits, health, and education to the provinces.

On the question of revenue, the Commission recommended the elimination of conditional grants. The Commission quickly skirted the JCPC's ruling in the 1937 New Deal case. In the middle of an obscure footnote the commission inserted the comment, "[t]he constitutional validity of such grants is not entirely beyond doubt" (GOC 1940a, p.249; note 17). Given the Commission's opposition to conditional grants, it seems odd that they virtually ignored the judgement of the JCPC. Perhaps the nationalist outcry against the JCPC in English Canada made the Commission reticent about openly siding with the court. This case will be examined more closely below.
grants, and it suggested that the provinces should "surrender all existing subsidies" (GOC 1940b, p.86). It proposed, furthermore, that the provinces should forego all personal income and corporate taxes as well as succession duties (GOC 1940b, p.86). In exchange, "[t]he Dominion, while retaining its unlimited taxing powers, would recognize an obligation to respect the remaining revenue sources of the provinces" (GOC 1940b, p.86), although it was not clear what revenue sources would be left available to the provinces. The Commission conceded that some provinces might need additional revenue but it suggested that provincial revenue could be supplemented by unconditional "national adjustment grants," or what are now called federal equalization payments (GOC 1940b, p.83-4).

The Commission argued that "[t]he recommendations which have been described would, if implemented, safeguard the autonomy of every province by ensuring to it the revenue necessary to provide services in accordance with the Canadian standard. Every provincial government...would be placed in a better financial position than it is today" (GOC 1940a, p.273). Viewed through the lens of federal theory, however, the Commission's recommendations seem inconsistent. The proposed elimination of conditional grants accords with federal theory, but their tax scheme would have left the provinces with insufficient revenue to meet their constitutional obligations. In this regard, the Commission would have simply perpetuated the initial inadequacy of the BNA Act.

The federal government accepted the Commission's recommendations to eliminate conditional grants, at least in the short term. When Maurice Duplessis lost the provincial election in Québec in October 1939, the federal government seized the opportunity to amend the BNA Act and transfer responsibility for employment relief from the provinces to the Dominion. With the Liberal administration of Adélard Godbout firmly in control in Québec, Prime Minister Mackenzie
King was able to obtain unanimous provincial consent for this amendment and the British Parliament duly amended the constitution. In 1951, the constitution was amended again to make old-age pensions a concurrent jurisdiction. Duplessis, who was reelected in 1944, consented to this amendment after ensuring that it would not later prejudice a provincial age pension plan. Provincial paramountcy was thus maintained in the field of old age security.

The Resurrection of Conditional Grants

While the Rowell-Sirois Commission recommended the elimination of conditional grants, the federal government moved to establish a raft of new conditional grant programs after World War II. Over the next twenty-five years, in short, the federal government engaged in an unprecedented process of state building -- the development of a welfare state -- and equally unprecedented forays into areas of provincial jurisdiction. At the second post-war conference on reconstruction, in April 1946, Duplessis noted wryly, "the appetite of the Federal Government has increased. This is not a good sign" (GOC 1946, p.411). Québec nationalists resented this federal expansion into areas of provincial jurisdiction, and it may have contributed to the rise of Québec separatism.

Family Allowances

The Second World War had exacted a heavy toll on the Canadian family, especially children. The federal government consequently introduced a family allowance act in July 1945, without, however, consulting the provinces. The Family Allowance Act was a direct initiative of Prime Minister King (Blake 1995), and it may be regarded as "Canada's first universal welfare payment program" (Guest 1985, p.131). The government of Québec took deep exception to the federal initiative. The family was considered the fundamental social organization in pre-Quiet Revolution
Québec. All family legislation was considered to be an exclusive prerogative of the provincial government. Legal opinion provided to the government of Québec suggested the law was unconstitutional and "a dangerous infringement on provincial rights" (Québec 1956, p.173). The Tremblay Commission reports that Premier Duplessis was motivated to write "a letter to the Canadian Prime Minister protesting the federal initiative" (Québec 1956, p.173). The federal government responded to such criticisms by saying that the family allowance program did not amount to a "regulatory" scheme of any provincial matters and as individual citizens were not obligated to accept the payments, no civil rights were infringed. The federal government rationale thus conveniently skirted around the 1937 JCPC decision on the spending power.

Post-Secondary Education

After the Second World War, the federal government also initiated a very generous set of benefits designed to reintegrate demobilized soldiers back into Canadian society. Louis St. Laurent, the federal minister of justice, outlined the proposed veteran provisions at the Dominion-Provincial Conference on Reconstruction, held in Ottawa in August of 1945. Each demobilized soldier was entitled to a substantial cash gratuity prorated to time served in the armed forces. In addition, veterans could take advantage of a variety of resettlement programs, including employment assistance, vocational training, grants for the purchase of agricultural operations, or free university education. These benefits were included in the 1945 Veterans' Rehabilitation Act.

The universities, however, could not enrol a large number of veterans without financial assistance. As the provinces had rented their major revenue sources to the federal government, they were unable to provide universities the additional funds they required to educate demobilized soldiers. The federal government was thus forced to provide grants directly to universities. The
universities received $150 for each veteran registered (Coleman 1984, p.70). The government of Québec, normally prone to jealously guarding its autonomy, acquiesced to these grants as a temporary measure to assist the country's honourable war veterans. The federal grants constituted about 10-15% of university funding (Coleman 1984, p.70).

The veteran education grants, which began in 1945-6, were due to lapse in fiscal year 1951-2. As part of the post-war reconstruction project, the federal government established a Royal Commission on National Development in the Arts, Letters, and Sciences, chaired by Vincent Massey. The Massey Commission was asked to investigate a wide range of cultural issues including the question of funding post-secondary education. When the Massey Commission recommended the continuation of direct federal funding of universities after 1951, the government of Québec voiced its objections vigorously. The federal government accepted the Commission's recommendation and in June 1951 allocated $7.1 million for universities.

Duplessis allowed Québec universities to receive the federal grants in 1951, while he contemplated how to proceed. The following year he threatened to withdraw funding to any university that accepted the federal grant. Québec universities thus declined future federal grants. Consequently, "Québec taxpayers were forced to contribute to the costs of a federal program, the benefits of which they were unable to share in" (Carter 1971, p.87). Duplessis responded to the federal government's decision to continue direct funding of universities by announcing in February 1953 that Québec would hold a Royal Commission of Inquiry on Constitutional Problems, which was to be chaired by Judge Thomas Tremblay.⁹

⁹ Duplessis received support in this matter from unexpected quarters. Pierre Trudeau wrote in a 1957 Cité Libre article, "[s]omething is wrong somewhere. On the question of university grants, I find myself in disagreement with my friends and with people whose ideas I usually find congenial. On the other hand, I quite approve of some of the attitudes taken by Mr. Duplessis and the nationalists, with whom I am not in the habit of agreeing" (Trudeau 1968, p.79).
The following year Duplessis directly challenged the federal government when he imposed a personal income tax estimated at 15% of the federal income tax. Duplessis was only exercising the province's constitutional right to raise revenue by direct taxation, but "in the context of post-war Canadian federalism, Duplessis's legislation was seen to be radical" (Coleman 1984, p.72). Duplessis's bold initiative forced the federal government to renegotiate the general fiscal arrangements with the provinces. In the 1957-62 tax sharing agreements, the federal government doubled the provincial share of income tax to 10% and raised its corporate income tax share from 5% to 9% (see above). In 1960, the federal government reduced its corporation tax in Québec by a further 1%, thus giving the province an abatement space of 10%. This 1% abatement was approximately the value of the university grant Québec would have received had it accepted the federal university grant. With this agreement, Québec was able to finance its universities without federal assistance. By the mid-1970s, the federal government virtually dropped all conditionality in university funding (see below).

Health Care

Prior to the Second World War, health care was considered a private responsibility under the political jurisdiction of the provinces. The Rowell-Sirois Commission recommended that health remain in the purview of the provinces. Since the war, the federal government has been an active participant in the formation of Canada's public health system. The constitution, however, was never amended to permit federal government involvement in this area of provincial jurisdiction. Instead, the federal government thrust itself into the field of health care through its superior fiscal position and general dominance in Canadian public life.

At the August 1945 Federal-Provincial Conference on Reconstruction, Brooke Claxton, the
federal minister of National Health and Welfare, outlined the federal government's health care proposals. He acknowledged at the start that "[i]n Canada health services fall clearly within the jurisdiction of the provinces, which share their administrative and financial responsibilities in this connection with the municipalities" (GOC 1946, p.86) but, he hastened to add, "[i]t is believed that none of these proposals involves in itself any change in the constitutional jurisdiction or responsibility of federal or provincial governments under the BNA Act" (GOC 1946, p.89). The Health Insurance Proposal was, in Claxton's words, "designed to put provincial governments in a financial position to develop and administer a comprehensive health insurance programme worked out by progressive stages on an agreed basis" (GOC 1946, p.89). In December 1946, Paul Martin Sr. became the federal minister of health, and he was responsible for implementing the federal government's post-war health insurance initiatives. Malcolm Taylor reports that the "[p]rovinces were required to submit specific proposals for Ottawa's approval for the expenditure of all funds. Every project -- and there were thousands of them -- was announced by The Honourable Paul Martin" (Taylor 1978, p.16).

At the Federal-Provincial Conference, in October 1955, St. Laurent stated, that health

is a matter, of course, which under our constitution falls squarely within provincial jurisdiction. The Federal government does not wish to see this position altered; nor would it wish to be a party to a plan for health insurance which would require a constitutional change or federal interference in matters which are essentially of provincial concern. The Federal government recognizes, however, that there may be circumstances in which it would be justified in offering to assist provincial governments in implementing health insurance plans designed and administered by the provinces (GOC 1955, p.9; emphasis added).

The critical question here is under what circumstances would federal involvement in a provincial activity be justified? St. Laurent answered the question as follows:
In the view of the Federal government the condition prerequisite to federal support of provincial programme in respect of health insurance is that it can reasonably be shown that the national rather than merely [a] local sectional interest is thereby being served... in my view, so long as only one, two or three provinces, representing a distinct minority of the Canadian population, indicate their intention to proceed with health insurance, there can be little if any justification for the national government imposing taxes on all the Canadian people to share the cost of health insurance in those provinces. But if there were a substantial majority of provincial governments, representing a substantial majority of the Canadian people who were prepared to embark upon provincially administered health insurance schemes involving no constitutional change or interference in provincial affairs, but simply technical support and financial assistance from the federal authority, then the Federal government would be justified in participating in an increase in the capital assets of the Canadian people (GOC 1955, p.11; emphasis added).

With this logic, the federal government could have assumed responsibility for all provincial undertakings and negated the federal principle entirely. Despite St. Laurent's contention, the "national interest" is not defined in the constitution, and it is not explicitly a federal power. In effect, St. Laurent "declared" that health was a "national" issue, which consequently justified federal intervention, notwithstanding the constitution or the federal principle.10

In January 1956, Paul Martin announced the federal government's proposed hospital insurance plan. The federal proposal offered to pay for half the cost of hospital and diagnosis services, with the condition that the services be universally available to all citizens of the province (Taylor 1978, p.217). Although hospital insurance was a matter of provincial responsibility and the

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10 Section 92 (10) grants the provinces the ability to provide local works or undertakings, with some exceptions, including "such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces" (Section 92.10.c). The courts have distinguished between "works" and "undertakings." A "work" is understood to be a physical thing, a railway or building for example, and not a service, whereas an "undertaking" is understood as an "arrangement" or "organization" or "enterprise" (see Laskin 1969, p.505-6; Hogg 1985, p.492). The federal government may be able to declare a hospital or a university a "work," but it could not declare education or health services to be a "work" for "the general advantage of Canada."
The act was initiated as a shared program, the federal government assumed the dominant position in the field of health insurance. Taylor writes,

[t]he degree of control was extraordinary. Every essential requirement for the operation of a program was prescribed by the federal government. The provincial government would have to establish a hospital planning division; it must licence, inspect and supervise hospitals and maintain adequate standards; it must approve the purchase of furniture and equipment by hospitals; it must collect the prescribed statistics and submit the required reports and the provinces must make insured services available to all on uniform terms and conditions (1978, p.230).

The provinces were not enthusiastic about federal intervention in an area of provincial concern, but they did not have sufficient revenue to establish hospital insurance programs alone.

After the establishment of the federal hospital insurance act, the provinces reassumed the initiative, especially Saskatchewan once again. In December 1959, Premier Douglas announced his government's intention to create a provincial medical care insurance program. The program, which came into effect in 1962, was compulsory and universal and was the first comprehensive public health insurance plan in North America. The Saskatchewan scheme also revived the federal interest in medical insurance. The federal government passed the Medicare Act in December of 1966. The act was designed to bring universal medical insurance to all Canadians as and when the provinces negotiated agreements with the federal government. Under the Medicare Act, the federal government agreed to assume up to half the costs of provincial medical insurance programs.

Although the provinces were made responsible for the development and administration of medical insurance programs, the Medicare Act of 1966 established "broad federal guidelines" within which the provinces were to work. The provinces had to respect five conditions to be eligible for

11 The federal Liberal party had first promised a comprehensive medical insurance scheme in its 1919 election platform.
federal funds: 1) universality of coverage; 2) comprehensiveness of insured services; 3) accessibility; 4) portability; and 5) public administration (GOC 1981, p.105). Taylor argues these conditions did not represent a significant imposition on the provinces. Indeed, he argues that the Medicare Act was "not a federal program, but ten provincial programs that together with federal sharing would aggregate to a national program of uniform minimum standards for all Canadians" (1978, p.362). Carolyn Tuohy acknowledges that the "eligibility for provincial programs were very generally phrased" but she contends that "[t]he federal government's financial leverage under cost-sharing arrangements gave it a significant steering effect on the system" (Tuohy 1994, p.193). Québec objected to this encroachment into its constitutional sphere of authority and sought to extricate the province from federal tutelage, as we shall see below.

Old Age Security and Canada/Québec Pension Plans

In June 1963, the newly elected Liberal government in Ottawa announced its plan for a revised pension scheme. The government of Québec, however, had indicated its desire to create a provincial pension plan in 1962. Premier Lesage thus immediately informed Prime Minister Pearson of Québec's intention of pursuing its own plan (Simeon 1972, p.45-48). Québec was in a strong bargaining position because the constitutional amendment of 1951 had retained provincial paramountcy in the area of old age pensions. As such, the federal government would at least have to negotiate with the provinces before any plan could be implemented.

At the federal provincial conference, held in Québec City, in April 1964, Premier Lesage unveiled a proposed provincial pension plan that was far more generous than the federal government's proposed scheme (Simeon 1972, p.55). Prime Minister Pearson reportedly quipped that he would like to "opt-in" to the Québec plan (Simeon 1972, p.55). The federal government was
forced to redraft its plan to match the Québec proposal. After secret negotiations between the
governments of Canada and Québec, it was agreed that the two plans would operate independently
but they would also be nearly identical and fully coordinated. Québec was thus able to ensure
provincial paramountcy in the field of old age pensions.

The Canada Assistance Plan and Social Welfare

The Canada Assistance Plan (CAP) was introduced in April 1966. The plan amalgamated a
number of social assistance plans, notably the Unemployment Assistance Act (1956), Old Age
Assistance Act (1951), Blind Persons Act (1951), and the Disabled Persons Act (1954). These were
all means tested programs intended to support individuals who were either not covered or
insufficiently covered by existing programs. The Unemployment Assistance Act was intended
primarily for those who had exhausted their Unemployment Insurance benefits, while the Old Age
Assistance Act was extended to individuals aged 65-9 who needed financial assistance before being
eligible for a Canada pension at aged 70. The cost of these programs was shared on a fifty-fifty basis
between the federal government and provinces (Guest 1985, p.145-6). The CAP was intended to
improve administrative efficiency. In short, "CAP was not seen as a major innovation, but merely
as a 'tidying up' exercise in the wake of the CPP [Canada Pension Plan]" (Dyck 1995, p.328).

The CAP, however, also extended the dubious concept of conditional grants. As the CAP
was a consolidation of existing programs, rather than a new program initiative, it did not generate
the political pyrotechnics that were evident in the development of other programs, notably medicare
and pensions. The federal government, perhaps having learned a lesson from other conditional
programs, attempted to minimize the conditions attached to the Canada Assistance Plan. The CAP
insisted only that "a provincial assistance program must base eligibility for assistance on need alone,
irrespective of its cause, and must not make previous residence in the province a requirement" (Banting 1987, p.11). The CAP, however, was not entirely benign. Rand Dyck reports,

> [u]nder the Canada Assistance Plan one or more federal field representatives were appointed to be located in each provincial capital. These officials usually occupied an office in the midst of the provincial welfare department and were in constant communication with provincial welfare administrators. They had two main functions. One was to control the operation of the plan to ensure that the province carried out its responsibilities, met federal conditions, and made valid claims on the federal treasury. The other was a liaison function between the federal and provincial department, to advise both levels on issues raised, to report on current or expected developments in both directions, and to solve or minimize potential problems (Dyck 1995, p.333).

The placement of federal officials in provincial capitals to ensure that provincial legislation met federal conditions was a serious violation of the federal principle. While one observer has described the CAP as “the ultimate in cooperative federalism” (Dyck 1995, p.326), governments of Québec describe this encroachment into areas of provincial jurisdiction as "domineering federalism." The CAP may have signalled a new development in the evolution of the Keynesian welfare state in Canada, but it also signalled a continued erosion of provincial sovereignty and as such further alienated Québec.

**Conditional Grants: The Response in Québec**

The number and magnitude of conditional grants and shared-cost programs grew appreciably after the Second World War. Conditional grants increased from 19% of federal payments to the provinces in 1955, to 72% in 1965 (Moore *et al* 1966, p.112). In 1953, conditional grants constituted only 5.7% of provincial revenue, but by 1968 that figure had risen to 22.5% (Carter 1971, p.24--7). In 1969-70, conditional grants totalled $1.9 billion, two-and-a-half times the level of unconditional
grants (Carter 1971, p.1). In 1970, there were 79 separate conditional grant programs (Carter 1971, p.83). Conditional grants represented an infringement in areas of provincial jurisdiction and they seriously distorted provincial priorities. In short, conditional grants licensed federal intrusion in areas of provincial jurisdiction, undermining provincial sovereignty in social affairs. Québec took serious exception to this federal encroachment into the provincial domain.

After he became premier in 1960, Jean Lesage, following the Tremblay Commission, launched a trenchant critique of federal conditional grants. He explained that conditional grants "do not permit the provinces to use their own revenues as they wish nor to take local conditions sufficiently into account" (GOC 1960, p.130). He described such programs as "absolutely unacceptable to Québec" (1968, p.222), and he demanded the termination of joint federal-provincial initiatives. He acknowledged that these grants may have stimulated the development of social programs but, he said, "these programs are now sufficiently well established on the provincial scale to enable the Federal government to cease taking part in them and to vacate these fields" (GOC 1960, p.130). He added, of course, that it would be necessary for the federal government to provide full financial compensation to the provinces for the additional costs assumed by them. "In the meantime," he declared, "the government of the Province of Québec...is taking the necessary to steps to accept, on a temporary basis, and without prejudice to its full sovereignty, all the conditional grants that is not now receiving but which are made to the other provinces by the Federal government. We have in mind particularly Hospital Insurance and the Trans-Canada highway" (GOC 1960, p.130). In the six years that he was the premier, Lesage fought relentlessly against federal conditional grants and shared cost programs.

At the federal-provincial conference in November 1963, it was obvious that the federal
government was on a collision course with Québec. While Pearson was reportedly conciliatory, Lesage arrived combatively with "a thirty member delegation and a fifty-page brief" (Thomson 1984, p.378). Lesage reiterated his demands for a 25-25-100 apportionment of the major tax fields and for termination of shared-cost programs. He also challenged the federal government on its proposed pension and medical programs. When Lesage could not extract adequate fiscal resources from the federal government, he insisted that another conference would have to be held before the next Québec budget. The first ministers agreed to meet in Québec City on March 31st and April 1st 1964.

By all accounts the Québec City conference was incendiary. The conference took place in the shadow of the FLQ bombings of the previous year and with nationalist students protesting outside the Québec legislature where the first ministers were meeting. Pearson arrived at the conference ready to discuss the principles of conditional grants and shared-cost programs and, he said, he was willing "to consider whether some of the shared programs should now be changed, with federal withdrawal and a full assumption of provincial responsibility" (GOC 1964, p.5). The federal government proposed that it would provide the provinces income tax abatement points for the larger programs and cash adjustments for the smaller programs. The federal government insisted, however, that if a province opted-out of a shared cost program it would be obliged to continue a similar program with 'national' (read federal) standards (Moore et al 1966, p.87).

Lesage renewed his demand for a new fiscal arrangement. He insisted the principal tax fields must be shared 25-25-100; for Québec, he asserted, "these demands represent a strict minimum" (GOC 1964, p.12). He also reiterated his demand that shared-cost programs be terminated:

[1]he constitutional problem brought up by joint programmes is serious. In practice, the existence of these programmes reduces the initiative of the provinces in the spheres of activity which the constitution recognizes their own and it even distorts the order of
priority which the provinces would like to establish in their own expenditures (GOC 1964, p.17).

The electrifying confrontation atmosphere led many federal officials and journalists to believe they were witnessing a crisis that threatened the continuation of confederation (Simeon 1972, p.56).

Between April and August 1964, Québec and the federal government withdrew from the brink and sought to negotiate a mechanism by which Québec could extricate itself from shared cost programs. The government of Québec was determined to obtain the fiscal resources to fund its own programs. Furthermore, although the provinces possessed the constitutional jurisdiction for most social programs, Québec was forced to negotiate for the political authority to govern its own social programs. Claude Morin has said in his memoirs that "Québec negotiators always clearly told their federal opposite numbers that the exercise of the right to contract out only made sense to the extent that it pointed to complete independence in these areas" (Morin 1976, p.14; emphasis added). The federal government was willing to transfer the necessary fiscal resources, if an appropriate mechanism could be devised, but it was determined to retain its ability to establish program standards.

In a letter to Lesage, dated August 15, 1964, Pearson presented the federal government's final proposals. Perry reports that "[t]he letter outlined an interim or transitional arrangement under which Québec or any other province that wished to contract out would continue to provide the relevant services according to the agreements then in force, furnish the federal government with an accounting of the expenditures incurred, and continue to participate in federal-provincial consultation and coordination" (Perry 1997, p.213). The offer included up to 20 tax abatement points, 23 if one includes compensation for family allowances, to any province opting-out of all
federal shared cost programs.\textsuperscript{12} Cash payments were offered for a variety of smaller programs.

While this offer was not entirely satisfactory to the government of Québec, it accepted the proposal reluctantly. The details of the proposal, and the principle of opting-out, were enshrined in the Established Program (Interim Arrangements) Act of 1965. Québec was the only province to exercise this right and it immediately opted-out of 29 federal-provincial shared cost programs (Black 1975, p.142).\textsuperscript{13} Most notably, Québec opted-out of the hospital insurance program, as well as old-age assistance and welfare. When these latter programs were amalgamated in the Canada Assistance Plan, "[t]he contracting-out option was transferred to the new program, and Québec maintained its independent status" (Perry 1997, p.215). Québec thus received a 4\% income tax abatement space in lieu of the CAP. At the same time, Québec created a provincial pension plan separate from the Canada Pension Plan. Québec was thus able, at least partially, to extricate itself from the new welfare state created by the federal government and establish its own system of welfare.

After two decades of objections, Québec had managed to slow the federal juggernaut. Jacques Parizeau remembered the moment recently with affection and said, "with Jean Lesage we withdrew from 29 shared cost programs the same day; by god, it was quite a time."\textsuperscript{14} Claude Morin was much more pessimistic. He argued that while the opting-out arrangements were heralded as a "great triumph for cooperative federalism," it represented a pyrrhic victory for Québec. He maintained that the only thing that had changed was "Ottawa's financial participation." He

\textsuperscript{12} The offer included 14 points for hospital insurance, 2 points for old age assistance and blind and disable persons allowances, 2 points for the welfare portion of unemployment assistance, 1 point for vocational training, and 1 point for various health grants (Perry 1997, p.213). Perry notes that the old age assistance and welfare points were merged with the establishment of the Canada Assistance Plan.

\textsuperscript{13} After opting-out of all the shared cost programs, Québec obtained a 47\% income tax abatement space.

\textsuperscript{14} Interviewed by Pamela Wallin, CBC Newsworld, December 18, 1997.
continued,

[now, rather than simply receiving cheques from Ottawa, Québec could itself collect an increased number of points of personal income tax. The federal government had vacated the desired fiscal territory. At the same time the terms governing the shared cost programs were preserved in their entirety (Morin 1976, p.14).

He concluded, "Québec extracted no new powers from the operation and moreover [it] failed to limit that of the federal government" (Morin 1976, p.16).15

While the opting-out plan negotiated with the Pearson government did not provide Québec the fiscal or political assurances it was seeking, the government of Québec could satisfy itself that these provisions were only enacted into law as an "interim arrangement." However, "because contracting out of joint programs has not advanced beyond the interim stage, the sole contracting-out province, Québec, has had no greater flexibility in administration or program design than the other provinces" (Perry 1997, p.224). Although Québec has not significantly enhanced its autonomy by opting-out of shared cost programs, the federal government became increasingly concerned in the 1970s, especially after the rise of the Parti Québécois, that Québec had a sort of de facto separate status. The federal government was also concerned about escalating costs. In its effort to reestablish the provinces on the same footing, and to control spending, the federal government sought to alter the means by which fiscal resources were transferred to the provinces.

In the 1977 federal-provincial tax agreement the federal government introduced a new financing mechanism for established social programs. Under the new Established Program

15 Daniel Johnson, Lesage's successor, reiterated this point even more forcefully a few years later. He informed the Federal-Provincial Tax Structure Committee, "Québec will not enter any new shared-cost plans in fields of exclusive provincial jurisdiction...Let this point be understood once and for all: for social and cultural reasons, Québec absolutely insists on full respect for its fields of jurisdiction under the constitution; federal interference in these fields, direct or indirect, will not be tolerated" (GOC 1966, p.51).
Financing Act (EPF), federal payments for post-secondary education, hospital insurance, and medicare were transferred to the provinces in a single block. The federal contribution was equally composed of additional tax points and cash transfers. The provinces would in turn be responsible for dividing the block between the three programs, according to their own needs and priorities, "subject to a requirement that they maintain loosely defined national standards in these areas" (Perry 1997, p. 173). In 1996, the Canada Assistance Plan was folded into the Established Program Financing Act, and the entire package was renamed the Canadian Health and Social Transfer (CHST).

David Perry has argued that with the EPF and the CHST the federal government gained some control over the level of spending, but lost some control over how the money was spent (Perry 1997, p. 173). He adds, "[t]he shift from EPF to the CHST reduced federal cash transfers to the provinces and increased provincial flexibility in what had been the last major area of cost-sharing on the original basis, social welfare. Its net effect, therefore, was a further reduction in Ottawa's ability to impose national standards on the provinces" (Perry 1997, p. 263). The federal government has been able to eliminate its deficit in the 1990s by reducing the cash transfers in the EPF and CHST, but it has maintained significant degree of program control, especially in health care.

In 1984, the federal government introduced the Canada Health Act, which consolidated the Hospital Insurance and Diagnostic Services Act and the Medical Care Act. As a result of escalating

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16 Perry argues that the CHST was really just "an extended version of the EPF program, and it retained EPF's combination of cash payments and tax point transfers" (1997, p. 263). Ronald Watts has tried to estimate the degree of conditionality in Canadian transfer payments. He has determined that if the EPF transfers are considered to be conditional, then 63% of all federal transfers to the provinces are conditional. But, if EPF transfers are not considered conditional, then only 25% of total federal transfers are conditional. He argues, furthermore, "[t]he proportion of total state or provincial revenue made up by federal conditional transfers provides one significant measure of the constraints upon state or provincial autonomy... In Canada, if the EPF transfers are classified as conditional, the figure for 1991 would be 11.86 percent but if they are classified as unconditional it would be 3.99% (lowest among all federations)" (Watts 1996, p. 45).
costs and declining budgets, many hospitals introduced user fees and a number of doctors began billing patients directly for sums over and above the provincial fee schedule, a practice that became known as "extra-billing." Many people believed that extra-billing was contrary to the spirit of medicare. Thus, over the objections of the provinces,

the federal government moved to eliminate such charges through the passage of the Canada Health Act (Bill C-3). This act stipulated that federal payments to the provinces would be reduced, on a dollar-for-dollar basis, by the amount of user charges by hospitals and extra billings by physicians. Direct federal prohibition was impossible because, constitutionally health care is a provincial responsibility (Vayda and Deber 1995, p.317).

The federal initiative represented a unilateral alteration of the existing EPF arrangements, and a reassertion of federal dominance in health care. The provinces, especially Québec, objected to the federal government's renewed intrusion into the provincial domain.

Claude Ryan, the former leader of the Québec Liberal Party and one of the most moderate politicians in the province, has argued,

[i]n its original version Bill C-3 gave the federal government the right to define what constitutes mandatorily guaranteed services; to define adequate access to health services; to involve itself in delineating pay scales for doctors; to impose standards for its own visibility on the provinces; and to exercise increasingly predominant powers in the allocation of resources. The provinces were more or less relegated to the position of simple providers of services (Ryan 1985, p.211).

Pierre-Marc Johnson, the former leader of the Parti Québécois and premier of the province, voiced his objections concerning the Canada Health Act to the Senate Committee on Bill C-3. Johnson, quoted in a chapter by Claude Ryan, stated that "Bill C-3 in all its absurdity institutionalizes a system one can only describe as almost designed to create federal-provincial conflict.....The amendments made to Bill C-3 do not answer Québec's major claims in this regard" (1985, p.212). Ryan continues
himself by saying, "[t]here should....be no question whatsoever of subjecting the provinces to any kind of federal tutelage with respect to the provision of health care. Doing so would be a step backward. The federal government's recent claims in this area contravene the principle of federalism" (Ryan 1985, p.213; emphasis added). He concluded, "[o]ne can only deplore this inopportune, arbitrary, and abusive federal legislation" (Ryan 1985, p.212).

While the intention of the EPF arrangement may have been to reduce the federal conditions on the provinces, the Canada Health Act undermined that intention. Under the CHST, The federal government continues to influence provincial social programs. Alberta is now engaged in a war of wits with the federal government over health care. The federal government has threatened to withdraw funding from Alberta if the latter proceeds to introduce private health insurance alongside the public program. Furthermore, the federal government imposed penalties on British Columbia, under the CAP/CHST, when it imposed a six-month residency requirement on individuals applying for social welfare. The federal government thus continues, in violation of the federal principle, to influence programs that are clearly in the provincial domain. The federal government is able to wield this influence because the provinces remain dependent upon federal cash transfers, to the tune of twelve billion dollars per year, to fund social programs. Québec has objected strenuously to this structural deficiency in Canadian federalism and it has fought vigorously over the past two decades to constrain the federal spending power.

**The Spending Power and the Erosion of the Federal Principle**

In the two and a half decades following the end of the Second World War, the federal government vigorously pursued the development of a comprehensive welfare state. The government of Canada wanted to create a Keynesian social welfare state, but it failed to develop a Keynesian
theory of federalism. The federal government planned to pursue its policies of economic 
reconstruction without constitutional amendment or judicial review. Instead, it hoped to persuade 
the provinces to cooperate with federal objectives or coerce them financially. Federal ambitions, 
however, were continually challenged by Québec's insistence on provincial autonomy. The federal 
government was thus forced to develop a constitutional justification for its interference in areas of 
provincial jurisdiction. In the late 1960s, it settled on "the spending power."17

The federal government defined the term "spending power" as "the power of parliament to 
make payments to people or institutions or governments for purposes on which it (parliament) does 
not necessarily have the power to legislate" (Trudeau 1969a, p.4). The federal parliament has, in 
short, declared its right to spend money in areas outside its sovereign jurisdiction. Peter Hogg asks, 
"[w]hat is the constitutional basis for federal grants to the provinces and for federal involvement in 
shared-cost programs which are outside federal legislative competence?" He suggests,

[...]the only possible basis is the spending power of the federal 
Parliament, a power which is nowhere explicit in the Constitution Act 
of 1867, but which must be inferred from the powers to levy taxes 
(s.91(3)), to legislate in relation to 'public property' (s.91(1a), and to 
appropriate federal funds (s.106). Plainly the Parliament must have 
the power to spend the money which its taxes yield and to dispose of 
its own property. But of course the issue is whether this spending 
power authorizes payments for objects which are outside federal legislative competence (Hogg 1985, p.124; emphasis added).

The Canadian Bar Association has described, rather feebly, the constitutional legality of the federal 
spending power as "uncertain" (1981, p.1).18

17 The federal government's position was outlined in three documents, Lester Pearson (1968) Federalism for the 

18 The Canadian Bar Association Submission on Established Program Financing to the Parliamentary Task Force on 
the Federal and Provincial Fiscal Arrangements, Ottawa, May 14th, 1981.
The federal government has insisted that its spending power may be inferred from Sections 91 (1a) and (3) (Trudeau 1969, p.12). The JCPC, however, rejected that argument in its 1937 decision on the Employment and Social Insurance Act. Lord Atkin wrote towards the end of his judgement, "[i]t only remains to deal with the argument....that the legislation can be supported under the enumerated heads, 1 and 3 of s.91, of the British North America Act, 1867" (1982, p.116). Atkin allowed that the federal government may collect revenue by any mode of taxation, but, he continued, assuming the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s.92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence...If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid (1982, p.117).

Bora Laskin has noted the obvious: Atkin's "statement has not had any noticeable effect upon Dominion spending" (Laskin 1969, p.667).

In light of the court's decision, the federal government has tried to defend the spending power as "gift-giving." Peter Hogg suggests that there might be some merit to this position:

It seems to me that the better view of the law is that the federal government may spend or lend its funds to any government, or institution, or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses,

\[19\] The federal government derived the gift-giving idea from the minority judgement of Chief Justice Duff in the 1936 Employment and Social Insurance Act case. Duff wrote, "it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or accept it subject to such conditions" (quoted in Trudeau 1969, p.12). The JCPC, as noted above, rejected the argument of Chief Justice Duff and upheld the majority decision of the Supreme Court.
including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan, or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects (Hogg 1985, p.126).

Hogg notes that it is constitutional for the federal government to provide money to the provinces; indeed, federal statutory subsidies to the provinces are written into the constitution. Scott has argued forcefully that "[g]enerosity in Canada is not unconstitutional" (Scott 1977, p.297). However, as Trudeau noted long before he entered public office, "governments may give donations only within the limits of the constitution" (Trudeau 1968, p.89).

Even if the gift giving argument could be shown to be constitutionally legal, there can be no justification for forcing a donee who declines a gift to abide by the conditions attached to the gift as if the donee had accepted the gift. This is precisely the situation that pertains in the opting-out arrangements. Peter Hogg admits as much himself:

All of these opting out arrangements bind the opting-out province to

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20 Scott argues, "[a]ll public monies that fall into the Consolidated Revenue Fund of the federal and provincial governments belong to the Crown. The Crown is a person capable of making gifts or contracts like any other person, to whomsoever it chooses to benefit. The recipient may be another government, or private individuals. The only constitutional requirement for Crown gifts is that they must have the approval of Parliament or legislature. This being obtained the Prince may distribute his largesse at will. Such gifts, of course, do not need to be accepted; the donee is always as free to reject the gift as the donor to offer. Moreover, the Crown may attach conditions to the gift, failure to observe which will cause its discontinuance. These simple but significant powers exist in our constitutional law though no mention of them can be found in the BNA Acts. They derive from doctrines of the Royal Prerogative and the common law" (1977, p.296).

21 This argument was made in his famous article, "Federal Grants to Universities," first published in Cité Libre, February 1957.
continue established programmes without significant change, or in the case of new programmes to establish or continue comparable provincial programmes. All that opting out really involves is a transfer of administrative responsibility to the province. It does not give the province the freedom to deploy resources which would otherwise be committed to the programme into other programmes. The province gains little more than the trappings of autonomy: the federal government 'compensation' to an opting-out province is really just as conditional as the federal contribution to participating provinces (Hogg 1985, p.123).

The fact that the federal government has allowed Québec to opt-out of certain fiscal arrangements and social programs could be interpreted as a tacit admission that the spending power is unconstitutional and a violation of the federal principle.

The federal government has circumvented the constitution and the judicial interpretations of the spending power by employing a narrow definition of legislation. The federal government reasons that parliament has "the power to spend from the Consolidated Revenue Fund on any object, providing the legislation authorizing the expenditures does not amount to a regulatory scheme falling within provincial powers" (Trudeau 1969, p.12; emphasis added). Peter Hogg, however, admits that "if...federal funds are granted on condition that the programme accord with federal stipulations, then those stipulations will effectively regulate the programme even though it lies outside federal legislative authority" (Hogg 1985, p.123). And Donald Smiley has written, "[a]lthough it is not within my competence to judge the constitutionality of the various uses of this power...it appears to a layman to be the most superficial sort of quibbling to assert that when Parliament appropriates funds in aid of say, vocational training or housing, and enacts in some detail the circumstances under which such moneys are to be available that Parliament is not in fact legislating in such fields" (Smiley 1968, p.73). The constitutionality of the federal spending power seems to rest tenuously on legal semantics.
In a political sense, the federal government has "justified" the spending power, and its interference in areas of provincial responsibility, as serving the "national interest." The federal government reasons, "because the people of Canada will properly look to a popularly elected Parliament to represent their national interests, it should play a role with the provinces, in achieving the best results for Canada from provincial policies and programmes whose effects extend beyond the boundaries of a province" (Trudeau 1969, p.34; emphasis original). The federal government concluded, "[i]t is in the nature of federalism, in other words, for the citizen to look to Parliament for an expression of his national or extra-provincial interests" (Trudeau 1969, p.34). The spending power is the "vehicle," argues the government, "by which the 'national interest' in the level of general provincial public services or of a particular public source can be expressed" (Trudeau 1969, p.30). The idea of "national standards" for social programs is a corollary of the "national interest" justification for the spending power.\footnote{The federal government proposed that it would only introduce new conditional grants for federal-provincial programs if there was "a broad national consensus in favour" of the program (GOC 1969a, p.38). The federal government suggested that a "national consensus" would exist if three of the four Senate regions supported a particular program initiative. By this scheme, a "consensus" could conceivably exist with as few as five provinces agreeing to the initiative. If Ontario, two western provinces, and two of Nova Scotia, New Brunswick or Newfoundland supported an initiative, the federal government would conclude that "a national consensus" existed for the program. This formula would obviously do little to reassure Québec.}

The notion of a national consensus and national standards implies the presence of only one nation. This is highly problematic in a multinational society, and it has been particularly disconcerting to the government of Québec. Many Québécois find the notion of national standards doubly offensive. First, they believe it represents an imposition of the standards held by the 'English Canadian nation' on the Québécois nation. That is a subjective feeling. Second, and more concretely, they argue that federal government is imposing standards in areas of provincial

...
jurisdiction. The provinces, many argue, should be able to determine their own standards in areas of provincial jurisdiction. At the very least, argues Claude Ryan,

'national standards' should be governed by an agreement among the governments concerned. The concrete search for these standards must be effected in ways that fully respect provincial sovereignty (Ryan 1985, p.218; emphasis added).

Note how Ryan must qualify the concept of national standards with inverted commas.\(^{23}\) While Québécois cannot speak about national standards (in a Canadian sense), Canadians outside Québec have come to insistent upon country-wide standards for social programs. Indeed, many of these social programs, notably health care, seem to have become part of the national identity of English Canadians. English Canadian nationalism has thus triggered nationalist resentment in Québec.

Despite the concerns expressed by the government of Québec, the federal government appeared to be unfazed. Indeed, it argued, "there seems to have been little disposition on the part either of the federal or provincial governments to seek further judicial clarification of the matter [i.e. the spending power]....Only governments of Québec have advanced the more general proposition that it was constitutionally improper for Parliament to use its spending power to make grants to persons or institutions or governments for purposes which fall within exclusionary provincial jurisdiction" (Trudeau 1969a, p.14; emphasis added). Québec's opposition to the spending power, however, is a political problem; indeed, Québec's frustration with the fiscal arrangements in Canada has taken the country to the brink of dissolution. The federal spending power has consequently been central to the constitutional negotiations designed over the past thirty years to keep Québec in confederation.

The government of Québec, led by Robert Bourassa, sought to define and limit the federal

\(^{23}\) Louis Bathazar expands upon this point when he writes, "[t]he very tendency to use the word 'national' to refer to a federal government reflects a trend toward a kind of federation in which federated states are hardly more than junior governments or administrative units" (Balthazar 1998, p.108).
spending power in the 1971 Victoria Charter. While Bourassa did not object to adding "family, youth, and occupational training allowances" to the realm of concurrent jurisdiction in Section 94A, he was determined to ensure that provincial supremacy in these areas would be meaningful. Pierre Trudeau apparently feared that "the constitutional change proposed by Québec would, over the years, lead to an erosion of federal income security programmes and their replacement by purely provincial plans" (quoted in Forget, 1986, p.124). Claude Forget, however, argued that "Québec was not attempting to deny the existence of the federal spending authority, but rather to restrict the exercise of this authority in such a way as to make social allowances paid to citizens by the federal government consistent with provincial social policies" (Forget 1986, p.125). When Bourassa was unable to obtain the assurances he desired on this matter, he withdrew his support for the agreement. When Bourassa was replaced by René Lévesque as the premier of Québec in 1976, separatism dominated the political discourse in the province until the mid-1980s when Bourassa made a triumphant return to power. In the ensuing two episodes of megaconstitutional politics, Bourassa tried again to define and delimit the federal spending power.

The Meech Lake Accord appeared to provide Premier Bourassa everything he had been seeking in the Victoria Charter with regards to federal spending. The Accord proposed a constitutional amendment to insert a new Section 106A to the Constitution Act, 1867, to read:

(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in

24 Article 44 of the Victoria Charter proposed that Section 94A of the BNA Act be amended with the italicized words: "The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits including survivors' and disability benefits irrespective of age, and in relation to family, youth, and occupational training allowances, but no such law shall affect the operation of any law present or future of a Provincial Legislature in relation to any such matter."
an area of exclusive provincial jurisdiction, if the province carries on
a program or initiative that is compatible with the national objectives.
(2) Nothing in this section extends the legislative powers of the
Parliament of Canada or of the legislatures of the provinces.

Again, the government of Québec did not try to eradicate the spending power, only its use.

Although the Meech Lake Accord only institutionalized the status quo, Premier Bourassa was
pleased with the spending power provisions in the Accord. He told the National Assembly,

[w]ith respect to the federal spending power, we have obtained the
best possible framework for its exercise through a guarantee of
flexibility and respect for provincial areas of jurisdiction. The
exercise of the federal spending power has for the past 30 years been
a zone of constant friction between the federal government and the
provinces. Québec has always vigorously denounced the unilateral
exercise of this spending power, which has been the equivalent of
actual constitutional amendments made de facto to the division of
areas of legislative jurisdiction (quoted in Trudeau 1988, p.139).

As Bourassa explained, "[t]he new section 106(A) is drafted so that it speaks solely of the right to
opt out, without either recognition or defining the federal spending power...So Québec keeps the
right to contest before the courts any unconstitutional use of the spending power" (quoted in Trudeau
1988, p.139-140).

The Meech Lake Accord drowned on June 23, 1990, after treading water for three years.
The Accord had encountered much criticism, not least of which were vigorous claims that it would
lead inevitably to a "decentralized" federation with a concomitant diminution of Canada's social
programs. In the next round of megaconstitutional talks, Bob Rae, the newly elected premier of
Ontario, sought to reverse this "trend." Rae was particularly adamant that the next constitutional
agreement had to include a constitutionally entrenched social charter. In the Charlottetown Accord,
the governments of Canada committed themselves to "the principle of the preservation and
development of the Canadian social and economic union.\textsuperscript{25} The terms of the economic and social union were non-judicable; the statement was supposed to reflect commonly held Canadian values.

Despite the non-judicable nature of the social and economic union, its presence in the Charlottetown Accord symbolized the attachment of Canadians, especially outside Quebec, to social programs and the federal role in governing these programs. The framework established in the Charlottetown Accord for the expenditure of government money similarly reflected the growing appreciation of an activist central government. The spending power provisions of the Charlottetown Accord were stated as follows: "The government of Canada and the governments of the provinces are committed to establishing a framework to govern expenditures of money in the provinces by the government of Canada in areas of exclusive provincial jurisdiction that would ensure, in particular, that such expenditures a) contribute to the pursuit of national objectives..." (GOC 1992, p.47).\textsuperscript{26} This enunciation of the federal spending power, rather more in accordance of the views of Canadians outside Quebec, clearly enshrined the federal government's practice of intervening in areas of provincial jurisdiction. This was a tremendous setback for Premier Bourassa and made the Accord all that more difficult to sell in Quebec. Since the death of the Charlottetown Accord, the debate in Quebec has centred on sovereignty and the province's separation from Canada.

All of the means by which the federal government has tried to justify the spending power

\textsuperscript{25} The social union was intended to obtain the following objectives: "a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible; b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities; c) providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education; d) protecting the rights of workers to organize and bargain collectively; and e) protecting, preserving and sustaining the integrity of the environment for present and future generations." The objectives of the economic union were to include "the free movement of persons, goods, services and capital; the goal of full employment; ensuring that all Canadians have a reasonable standard of living; and ensuring sustainable and equitable development" (GOC 1992).

\textsuperscript{26} Charlottetown Accord, Draft Legal Text, October 9, 1992.
have been inadequate. The JCPC ruled that the spending power was *ultra vires*; the gift-giving argument is tenuous at best; and justifying the spending power as in the national interest is highly problematic in a multinational federation. Even if the federal government was able to prove the constitutionality of the spending power in a court of law, there cannot be any doubt that it violates the federal principle. As Lord Atkin concluded, if the federal spending power was constitutional, it "would afford the Dominion an easy passage into the Provincial domain" (1982, p.117). In short, the federal spending power has made a charade of provincial sovereignty.

The desire for sovereignty is an integral characteristic of nationalism. The various governments of Québec, federalist and separatist alike, have objected strenuously to the erosion of provincial sovereignty, especially the realm of social policy. Claude Ryan argues forcefully,

> [p]rovincial sovereignty in the fields of health and higher education must be clearly recognized and respected. Sovereignty here means primary and exclusive provincial jurisdiction over hospital and health insurance programs and the structure and management of higher education. Federal funding of these programs must not serve as a means of encroaching on areas of decision that are within the exclusive jurisdiction of the provinces (Ryan 1985, p.218).

The federal government has steadfastly ignored this essentially federalist message from Québec and consequently many Québécois now reject federalism.

In sum, the federal spending power, styled as the hallmark of cooperative federalism, has been an instrument of federal domination. It has allowed the federal government to enter provincial areas of jurisdiction with impunity. Canadians, outside Québec at least, have come to regard the federal government as the guarantor of (provincial) social programs. It seems that Canadians have come to expect the collector of taxes, the federal government, to be responsible for the provision of cherished programs. Only in Québec, which collects its own taxes, do the citizens turn to the
provincial government as the guarantor of their social services. Many Québécois now believe that the locus of sovereignty ought to reside in Québec City, while Canadians outside Québec believe that sovereignty properly resides in Ottawa. This is a case of diverging nationalism; the multinational Canadian federation has become unhinged.

The *raison d'être* of federalism is to allow diversity to flourish amongst the provinces in areas of provincial jurisdiction. To insist upon uniformity of social policy in areas of provincial jurisdiction, as the federal government has done, undermines the essence of federalism. The desire for national standards in provincial social programs by Canadians outside Québec offends many Québécois. When one views the legacy of the spending power, one is tempted to pose Walker Connor's old question and ask if the federal government has engaged in "nation-building or nation-destroying?"\(^27\)

**Conclusion**

The structure of Canadian fiscal federalism has been quasi-federal from the outset. At the time of Confederation, the provinces were not allocated sufficient sources of revenue to meet their constitutional obligations. The provinces were thus immediately dependent upon financial subsidies provided by the federal government. This structural deficiency stems from a constitution that did not enshrine the federal principle. Although the JCPC endeavoured to provide the provinces jurisdictional sovereignty, the fiscal arrangements between the federal government and the provinces did not move any closer to the federal principle. Indeed, the three pillars of fiscal federalism in Canada in the twentieth century -- the tax collection agreements, conditional grants, and the federal spending power -- all violate the federal principle. Since the late 1960s, fiscal relations in Canada

have only become more confused. It does not seem coincidental that the separatist movement arose in Québec during this time; indeed, these events are causally related.

The federal principle suggests that the two orders of government in a federation should maintain separate revenue pools. The tax collection agreements in Canada have amalgamated the various revenue sources into a single pool and essentially created a unitary tax system. Unlike Switzerland, which has maintained separate tax fields, the two orders of government in Canada have been forced to compete for the same resources. Edgar Benson, the federal finance minister in the late 1960s, seemed to indicate that this was a satisfactory arrangement:

> [t]he application in the Constitution of the 'principle of access to revenue sources' should result in virtually *unlimited* powers of taxation being granted to both the federal and provincial governments, each within its jurisdiction. Parliament should have the power to tax all persons, incomes, property and transactions (sales and purchases) in Canada, and each province should have the same powers within the province (Benson 1969, p.16; emphasis added).

The position of the federal government is flawed: two orders of government cannot have *unlimited* powers of taxation if they are sharing the same tax fields. Conflict is inevitable in such a system. While Québec has been able to opt out of the tax collection agreements, the structural deficiency of Canada's taxation system has remained unaltered. The federal government and the provinces are still competing for the same tax sources.

The system of conditional grants, which was developed after the Second World War, has also distorted the federal principle in Canada. The government of Canada wanted to create a Keynesian social welfare state, but it failed to develop a Keynesian theory of federalism. The federal government attempted to pursue its post-war development of the welfare state with financial enticements or coercion of the provinces, instead of constitutional amendment or judicial review.
The government reasoned it was not always possible to amend the constitution:

this 'either-or' approach -- either it is federal jurisdiction or it is not -- does not meet the situations so prevalent in today's society, where there is a solid national interest in certain provincial problems or policies, but not such a 'total' national interest as to call for the transfer of jurisdiction to the Parliament of Canada. It is for these 'in-between situations' that some such vehicle as federal-provincial programmes, involving on occasion the spending power, is required (Trudeau 1969, p.30-2).

While all the provinces have resented this blurring of the federal principle and intrusion into their sphere of jurisdiction, the reaction in Québec has been qualitatively different. As a province with a distinct national identity, Québec has regarded these intrusions as a violation of its sovereignty, not just not a fiscal disagreement. Québec eventually opted-out of all the important shared-cost programs but not without a struggle. Furthermore, Québec has been compelled to establish programs of a comparable nature. In short, the social agenda in Québec has been determined in good measure by the federal government, much to the consternation of successive governments of Québec.

The federal government, in short, stopped thinking federally in the late 1960s. It argued that "[t]he case for a federal spending power for the purpose of enabling Parliament to contribute toward provincial programmes in fields of provincial jurisdiction is to be found in the very nature of the modern federal state" (Trudeau 1969, p.20). The government argued further that "[t]he modern industrial state is so interdependent, particularly in technological and economic terms, and its population is so mobile, that it has become quite impossible to think of government policies and programmes as affecting the people within the jurisdiction of the particular government responsible for these policies" (Trudeau 1969a, p.22). The federal government consequently rejected federalism as system of government with divided sovereignty:

It can be argued that the Constitution should be contrived so as to
avoid any need for a spending power -- that each government ought to have the revenue sources it needs to finance its spending requirements without federal assistance, and further that where the national interest comes to attach to a certain matter within provincial jurisdiction the Constitution ought to be amended to transfer that matter to federal jurisdiction. The difficulty with this tidy approach to federalism is that it does not accord with the realities of a Twentieth Century state (Trudeau 1969, p.30; emphasis added).

Various governments in Québec have tried repeatedly since the Second World War to have the structure of fiscal relations in Canada conform to the federal principle. In the above passage, the federal government seems to concede to the Québec separatists that federalism does not and cannot work. Many Québécois have thus abandoned the federal project in favour of independence.
Chapter 8

Fiscal Federalism in India:

Paternalism in Action
The structure of centre-state relations in India is such that the states have insufficient resources to meet their constitutional responsibilities. Successive finance commissions have devolved more and more taxes to the states but the states continue to have insufficient revenue to meet their expenditures. Indeed, as the states have been forced to borrow from the centre to meet their revenue-expenditure gap, they have amassed a considerable debt owed to the centre. India's fiscal relations, as with its legislative relations, thus violate the federal principle. The constitutional and fiscal subordination of the states to the centre has been a major source of conflict in India.

Centre-state fiscal relations in India have been further strained by the extra-constitutional and extra-parliamentary role played by the Planning Commission. The Constituent Assembly envisioned that the Finance Commission would be responsible for the division of revenue. With this in mind, the Assembly made provision in the Constitution for the Finance Commission. The Planning Commission was formed in 1950 by executive fiat; it does not have constitutional authority; it does not even have the sanction of law, as the matter was never considered by Parliament. Now, however, the Planning Commission is responsible for a larger transfer of resources from the centre to the states than the Finance Commission. This is accomplished rather dubiously by Article 282, the first "miscellaneous" financial provision mentioned in the Constitution. In short, the entire planning process has further subverted the structurally flawed design of centre-state fiscal relations in India. This in turn has further upset centre-state relations in India.

**Indian Fiscal Federalism: The Constitutional Scheme**

The financial provisions of the Indian constitution were derived almost wholly from the 1935
Government of India Act.¹ The details of India's fiscal relations are enumerated in Articles 264 through to 293 of the Constitution. Revenue sources emanate from the division of powers itemized in List I (union powers) and II (state powers) of the Seventh Schedule. While there are shared taxes, no revenue sources are included in the concurrent list, although all residual taxes are assigned to the federal government. The Constitution outlines a four-fold scheme of revenue collection:

1) Duties levied by the Union but collected and appropriated by the States, e.g. stamp and medicinal duties (Article 268).
2) Taxes levied and collected by the Union but assigned to the States, notably estate duties and railway taxes (Article 269).
3) Taxes levied and collected by the Union and distributed between the Union and the States, e.g. income tax (Article 270).
4) Taxes which are levied and collected by the Union and may be distributed between the Union and the States, e.g. custom and excise duties (Article 272).

The Sarkaria Commission explained that "[t]he basic principle followed in the constitution in the division of taxation powers between the Union and the states is that tax on production, with a few exceptions, is levied by the Union and on sale by the state governments" (GOI 1988a, p.270).² The distribution of revenues between the centre and the states is determined by a Finance Commission appointed by the President every fifth year, under Article 280 of the constitution.

Despite this elaborate constitutional creation, Ambedkar conceded that "the provinces are very largely dependent for their resources upon grants made to them by the Centre" (GOI 1949a,

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¹ Good overviews of fiscal relations in colonial India are found in a number of official and non-official sources. See Gledhill (1951), Alexandrowicz (1957), Pylee (1965), Austin (1966), Grewal (1974), and especially Chanda (1965, chapter four). See also the First Finance Commission Report (GOI 1952), Report of the Study Team on Centre-State Relations, Administrative Reforms Commission (GOI 1967), and the Sarkaria Commission on Centre-State Relations (GOI 1988).

² At another point, the Sarkaria Commission noted that "[a]location of the heads of taxation between the Union and the states is based on the broad principle that taxes which are location-specific and relate to subjects of local consumption have been assigned to the states. Those taxes which are of inter-state significance and where the tax payer can gain or evade tax by shifting his habitat, or where the place of residence is not a correct guide to the true incidence of tax, have been vested in the Union" (GOI 1988a, p.253).
While many members of the Assembly were concerned about the level of provincial resources, few were concerned about the creation of a proper federal fiscal system. Austin reports,

"[i]n twenty memoranda from provincial governments to the Assembly about sales tax and on the distribution of revenues, each placing the strongest possible claims for increased funds, no government couched its demands in terms of protecting its autonomy or of 'state rights.' Nor, with one or two exceptions, did members of the Assembly stand up in the House and claim that for the proper working of the federal system the provinces should control sufficient sources of revenue to be able to meet their budgetary needs (Austin 1966, p.216).

"This," as Austin says, "could hardly be called a traditional defence of provincial autonomy" (1966, p.187). In short, Austin states bluntly, "[o]ther parts of the Constitution may demonstrate the unique aspects of Indian federalism...but none fly so directly in the face of the classical federal tradition as the provisions for the distribution of revenues" (1966, p.217).

These deviations from the classical tradition, in regard to fiscal relations, are consistent with the tenor of the Indian constitution. The reasons for it are not difficult to ascertain. First, the Constituent Assembly relied heavily on the 1935 Government of India Act which, at best, was quasi-federal. Second, the provinces were not sovereign, or even semi-sovereign, political entities. Third, Indian leaders were determined to vest sovereignty solely in Parliament and to create a strong executive authority to deal with the crises facing the country at independence. Finally, the entire political system was dominated by a single party. The Congress party created a system amenable to its own political structure. This quasi-federal system, however, has proven to be incompatible with the multi-party system that has evolved in the past thirty years.

The Finance Commission

The Finance Commission was proposed by the Constituent Assembly's Expert Committee
on Finance. It was enshrined in Article 280 of the Constitution. The Commission is formed every five years upon the recommendation of the President. It is charged with the responsibility of dividing shared taxes, allocating the state share of those taxes, and determining grants-in-aid. The Finance Commission operates as a quasi-judicial authority, with powers similar to the courts. The creation of the Finance Commission was intended to reassure the states that the allocation of revenue would be determined impartially. However, parliamentary sovereignty was retained; parliament may reject the recommendations of the Finance Commission by simply providing an "explanatory memorandum" as to why a recommendation has not been accepted. Parliament has indeed rejected Finance Commission recommendations on three occasions (GOI 1988a, p.290).

The various Commissions have followed many of the norms established by the first Commission. First, the finance commissions have shown a general desire to meet state revenue needs from the devolution of taxes, rather than grants. Second, grants-in-aid have largely been intended to close gaps in "normal" expenditure and revenue after devolution. A number of states, especially the poor hill states, have continued to exhibit large revenue gaps, even after devolution. Subsequent commissions thus began addressing more squarely the question of fiscal equalization to redistribute modestly the wealth of the country from the wealthier states to the poorer states. The commissions, over time, also became economically more sophisticated.

The various commissions were invariably influenced by the political and economic conditions of the day. The First Commission had the task of operationalizing the parameters of the commission's mandate. The Second Commission was hampered by the process of states reorganization. The projections of the Fourth Commission were immediately nullified by "[t]he hostilities with Pakistan, sudden cessation of American aid, [and the] devaluation of the rupee" (GOI
1969, p.14). These commissions attempted to tackle these problems without an apparent partisan bias. On occasion, however, some commissions appeared to adopt a partisan slant.

The Sixth Commission, which was appointed after Mrs. Gandhi's triumphant electoral victory of 1971, explicitly directed itself towards Mrs. Gandhi's "garibi hatao" policy. It wrote, "[t]he approach to the Fifth Plan has recognized, among other things, the importance of an appreciable increase in the social consumption for [the] elimination of poverty" (GOI 1973, p.8; emphasis added). This Commission was also infused with an overt Indian 'nationalism.' The commissioners stated emphatically, "[i]n our scheme of devolution of resources to the states, we have taken the view that the resources belong to the nation and they should be applied at points where they are most needed" (GOI 1973, p.7; emphasis added). The Eighth Commission had similar nationalist overtones. The orientation of these two commissions is inimical to India's multinational character.

Such an overt bias towards the centre can only provoke conflict with peripheral nationalities.

The Eighth and Ninth Commissions were chaired by members of the Lok Sabha, Y. B. Chavan and N. K. P. Salve respectively. The Expert Committee on Financial Relations of the Constituent Assembly recommended, for the sake of expertise and impartiality, that the chair of the Finance Commission ought to be at least a "Judge of a High Court" (GOI 1948/9, p.68). Previous chairs of the Commission were former state governors and chief ministers and thus obviously well connected to the Congress party, but the elevation of Members of Parliament to the chair of the finance commission gives the appearance of strong central bias.

Whereas the Expert Committee on Financial Relations of the Constituent Assembly

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3 The Eighth Commission, wrote, "[t]he crux of the problem is that the resources are limited and the needs of the states are enormous...The overriding consideration which has guided this Commission is the national interest taken as a whole. Ultimately the solutions we have chosen have been judged on this touchstone" (GOI 1984, p.7; emphasis added).
recommended that the finance commissioners should be appointed for five year terms, renewable for a further five years (GOI 1948/9, p.68), the average commission has lasted only sixteen months. The shortest Commission, the third, lasted twelve months and the longest, the ninth Commission, only twenty-four months. Almost every Commission has deplored the lack of administrative support for its work, and most have recommended that a permanent administrative apparatus be established to support the commission's work, if not a permanent Commission.4

The main text of the Ninth Commission Report seems to support the vigorous note of dissent by one its members opining that "the Constitution envisages a permanent Finance Commission to be reconstituted every five years" (GOI 1989, p.41). Central government resistance to this idea has thus far been strong. The Sarkaria Commission, without compelling justification, stated emphatically "[w]e are, therefore, of the view that there is no need for a permanent Finance Commission" (GOI 1988a, p.285). Why the Union government has been so hesitant to strengthen the constitutionally sanctioned work of the Finance Commission remains an open question. One may speculate that the Union government has been reluctant to establish an agency that might challenge the authority of the Planning Commission, hitherto one of the main priorities of the Union government.

Trends in Union-State Finance

The Sarkaria Commission review of Union-state fiscal relations led to three conclusions:

1) The Union has been raising the major part of the combined resources;
2) The growth-rate in States' own revenues, given the initial small

4 The First Commission wrote, "[o]ur experience as the first Commission has impressed us with the need for a small organization being set up, preferably as part of the secretariat of the President, to make a continuous study of the finances of the state governments so that whenever the Commission are [sic] constituted in the future, they will have sufficient material available to them at the very commencement of their enquiry" (GOI 1952, p.110).
Their first conclusion is unassailable. Indeed, the Seventh Finance Commission indicated that the
centre's tax revenue constitutes about $2/3$ of the total, while the states only collect about $1/3$ (GOI 1978, p.61). Table 8.1 below shows the overwhelming, and increasing, importance of excise and
customs duties for central revenue. These taxes comprised about $60\%$ of the centre's revenue in
1951-2, but now account for about $77\%$. The Sarkaria Commission stated, amazingly, that
"[a]\textit{p}proximately $85\%$ of the union's tax revenues are collected from offices located in eight port and
metropolitan cities situated in seven maritime states and one union territory" (GOI 1988a, p.272).

Table 8.1: Union and State Revenue Sources

<table>
<thead>
<tr>
<th></th>
<th>1951-52 (Rs Crores)</th>
<th>Percentage of total tax revenue</th>
<th>1984-85 (Rs Crores)</th>
<th>Percentage of total tax revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Union</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income tax</td>
<td>145.99</td>
<td>28.5%</td>
<td>927.66</td>
<td>8.2%</td>
</tr>
<tr>
<td>Corporation</td>
<td>41.41</td>
<td>8.1%</td>
<td>2,555.90</td>
<td>10.9%</td>
</tr>
<tr>
<td>Excise Duties</td>
<td>85.78</td>
<td>16.7%</td>
<td>11,150.84</td>
<td>47.5%</td>
</tr>
<tr>
<td>Customs</td>
<td>231.69</td>
<td>45.2%</td>
<td>7,040.52</td>
<td>30.0%</td>
</tr>
<tr>
<td>Total</td>
<td>512.65</td>
<td>100.0%</td>
<td>23,470.59</td>
<td>100.0%</td>
</tr>
<tr>
<td><strong>State</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Land Tax</td>
<td>48.87</td>
<td>21.3%</td>
<td>318.41</td>
<td>2.6%</td>
</tr>
<tr>
<td>Sales Tax</td>
<td>59.04</td>
<td>25.8%</td>
<td>7,028.94</td>
<td>56.9%</td>
</tr>
<tr>
<td>Excise</td>
<td>50.14</td>
<td>21.9%</td>
<td>1,857.36</td>
<td>15.0%</td>
</tr>
<tr>
<td>Motor Vehicles</td>
<td>9.89</td>
<td>4.3%</td>
<td>704.55</td>
<td>5.7%</td>
</tr>
<tr>
<td>Entertainment</td>
<td>8.94</td>
<td>3.9%</td>
<td>360.07</td>
<td>2.9%</td>
</tr>
<tr>
<td>Total</td>
<td>229.05</td>
<td>100.0%</td>
<td>12,342.81</td>
<td>100.0%</td>
</tr>
</tbody>
</table>


The second conclusion reached by the Sarkaria Commission, while true, must be qualified.
State revenues have been rising at about the same pace as Union revenues, as indicated by Table 8.2. The second item in the table, growth of transfers, confirms the Sarkaria Commission’s third conclusion. The steady growth of state revenue, however, is misleading. As the equally high growth of transfers would indicate, the growth of state revenue has not been able to keep pace with expected state expenditure. In short, the states have not had sufficient resources to meet their constitutional obligations. The states have consequently become more dependent on the Union government.

Table 8.2: Annual Growth of Union and States Resources, 1951-52 to 1984-85

<table>
<thead>
<tr>
<th></th>
<th>Revenue Account</th>
<th>Capital Account</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Resources</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Union and States)</td>
<td>13.43%</td>
<td>11.49%</td>
<td>12.80%</td>
</tr>
<tr>
<td>Union (Before Transfers)</td>
<td>13.76%</td>
<td>11.51%</td>
<td>12.83%</td>
</tr>
<tr>
<td>(After Transfers)</td>
<td>13.05%</td>
<td>12.03%</td>
<td>12.58%</td>
</tr>
<tr>
<td>States (Own Resources)</td>
<td>12.86%</td>
<td>11.75%</td>
<td>12.67%</td>
</tr>
<tr>
<td>(After Transfers)</td>
<td>13.74%</td>
<td>10.77%</td>
<td>13.04%</td>
</tr>
<tr>
<td>2. Transfers</td>
<td>15.60%</td>
<td>10.30%</td>
<td>13.67%</td>
</tr>
</tbody>
</table>

Source: GOI 1988, p.323.

While the states have required, and received, about half the total of combined Union and state revenue (GOI 1988a, p.322), their own share of the combined revenue has slipped from 33.3% in 1951-56 to 28.5% in 1980-85. In fact, as the Table 9.3 indicates, the state share has averaged only 28.7% in this period, meaning that it has quite often been lower. The 1978-80 period marked an all-time low, at only 18.7%. In sum, the weak fiscal position of the states has declined over the years since independence, reinforcing the quasi-federal nature of the Indian political system.
Table 8.3: Aggregate Resources

<table>
<thead>
<tr>
<th>Plan Period</th>
<th>1 Union (Before Transfers)</th>
<th>2 Union (After Transfers)</th>
<th>Transfers</th>
<th>3 State (Own Resources)</th>
<th>4 State (After Transfers)</th>
<th>5 Union/State Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951-56</td>
<td>4,495</td>
<td>3,188</td>
<td>1,307</td>
<td>2,241</td>
<td>3,548</td>
<td>6,736</td>
</tr>
<tr>
<td></td>
<td>(67.7)</td>
<td>(47.3)</td>
<td>(19.4)</td>
<td>(33.3)</td>
<td>(52.7)</td>
<td>(100)</td>
</tr>
<tr>
<td>1956-61</td>
<td>9,181</td>
<td>6,652</td>
<td>2,529</td>
<td>3,214</td>
<td>5,743</td>
<td>12,395</td>
</tr>
<tr>
<td></td>
<td>(74.1)</td>
<td>(53.7)</td>
<td>(20.4)</td>
<td>(25.9)</td>
<td>(46.3)</td>
<td>(100)</td>
</tr>
<tr>
<td>1961-66</td>
<td>17,104</td>
<td>12,387</td>
<td>4,717</td>
<td>5,703</td>
<td>10,420</td>
<td>22,807</td>
</tr>
<tr>
<td></td>
<td>(75.0)</td>
<td>(54.3)</td>
<td>(20.7)</td>
<td>(25.0)</td>
<td>(45.7)</td>
<td>(100)</td>
</tr>
<tr>
<td>1966-69</td>
<td>14,660</td>
<td>10,325</td>
<td>4,335</td>
<td>5,485</td>
<td>9,820</td>
<td>20,145</td>
</tr>
<tr>
<td></td>
<td>(72.8)</td>
<td>(51.3)</td>
<td>(21.5)</td>
<td>(27.2)</td>
<td>(48.7)</td>
<td>(100)</td>
</tr>
<tr>
<td>1969-74</td>
<td>33,290</td>
<td>22,046</td>
<td>11,244</td>
<td>14,404</td>
<td>25,648</td>
<td>47,694</td>
</tr>
<tr>
<td></td>
<td>(69.8)</td>
<td>(46.2)</td>
<td>(23.6)</td>
<td>(30.2)</td>
<td>(53.8)</td>
<td>(100)</td>
</tr>
<tr>
<td>1974-78</td>
<td>52,659</td>
<td>37,454</td>
<td>15,205</td>
<td>22,296</td>
<td>37,501</td>
<td>74,955</td>
</tr>
<tr>
<td></td>
<td>(70.3)</td>
<td>(50.0)</td>
<td>(20.3)</td>
<td>(29.7)</td>
<td>(50.0)</td>
<td>(100)</td>
</tr>
<tr>
<td>1978-80</td>
<td>39,382</td>
<td>25,465</td>
<td>13,917</td>
<td>15,870</td>
<td>29,787</td>
<td>55,252</td>
</tr>
<tr>
<td></td>
<td>(71.3)</td>
<td>(46.1)</td>
<td>(25.2)</td>
<td>(18.7)</td>
<td>(53.9)</td>
<td>(100)</td>
</tr>
<tr>
<td>1980-85</td>
<td>174,756</td>
<td>118,725</td>
<td>56,031</td>
<td>69,640</td>
<td>125,671</td>
<td>244,396</td>
</tr>
<tr>
<td></td>
<td>(71.5)</td>
<td>(48.6)</td>
<td>(22.9)</td>
<td>(28.5)</td>
<td>(51.4)</td>
<td>(100)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>345,527</td>
<td>236,242</td>
<td>109,285</td>
<td>138,853</td>
<td>248,138</td>
<td>484,380</td>
</tr>
<tr>
<td></td>
<td>(71.3)</td>
<td>(48.8)</td>
<td>(22.6)</td>
<td>(28.7)</td>
<td>(51.2)</td>
<td>(100)</td>
</tr>
</tbody>
</table>

(figures: Rs crores)
(Parentheses: percentage of combined revenues)
Source: GOI 1988, p.322.

If the data in Table 9.3 is reworked, it may be seen that the states' own sources of revenue as a percentage of its total revenue after Union transfers has declined from 63.2% in the first period,

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Columns 1 plus 3 equal total revenue (column 5) before transfers, and columns 2 plus 4 equal total government revenue (column 5) after transfers. Note that there is a mistake in line one: columns 1 plus 3 equal 101% of total revenue. The mistake exists in the original source.
to 55.4% in the last period, with an average of 55.95% for the total time period. As the growth in transfers indicates the states have become financially more dependent upon Union largesse than when they started after independence (see, Table 8.4). Instead of a progressive federalization of the country, as might have been expected, there has been an increase of Union fiscal dominance. With the states less able to finance their constitutional areas of jurisdiction, their political autonomy has been eroded.

Table 8.4: Transfers from the Union to the States, 1951-52 to 1984-85 (Revenue Account)

<table>
<thead>
<tr>
<th>Plan Period</th>
<th>Share in Taxes</th>
<th>Grants (A.275)</th>
<th>Grants in lieu of other taxes</th>
<th>Other Grants</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951-56</td>
<td>348</td>
<td>24</td>
<td>64</td>
<td>166</td>
<td>02</td>
</tr>
<tr>
<td>1956-61</td>
<td>670</td>
<td>153</td>
<td>78</td>
<td>558</td>
<td>1,459</td>
</tr>
<tr>
<td>1961-66</td>
<td>1,195</td>
<td>292</td>
<td>84</td>
<td>1,023</td>
<td>2,594</td>
</tr>
<tr>
<td>1966-69</td>
<td>1,271</td>
<td>422</td>
<td>48</td>
<td>1,100</td>
<td>2,841</td>
</tr>
<tr>
<td>1969-74</td>
<td>4,547</td>
<td>737</td>
<td>77</td>
<td>3,166</td>
<td>8,527</td>
</tr>
<tr>
<td>1974-78</td>
<td>6,313</td>
<td>2,068</td>
<td>65</td>
<td>3,703</td>
<td>12,149</td>
</tr>
<tr>
<td>1978-80</td>
<td>5,361</td>
<td>927</td>
<td>33</td>
<td>3,808</td>
<td>10,129</td>
</tr>
<tr>
<td>1980-85</td>
<td>23,522</td>
<td>2,020</td>
<td>116</td>
<td>16,408</td>
<td>42,066</td>
</tr>
<tr>
<td>Total</td>
<td>43,227</td>
<td>6,643</td>
<td>565</td>
<td>29,932</td>
<td>80,367</td>
</tr>
</tbody>
</table>

(Rs. crores)
(Source: GOI 1988a, p.322).

As suggested above, the escalating resource transfers from the centre to the states indicate a growing dependence of the latter on the former. The states' ability to finance their revenue expenditure from their own resources declined from 74.1% in the first plan period to 60.2% in the sixth plan period, 1980-85 (GOI 1988a, p.327). The increased reliance on Union resources, including shared taxes, has served to erode state autonomy and it caused the states to become financially dependent on the central government. This is a violation of the federal principle and it
has severely strained centre-state relations in India. Before continuing, it is important to review the history of shared centre-state revenue.

**Income Tax**

Income tax, from sources other than agricultural income, is levied and collected by the Union government, but Article 270 stipulates that the proceeds must be shared with the state governments, as determined by the Finance Commission. While revenue derived from income tax has increased from Rs. 145.99 crores in 1951-52 to Rs. 1,927.66 crores in 1984-85, a thirteen-fold increase, it has slipped from being the second most important source of tax for the Union government to the fourth leading source of revenue (GOI 1988a, p.259). Whereas income tax constituted 28.5% of Union government revenue in the first period, it accounted for only 8.2% of revenue in the second period (GOI 1988a, p.259). This is largely as a result of the outstanding increase in Union excise duties, which have increased by a factor of 130. It is estimated that income tax is paid by only 1% of the population. This staggering fact is a result of poor collection, a largely informal economy, and because agricultural income tax is a state revenue source (see below).

The First Finance Commission was not initiated until some two years after the promulgation of the constitution. In the interim, "the States' share of income tax and its distribution and the payment of grants-in-aid under Articles 273 and 275 of the Constitution had to be regulated by Order of the President" (GOI 1952, p.24). At this time, the states were awarded 50% of income tax. This followed the award pattern determined by the British after the implementation of the 1935 Government of India Act. The First Finance Commission encountered a near unanimous demand from the states to raise their share of income tax to at least 60% (GOI 1952, p.70-1). The Commission thus recommended that the state share of income tax should be raised to 55%. The
Commission adopted a simple and rather conservative formula for distribution. It recommended that 20% of the states' share of income tax should be distributed among the states on the basis of tax collection and that the remaining 80% would be divided on the basis of population, according to the 1951 census (GOI 1952, p.76). The Second Commission raised the state share of income tax to 60%. As to the allocation of the tax, however, the Second Commission concluded that collection could not be considered an "equitable basis of distribution" (GOI 1957, p.40). It thus recommended that income tax be distributed 10% on the basis of collection and 90% on the basis of population.

The Finance Act of 1959 reclassified income tax paid by companies as "corporation tax," thus removing it from the pool of divisible taxes, much to the displeasure of the states. The states appealed to the Third Finance Commission to raise the state share of income tax as compensation for the reduced size of the divisible pool. The demands ranged from 70% to 90%. The Third Finance Commission was broadly sympathetic to the states' concerns but only recommended raising the state share of income tax to 66.6%. As for the distribution of income tax, the Third Commission reverted to the 80/20 formula adopted by the First Commission. The Third Commission reasoned that income tax, sans corporation tax, was almost wholly of local origin thus there ought to be a greater reward for the collection of the tax.

As the states continued to experience a serious gap between revenue and expenditure, the Fourth Finance Commission recommended that the states should receive 75% of income tax, divided 80% on the basis of population and 20% on the basis of collection (GOI 1965, p.18-9). The Fifth Finance Commission did not alter the states' share of income tax, but recommended that the redistribution formula of the Second Commission be adopted, dividing income tax 90% on the basis of population and 10% on the basis of collection (GOI 1969, p.24). The Sixth Finance Commission
felt compelled by the states' continuing revenue-expenditure gap to increase the state share of income tax to 80%, divided by the 90/10 formula (GOI 1973, p.12). The Seventh Finance Commission faced similar pressures and consequently recommended increasing the state share of income tax to 85%, again divided by the 90/10 formula (GOI 1978, p.63). The Eighth and Ninth Finance Commissions maintained the state share of income tax at 85%, despite persistent demands from the states for an enlargement of their share.

While the Eighth and Ninth Finance Commissions did not alter the state share of income tax, they worked assiduously to improve the progressiveness of the distribution formula. Income tax was hitherto distributed among the states largely on the basis of population with a small reward for collection. None of the states seemed particularly pleased with this formula. The contributor states -- Punjab, Maharashtra, and Gujarat -- all wanted a higher portion distributed on the basis of contribution, whereas the poorer states opposed the contribution variable. Many states were also opposed to population as the major determinant of allocation and recommended other variables such as level of development, backwardness, proportion of tribals and scheduled castes, area, infrastructural requirements and the like (GOI 1984, p.42).

The Eighth Finance Commission moved to distribute income tax according to a progressive equalization formula, similar to the distribution of excise taxes (see below). The Eighth Commission determined that income tax should be distributed 10% on the basis of contribution, 45% to the distance from the per capita income of the highest state multiplied by population, 22.5% by

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6 The Eighth Commission acted on the note of dissent from Dr. Raj Krishna appended to the Seventh Finance Commission Report. "We agree," wrote the Eighth Commission, "with Dr. Raj Krishna that 'there is no legal or economic basis for allocating shareable income tax revenue and excise revenue according to different criteria.' There is great force in his dissent where he says: 'it cannot be argued that progressivity should be a feature of the inter-state distribution of excise revenue but not of the inter-state distribution of income tax revenue'" (GOI 1984, p.44).
population, and 22.5% to the inverse of per capita income multiplied by population of the state (GOI 1984, p.44). The Ninth Finance Commission slightly revised this formula. It divided the last item in half such that 11\(\frac{1}{4}\)% would be distributed "on the basis of a composite index of backwardness," and 11\(\frac{1}{4}\)% "on the basis of the inverse of per capita income multiplied by the population of the state in 1971" (GOI 1989, p. 18).

The move to greater equalization has been a positive development for the less developed states, and an irritant for the wealthier states, which resent contributing more taxes than they receive in return. But this more progressive distribution of income tax cannot disguise the fundamental structural problem in centre-state fiscal relations: the states do not have sufficient and independent sources of revenue to meet their constitutional obligations. The states are thus beholden to the centre to meet their expenditure requirements. Despite the fact that 85% of income tax is redistributed to the states, the centre has refused to recognize this tax source as essentially a state prerogative and, in fact, has been rather niggardly concerning a variety of miscellaneous state grievances.

The Eighth and Ninth Commissions received demands from all the states for the sharing of corporate income tax and the Union surcharge on income tax. The states contend, with justification, that these Union revenue sources adversely affect the revenue position of the states. The Eighth Commission noted that "similar arguments by the states were put forward before the Third Finance Commission and have been repeated before all succeeding Commissions" (GOI 1984, p.41). The Union corporation tax and the surcharge on income tax are clearly constitutional, but the Eighth Commission strongly suggested to the central government that "for the sake of amicable centre-state

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7 The Union government has exploited Article 271 and imposed a surcharge on income tax, anywhere from 12\(\frac{1}{2}\)% to 15% at different times, and have thus minimized the loss from their shrinking share of this tax. Income tax penalties and interest recoveries, furthermore, have not been shared with the states because the Law Ministry has determined that they are not income tax per se.
relations it should reconsider the indefinite continuance of the surcharge" (GOI 1984, p.41). Further, it wrote, "[a]s regards corporation tax, the grievance of the states is even stronger...it is important to remove this major irritant in centre-state relations. Corporation tax has shown a high elasticity and it would seem only fair that the states also should have access to such a source of revenue" (1984, p.41). The benefits derived from clinging to these minor resources do not seem to be greater than the friction in centre-state relations caused by the Union government's intransigence.

Excise Duties

The Constitution indicates in Article 272 that excise duties "may" be shared with the states "if Parliament by law so provides." Prior to the First Finance Commission, excise duties were maintained exclusively by the Union government but the First Commission concluded that the financial position of the states was so precarious that they would have to receive a portion of the country's excise duties. The First Commission's reward, however, was modest. At the time, excise duties were applied to twelve commodities and the Commission determined that the states should receive 40% of the proceeds derived from duties applied on tobacco products, matches, and vegetable products. The state share of these duties was distributed among the states on the basis of population (GOI 1952, p.80).

The Second Commission expanded the pool of divisible duties to include proceeds derived from sugar, tea, coffee, paper and non-essential vegetable oils, in addition to tobacco, matches, and vegetable products (GOI 1957, p.43). While enlarging the pool of divisible excise duties, the Second Commission reduced the state share from 40% to 25%. Despite the reduction of share, the states stood to gain greater revenue by virtue of the larger pool. The pool was to be divided 90% on the basis of population with an additional 10% adjustment to assist disadvantaged states.
The Third Finance Commission expanded the divisible pool of excise duties to include a total of 35 commodities, with a 20% share allocated to the states. The Fourth Finance Commission, concerned that the states still had insufficient revenue, took the bold step of granting the states a 20% share of all excise duties. The Fourth Commission advanced a number of reasons for its decision. First, the Commission suggested there was a need to coordinate Union excise policy with state sales tax laws. Second, it was argued that the states would be better protected from fluctuations in commodity prices by expanding the pool to the maximum size. In this manner, downward fluctuations in some commodities could have a better chance of being offset by upward fluctuations in other commodities. Relatedly, if it was understood that the states did not have a share in the revenue generated by all commodities, the states could be vulnerable to the Union government altering excises from shareable to non-shareable commodities. The Commission also felt the states should benefit from excises imposed on new commodities developed between Finance Commission reports. Finally, the Commission noted that "[a]s the commodities covered by the Union excise duties are of country-wide consumption, there is no justification for selecting only a few of the commodities for sharing" (GOI 1965, p.25).

The Fourth Finance Commission also moved to improve the progressiveness of the excise tax distribution formula. Upon the recommendation of the Commission, excise duties were to be distributed to the states 80% on the basis of population and 20% on the basis of "economic and social backwardness" of the states. The indicators of backwardness included 1) per capita gross value of agricultural production, 2) per capita value added by manufactures, 3) percentage of workers in the population, 4) percentage of enrolment in Classes I-V to the population in the 6-11 age group, 5) population/hospital bed ratio, 6) rural/urban ratio, and 7) the percentage of scheduled castes and
tribes in the state.

The next two Finance Commissions maintained the 20% state share of excise duties but each tried to improve the progressiveness of the distribution formula. The Fifth Commission recommended that 80% of the states' share of excise duties be distributed on the basis of population, and that two-thirds of the remaining 20% "should be distributed among states whose per capita income is below the average per capita income of all states in proportion to the shortfall of the state's per capita income from all states' average, multiplied by the population of the state" and one-third on the basis of a revised "index of backwardness" (GOI 1969, p.36). The Sixth Commission dropped the index of backwardness and recommended that 75% of the state share of excise tax should be distributed on the basis of population and 25% by "the distance of a state's per capita income from the state with the highest per capita income multiplied by the population of the state concerned according to [the] 1971 census" (GOI 1973, p.17).

The Seventh Finance Commission was concerned about the collective financial weakness of the states. The Commission noted that only five of twenty-two states maintained a non-plan revenue surplus prior to devolution and, of those five, Karnataka was only just over the break-even point. These five states combined for a revenue surplus of Rs. 2216 crores, while the remaining 17 states totalled a deficit of Rs. 9039.8 crores, for a net state deficit of Rs. 6823.8 crores (GOI 1978, p.68). In response, the Commission recommended a substantial devolution of excise duties. It recommended that the states should receive a 40% share of all excise duties, save the special case of duty on the generation of electricity. Even with this reward, eight states still had non-plan revenue deficits, all hill states, except Orissa.

The Seventh Commission also moved away from the rather crude "index of backwardness"
as a variable in the distribution of the states' share of excise duties towards a more sophisticated
distribution formula. The Commission did two things. First, it reduced the proportion of excise
duties allocated on the basis of population to 25%. Second, it developed three need-based criteria,
each allocated 25%. These criteria included the inverse of the per capita state domestic product, the
percentage of poor in each state, and a revenue equalization formula (GOI 1978, p.66-7). The
increased reward and the move away from population as the major criterion for distribution were
important developments in India's fiscal system.

The Eighth Finance Commission noted, however, that the overall financial position of the
states continued to decline. Six states showed a non-plan revenue surplus of Rs. 8063.94 crores.\(^8\)
The remaining sixteen states had a collective non-plan deficit before devolution of Rs. 18, 484.83
crores. The net deficit was Rs. 10, 420.89 crores. The net deficit thus increased by about 55% from
the previous Finance Commission report, and the deficit of the non-surplus states had doubled. The
Eighth Commission raised the state share of excise duties to 45% and improved the progressiveness
of the distribution formula. The first 40% of the state share of excise duties was to be distributed
25% on the basis of population, 25% on the basis of the inverse of per capita income, with the
remaining 50% on the basis of the distance of per capita income from the state with the highest per
capita income. The remaining 5% of the state share was to be "distributed to those states which have
deficits after taking into account their shares from the devolution of all taxes and duties" (GOI 1984,
p.53). This development indicated a more concerted move towards the principle of equalization.
The Ninth Finance Commission did not alter the state share of excise duties but it did seek to refine

\(^8\) The six surplus states included Gujarat, Haryana, Karnataka, Maharashtra, Punjab, as before, and Tamil Nadu.
Karnataka, moreover, had improved its position from the break-even point to a comfortable surplus.
In sum, the states are now receiving almost half of a tax that was not directly allocated to them, either wholly or partially. The progressive devolution and distribution of Union excise taxes illustrates two points about Indian fiscal federalism. First, the states simply do not have sufficient independent sources of revenue to meet their constitutional obligations. This is the fundamental structural flaw of Indian fiscal federalism. Second, the financial position of the states is highly varied. Only a few, wealthy states maintain non-plan surpluses, while most suffer deficits, especially the poor hill states of the northeast and northwest.

Grants-in-Aid

Article 275 of the Constitution stipulates that "[s]uch sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance." The Indian constitution allows for both conditional and unconditional grants, notwithstanding the question of whether conditional grants are in conformity with the federal principle. The First Finance Commission suggested that "[u]nconditional grants should reinforce the general resources of the state governments," while conditional grants could be used to stimulate developmental objectives (GOI 1952, p.95).

The First Finance Commission articulated six considerations for the provision of grants-in-aid to the states. The first consideration was the budgetary requirements of the state, adjusted to reflect "normal" expenditures for the purposes of cross-state comparison. The other considerations

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9 It recommended that excises duties be divided i) 25% on the basis of population, ii) 12½% on the basis of "Income Adjusted Total Population," iii) 12½% on the basis of an "index of backwardness," iv) 33½% on the basis of the distance of the per capita income of a state from the state with the highest per capita income, v) 16½% should be distributed among the states with revenue deficits even after devolution (GOI 1989, p.22).
included the tax effort of each state, economy of expenditure, standard of social services, special obligations, and broad issues of national importance (GOI 1952, p.96-7). The First Commission rewarded seven states grants-in-aid to supplement their general revenue, and eight states received special grants to improve primary education, for a total of Rs. 8.05 crores (GOI 1952, p.107).

The Second Finance Commission described the principles developed by their predecessors as "unexceptionable" (GOI 1957, p.23), but it concluded that new developments necessitated changes in the manner in which grants-in-aid were awarded. In particular, it surmised that the advent of the Planning Commission removed questions of social services and development issues from the purview of the Finance Commission. The Second Commission determined that only three considerations were now relevant, fiscal need, the gap between revenue and ordinary expenditures, and special broad purpose grants. It cautioned, however, that "[t]he gap between the ordinary revenue of a state and its normal inescapable expenditure should, as far as possible, be met by sharing of taxes. Grants-in-aid should be largely a residuary form of assistance given in the form of general and unconditional grants" (GOI 1957, p.25).

Despite the Second Commission's desire to meet state revenue needs as far as possible by the devolution of taxes, the Commission conceded that their devolution plan fell short of the requirements of most states and that substantial grants-in-aid were in order. Eleven states were allotted grants-in-aid by the Second Commission. These grants were projected to total Rs. 36.25 crores for each of the first three years of the Commission's plan and Rs. 39.50 for each of the last two years, for a five year total of Rs. 187.75 crores. The Second Commission acknowledged, "[t]he grants-in-aid, which we are recommending, are much larger than the grants-in-aid paid to the states in the past. This is mainly due to the fact that, in the past, the requirements of the states for
development were not fully taken into account, while we have done so" (GOI 1957, p.46-7).

The Third Finance Commission, concerned about the encroachment of the Planning Commission into the area of centre-state fiscal relations (see below), recommended that "the total amount of grants-in-aid should be of an order which would enable the states, along with any surplus out of the devolution, to cover 75% of the revenue component of their Plans" (GOI 1961, p.31-2). The Union government rejected this recommendation, preferring to leave Plan financing to the Planning Commission (GOI 1988a, p.290). Subsequent Finance Commissions, while not always happy with the role played by the Planning Commission, accepted this enforced separation between non-plan and plan revenue.

The Fourth and Fifth Finance Commissions did not recommend any substantive changes in the principles governing grants-in-aid. However, while eight states possessed sufficient revenue after the devolution of taxes, the total volume of grants-in-aid provided to the remaining ten states had ballooned to a projected Rs. 637.85 crores for the period 1969-70 to 1973-74, up nearly three-and-a-half times from the Third Finance Commission (GOI 1969, p.66). Despite the desire of the Fifth Commission to reduce grants-in-aid progressively over time, the Sixth Commission recommended grants-in-aid be rewarded to fourteen states to a tune of Rs. 2509.61 crores, just about a four-fold increase from the previous commission. Quite obviously the majority of states were still suffering from insufficient revenue sources.

The Seventh Finance Commission engineered the most substantial reformulation of grants-in-

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10 These states included Bihar, Gujarat, Haryana, Madhya Pradesh, Maharashtra, Mysore, Punjab and Uttar Pradesh. Haryana, Punjab, and Maharashtra, in fact, had revenue surpluses even without devolution.

11 The Commission hoped to reduce the level of grants-in-aid from Rs. 152.73 crores in the first year down to Rs. 102.41 in the last year of its projections (GOI 1969, p.66).
aid since the First Commission. The Seventh Commission articulated three principles to govern the provision of grants-in-aid. First, unconditional grants-in-aid were intended to cover the fiscal gap between normal expenditures and revenue after the devolution of income taxes and excise duties. Second, conditional grants-in-aid could be provided to close the gap in administrative standards between states. Third, grants-in-aid could "also be given to individual states to enable them to meet special burdens on their finances because of their peculiar circumstances or matters of national concern" (GOI 1978, p.59). The Seventh Commission recommended that eight states receive Rs. 1173.12 crores to cover their fiscal gaps, and it proposed that 17 states receive Rs. 436.79 crores for administrative improvement, for a total of Rs. 1609.91 crores. This represented a substantial reduction from the previous commission. The Eighth Commission, however, rewarded a total of Rs. 3769.43 crores grants-in-aid following the same principles, Rs. 1690.93 crores for fiscal gaps, and Rs. 2078.5 crores for administrative improvement (GOI 1989, p.89-95). This represents a 50% increase from the Sixth Commission. The Ninth Commission projected grants-in-aid to the tune of Rs. 15,017 crores, a staggering four-fold increase (GOI 1989, p.29).

Over the nine finance commissions grants-in-aid have risen almost 2,000 times. The financial weakness and dependency of the states cannot be better illustrated. The states now fall within three distinct groups: 1) states with non-plan surpluses prior to devolution; 2) states that achieve surpluses after devolution; and 3) states that continue to be in a deficit position even after the devolution of taxes. Only the wealthy states of Punjab, Haryana, Gujarat, Maharashtra, Tamil Nadu and Karnataka fall in the first group, while all the financially weak hill-states, including Jammu and Kashmir and Himachal Pradesh, fall in the third group.
State Indebtedness to the Centre

The financial resources available to the Indian states have been wholly insufficient to cover plan and non-plan expenditure. The states have responded to this financial insufficiency by resorting to loans. The debt situation of the states has risen dramatically since the 1950s (see Table 8.5), despite rather stringent constitutional provisions. Most of the state debt has been incurred for plan expenditures (GOI 1973, p.89), and more than half of it is owed to the centre, an estimated Rs. 55,536 crores of Rs. 91,053 in 1989 (GOI 1989, p.3).

Table 8.5: State Indebtedness

<table>
<thead>
<tr>
<th>Fiscal Year Ending</th>
<th>State Debt (Rs crores)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>375</td>
</tr>
<tr>
<td>1956</td>
<td>1,296</td>
</tr>
<tr>
<td>1961</td>
<td>2,739</td>
</tr>
<tr>
<td>1966</td>
<td>5,512</td>
</tr>
<tr>
<td>1969</td>
<td>7,425</td>
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<tr>
<td>1974</td>
<td>11,590</td>
</tr>
<tr>
<td>1979</td>
<td>18,785 (est)</td>
</tr>
<tr>
<td>1989</td>
<td>91,053 (est)</td>
</tr>
</tbody>
</table>

(Sources: GOI 1978, p.84; GOI 1989, p.3)

The financial health of both the Union and the states has been declining for two and a half decades. Between 1974-75 and 1986-87, revenue receipts of the Union grew at 14.4%, while expenditure grew at 16.8%. In the same time period, state revenue grew at 15.7%, while expenditure grew at 17.1%. The Centre has had operating deficits since 1979-80, and the states since 1984-85 (except 1985-86). In 1989-90, the combined revenue deficit of the states was estimated to be Rs. 4,451 crores, while the Centre's deficit was projected to be Rs. 7,012 crores. The total debt of the

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12 The states, by the provisions of Article 293, are not permitted to engage in external borrowing. Furthermore, the states must obtain permission from the Union government for loans, if the state has outstanding loans to the Union government or if the Union has acted as the guarantor of other state loans.
Union government rose from Rs. 19,193 crores in 1971 to Rs 228,241 crores in 1989. The Ninth Finance Commission projected the Union debt to rise to Rs 259,729 crores for the following fiscal year, of which Rs 231,692 was considered "internal" debt. The total debt of the states is presented in the table above.

The first five finance commissions, with the exception of the second, seemed unconcerned with the mounting state debt. Subsequent commissions have noted the debt situation of the states but they have tended to be rather sanguine about the problem. The Sixth Commission commented,

> [w]hile the mounting debt liabilities of the states have attracted considerable attention in various forms in recent years, we would like to observe that there is nothing intrinsically alarming about this growth of public debt. The continuous increase in the indebtedness of the states to the centre only reflects the assistance provided by the centre to the states (GOI 1973, p.84; emphasis added).

The Eighth Commission similarly stated, "[w]e see nothing basically wrong in the growth of public debt" (1984, p.100).

Only the Seventh Commission investigated the matter of state debt in any detail. It classified debt as incurring from non-productive, semi-productive, or productive expenditures and it concluded that the vast majority of debt was accumulated from semi-productive development schemes. Only two states, Punjab and Karnataka, applied their loans almost wholly to productive schemes. Sixteen of twenty-two states applied the majority of their loans to semi-productive purposes, while four states applied most of their loans to non-productive schemes (GOI 1978, p.86). It should have been clear by the late 1970s that debt was not just a centre-state problem but a financial crisis in the making. The massive state debt to the Union government is yet one more example of the dependency of the states on the centre in violation of the federal principle. The states not only must rely on Union grants, they must also assume large debts to the Union to meet their basic
constitutional responsibilities. The financial weakness of the states strains centre-state relations.

Agricultural Tax

The Sarkaria Commission on Centre-State Relations noted that the states were doing an insufficient job of maximizing their constitutional tax resources, most especially land revenue and agricultural income tax (GOI 1988a, p.255). Whereas in 1951-52, land revenue (21.3%), state excise duties (21.9%), and sales taxes (25.8%) provided almost equal sources of revenue, in 1984-85 sales taxes had risen to 56.9% of state revenue while land revenue had dwindled to a paltry 2.6% of state revenue. Land revenue did rise 6½ times, from approximately Rs. 49 crores to Rs. 318 crores, but this pales in comparison to the 119-fold increase in sales tax, from Rs. 59 crores to Rs. 7,028 crores (GOI 1988a, p.259; see also Table 9.1 above).

The agriculture sector, which contributes over 40% of India's gross domestic product, remains a virtually untapped revenue resource. Only the Fifth Finance Commission has identified the question of agricultural tax as a problem. The measly revenue generated by the agricultural sector, the Commission wrote, "cannot be considered prima facie to be very satisfactory" (GOI 1969, p.82). It added, "[t]he urgent need for devising an appropriate progressive tax policy for Indian agriculture is obvious" (GOI 1969, p.84). Twenty years later, however, the Sarkaria Commission noted that only "half-a-dozen states are levying Agricultural Income Tax. In three of them, it is confined to plantation groups" (GOI 1988a, p.270).

There are undoubtedly real problems associated with the collection of agricultural tax. As agricultural income tax is constitutionally separated from ordinary income tax, definitional problems arise as to what precisely constitutes agricultural income and what is consequently taxable by state governments. Fluctuations in production due to natural conditions also play havoc with incomes and
consequently create problems for any tax collection system. Finally, as Sarkaria noted, high levels of illiteracy prohibit accurate record-keeping and hinder tax collection (GOI 1988a, p.270-1).

The states also have little incentive to collect an agricultural income tax. The Third Finance Commission noted that the states have been "[s]ecure in the knowledge that the annual budgetary gap would be fully covered by devolution of Union resources and grants-in-aid" and have thus avoided levying a potentially unpopular tax. State-level politicians rely heavily on the dominant agricultural castes for support and consequently they are reluctant to enact legislation which will adversely affect this sector (Frankel 1978). The Congress party was scathing of state governments in its memorandum to the Sarkaria Commission. It argued, "[i]t is a truism that state governments in order to keep intact their vote banks do not levy [agricultural] taxes and shed crocodile tears of shortages of revenues" (GOI 1988b, p.672).

Income tax and agricultural income tax are both highly under-utilized in India. This is not wholly surprising in a developing economy but neither order of government can continue to assume increasing budgetary deficits indefinitely. The states are going to have to overcome their aversion to agricultural income tax if they wish to finance their constitutional obligations without being dependent on the centre. The states now receive 85% of income tax; perhaps if they were allowed to collect it themselves they might obtain more than the 1% return rate achieved by the Union government, which has no real incentive to pursue this tax source any longer. If the states collected both taxes, they would not be treating their citizens differently.

The Finance Commission and the Federal Principle

While the Finance Commissions now produce relatively sophisticated analyses of centre-state fiscal relations, they have tended to interpret their mandate narrowly. Time and again, the different
Commissions have refused to consider state suggestions because they either did not conform to the President's terms of reference or the constitutional scheme of fiscal relations. Neither of these obstacles should have prevented the Finance Commissions from entertaining new ideas. Indeed, the Constituent Assembly's Expert Committee on Financial Provisions stated specifically that the finance committee should consider changes to the constitutional structure, if appropriate:

it should be open to the Commission to make any recommendations it may think expedient in the course of the discharge of [its] duties. It may, for example, suggest a variation in the heads of revenue assigned to the Provinces...Its recommendations, in so far as they do not involve any change in the Constitution, would, when accepted by the President, be given effect to by him by order, while recommendations involving a change in the Constitution, if similarly accepted by him, would be dealt with like any other proposed amendment to the Constitution (GOI 1948/9, p.68).

The various Finance Commissions, however, have not fulfilled this bold mandate. They have never considered the implications of the federal principle, except, on occasion, to justify the quasi-federal structure of the constitution. Furthermore, as we shall see below, the Finance Commissions ignored their own constitutional status and meekly capitulated to the planning process.

The Fourth and Ninth Finance Commissions were the only ones to engage in a discussion about the meaning of federalism and the proper allocation of revenue sources. It seems, however, that this attention to the federal principle by these commissions was sparked by strong differences of opinion among the various commissioners. The Chair of the Fourth Finance Commission, P. V. Rajamannar, and Justice A. S. Qureshi of the Ninth Commission appended scathing notes of dissent to their respective commissions.

Rajamannar launched his dissent with a classical definition of federalism:

[The federal principle requires that the general and regional governments of a country shall be independent each of the other
within their respective spheres and shall be not subordination to the other, but coordinate with each other. Now, if this principle is to operate in practice, both the general and regional governments must each have independent control of financial resources sufficient to perform their respective functions (GOI 1965, p.86).

Rajamannar acknowledged that no federation has fully achieved this ideal but he insisted that India was particularly deficient in this regard. However, he stopped short of recommending constitutional changes to resolve this disparity; he suggested only that the Finance and Planning Commissions work with greater coordination to ensure the rationalization of centre-state fiscal relations.

Qureshi was more vociferous in his denunciation of India's fiscal framework. He argued, after nearly four decades of the Constitution having been into force, now the time is ripe for giving the second look at the relative resource base of the Centre and the States. With a view to bring about certain amount of equity and fair deal in the resource distribution and to move towards a just society, it is desirable that the entire question of equitable distribution of resources between the Centre and the States should be gone into by a high powered independent body (GOI 1990, p.55).

He also addressed squarely the fear that classical federalism would lead to the balkanization of the country. He argued, "it is very essential that the States should have fairly strong resource base. In my opinion, the equitable distribution of resources between the Centre and the States would in no way weaken the Centre. On the contrary, financially strong States would bring about a stronger centre" (GOI 1990, p.55-6).

Despite these vigorous notes of dissent, both Commissions supported India's quasi-federal constitutions. The Fourth Commission explained:

[The principle behind all these provisions is that in regard to some of the major revenue-yielding taxes and also in the case of some other taxes, where a country-wide uniformity of rates is desirable, the best authority for legislating and in most cases also of collecting, is the Union Government. The requirements of the Centre as well as those
of the component States could be met in the most equitable and efficient manner, by distributing the proceeds after these have been collected by the Central Government, rather than by dividing the powers of tax collection between the Centre and the States as has been done in some federations...Under this system, the Union Government is the agency for raising certain revenues for the benefit of both the Centre and the States and for distributing the proceeds between the Centre and the States and among the States themselves according to the principles and procedures set out in the Constitution (GOI 1965, p.7).

This thinking obviously contradicts the federal principle. The states have repeatedly voiced objections to this fiscal structure. Indeed, the Third Commission reported that "there is a general feeling that the contents of the autonomy of the States are being diluted not only by the prescription of detailed directions on subjects within the State list, but also by unilateral financial decisions taken" by the Union government (GOI 1961, p.36).

The Ninth Finance Commission also supported the quasi-federal status quo, indicating that thinking had not much changed in the thirty year interim between the Fourth and Ninth commissions. The Ninth Commission argued,

[i]f there could be perfect matching of the capacity to raise resources and the need for funds to provide services on an adequate scale at different levels of government and in the different regions, there would not arise what is commonly referred to as the federal finance problem. However, in reality it has been found difficult to provide sub-national governments, at the State as well as the local level, taxing powers commensurate with their expenditure needs. This is because of two important reasons: Firstly, the most productive sources of revenue have to be assigned to the Central or Federal Government in order to reap economies in collection and to avoid harmful economic effects, that would arise, if certain tax sources are assigned to sub-national governments....The second reason for limiting the taxing powers granted to the States is that there are not many taxes which can satisfy the principle that a tax levied by a given State should be borne mainly by its citizens. The incidence of most productive tax [sic] extends beyond the jurisdiction of particular States (GOI 1990, p.5).
Once the Commission had justified quasi-federalism, it continued to explain why the states could not be entitled to some of the more productive revenue sources, such as excise or income tax. In the first instance, it argued that excise taxes should not be levied by the states, "as differing rates of excises in different regions would lead to arbitrary and uneconomic location of industries" (GOI 1990, p.5). In the second case, it reasoned that a "progressive income tax levied by subnational governments could result in mobility of persons and allocation of resources in unintended and inefficient ways" (GOI 1990, p.5). In short, it argued that it was more efficient for the central government to levy and collect excise and income taxes, irrespective of the federal principle.

The Finance Commissions, in sum, have given remarkably little attention to the normative aspects of federalism. A consensus seems to have existed since the days of the Constituent Assembly that quasi-federalism was the better alternative for India. This consensus must now be seriously questioned. Centre-state relations have been strained for some three decades now, and financial matters are one of the core concerns. Second, the probity of public finance has deteriorated precipitously over the same time period, partly from the fact that the Union government has little or no accountability on how funds transferred from the centre are spent by the states. Each of these concerns has been exacerbated by another Indian shibboleth, the planning process.

The Planning Commission and the Federal Principle

The Planning Commission was created on March 15, 1950, by executive order of the Union government. Nehru assumed the chairmanship of the Commission, indicating its political importance. Although the order states that planning had been a priority of the Congress Party since 1938, the Constituent Assembly made no provision for a Planning Commission in the Constitution,
unlike the Finance Commission. The Third and Fourth Finance Commissions commented that the "magnitude" of the planning process was not anticipated (GOI 1961, p.34; GOI 1965, p.8). Indeed, Austin opined,

there was no clear idea during the framing period of how planning would affect the federal structure. It was certainly not foreseen that the Planning Commission would in effect supersede the Finance Commissions -- whose purview would revert to the non-plan aspects of federal finance as established by the Constitution. Nor is there any evidence that Assembly members foresaw that planning would mould the federal structure as much as, or more than, any of the more explicit federal provisions. Yet time has shown that, along with the dominant-party political situation, planning has been a strong unifying force within Indian federalism (1966, p.236).

Austin's assertion, except perhaps his overly optimistic conclusion, supports Frankel's contention that planning was largely a product of Nehru's determination, not a widespread consensus in the Congress Party (1978, p.75-85). From this rather underprivileged position, the Planning Commission proceeded to become a powerful institution, a "super economic cabinet," which undermined the Finance Commission and subverted the federal principle, to the detriment of centre-state relations.

The Planning Commission has distorted state development and fiscal priorities through the exploitation of the Union government "spending power." Union funding for state plans has been wielded much like the federal spending power in Canada for the development of social programs.

This is evident in the Administrative Reforms Commission's assessment that the planning process has been given effect to not through legislation, but through financial inducements. Theoretically, a state is free to reject central discipline...if it is prepared to forgo the large sums offered by the centre for the plans. In practice it has no choice but to accept for even

13 "Economic and Social Planning" was relegated to item 20 of the Concurrent List of powers in the Seventh Schedule. It is not even mentioned in the non-justiciable Directive Principles. Given Nehru's stature in the Constituent Assembly, Chanda argues "[i]t is strange, therefore, even inexplicable, that in an elaborate constitution comprising 395 articles and a number of schedules, no provisions had been made for a planning body" (1965, p.275-6).
the richest state is too poor to avoid such deprivation (GOI 1967, p.93).

Just as Canada did not develop a Keynesian theory of federalism when it introduced a wealth of social programs after the Second World War, India did not develop a federal planning process.

Without a constitutional framework for planning, the Finance Commissions were forced to determine how they were going to interpret their mandate in light of the Planning Commission and the Five Year Plans. The Second Finance Commission argued,

> [s]ome anomalies inevitably arise where the functions of the two Commissions, the Finance Commission and the Planning Commission, overlap. The former is a statutory body with limited functions, while the latter has to deal comprehensively with the finances of the Union and the States in the widest sense of the term. So long as both these commissions have to function, there appears to be a real need for effectively coordinating their work (GOI 1957, p.13).

Before the Finance Commission can determine the states' share of revenue, it must first assess the expenditure requirements of the states. This task was made near impossible because the Planning Commission assumed the responsibility of determining the capital expenditure of the states. The Second Finance Commission thus stated, "[w]e have omitted from our estimates all items of a capital nature" (GOI 1957, p.34).

The Third Finance Commission valiantly attempted to recapture the ground lost to the

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14 This task fell to the Second, Third, and Fourth Finance Commissions. The First Finance Commission was able to conduct its work without consideration of the Planning Commission, as the first plan was drafted after the Finance Commission had completed its report.

15 Chanda observed sympathetically that the Second Commission "soft-pedalled" their concerns. He asserted, "[t]he [Second] Commission were [sic] skating on thin ice, the Prime Minister being allergic to any criticism of the Planning Commission" (1965, p.206).

16 The Sarkaria Commission argued absurdly that "[s]ince the Planning Commission is a continuing body, its recommendations are based on 'dynamic' assumptions which take into account the changes in the economic structure." Whereas, "[s]ince the Finance Commission is constituted only periodically, the assumptions made by it remain broadly 'static' during the period covered" (GOI 1988a, p.251).
Planning Commission. First, the Commission wrote, "[i]t seems to us that to draw a line necessarily arbitrary on the basis of Plan and non-Plan expenditure in their treatment is not really sound" (GOI 1961, p.30). Moreover, it asserted, the "role and function of the Finance Commission, as provided in the Constitution, can no longer be realized fully due to the emergence of the Planning Commission as an apparatus for national planning" (GOI 1961, p.35). In an effort to maintain the fiscal scheme of the constitution, the Third Commission recommended that at least 75% of central transfers to the states should emanate from recommendations of the Finance Commission.

The Government of India flatly rejected the recommendation of the Third Finance Commission. However, as the chairman of the Fourth Finance Commission observed in his note of dissent appended to the Fourth Commission's report,

[t]his recommendation...was not accepted by the Government of India, but not for the reason that the [Third] Finance Commission travelled beyond its sphere. The reason was more practical than legal. In their explanatory Memorandum on the action taken on the recommendations of the Third Finance Commission, the Government of India only say that they do not consider it either necessary or desirable to accept the recommendation to include 75% of the revenue component of the State plans in the scheme of devolution recommended by the Commission, because there will be no real advantage in the States receiving assistance for their plans, partly by way of statutory grants-in-aid by the Finance Commission and partly on the basis of annual reviews by the Planning Commission (GOI 1965, p.89).

Although the Finance Commission was constitutionally sanctioned, the Government of India lent its political support to the Planning Commission. The various Finance Commissions have consequently been emasculated by realpolitik.

While the Government of India excised all mention of planning in the terms of reference established for the Fourth Finance Commission, this Commission could not refrain from making one
last statement of principle on the subject. It argued,

[t]he Constitution does not make any distinction between plan and non-plan expenditure, and it is not unconstitutional for the Finance Commission to go into the whole question of the total revenue expenditure of the States...It is, however, necessary to note that the importance of planned economic development is so great and its implementation so essential that there should not be any division of responsibility in regard to any element of the plan expenditure. The Planning Commission has been specially constituted for advising the Government of India and the State Governments in this regard. It would not be appropriate for the Finance Commission to take upon itself the task of dealing with the States' new plan expenditure (GOI 1965, p.9).

The Chairman of the Fourth Commission obviously had misgivings about this position,17 but Nehru's dominance was such that nothing could dislodge the planning process. Indeed, for many years after Nehru's death, an elite consensus existed concerning the virtues of planned development, a consensus that may only now be waning.

Later Finance Commissions simply acquiesced to their constitutional circumscription and subservience to the planning process, as if it was the normal course of affairs. The Seventh Commission boasted absurdly,

the freedom of a Finance Commission to evolve its own scheme of transfers for the period covered by its report is in no way limited. The only constraints on it are first, that it has to operate within the four corners of the constitutional provisions and secondly, that it should leave the area of Plan investment and Central assistance for State Plans to the Planning Commission (GOI 1978, p.60; emphasis added).

These limitations are obviously significant, and quite possibly unconstitutional.

The states were not particularly pleased with these developments. The Third Finance

Commission reported that "[t]here seems to be a strong feeling in the States that the restrictions and conditions, which are attached to the grants which they receive for Plan purposes, tie their hands unduly and deprive them of necessary flexibility and room for adjustments" (GOI 1961, p.30). Later, the Fourth Finance Commission mentioned that "[m]any States urged upon the Commission to include expenditure on the Fourth Plan in the estimates for the coming five years" (GOI 1965, p.8). In short, the states resented the infringement of their autonomy.

State autonomy has been infringed in a number of ways. First, as the Seventh Finance Commission noted, "[t]he centrally sponsored plan schemes are generally in the fields of responsibility assigned to the states or in the concurrent list" (GOI 1978, p.60). Second, the states have to receive central approval for almost every facet of the planning process, from revenue and expenditure budgets, to the establishment and location of industries, and related development programs (Chanda 1965, p.195). Third, federal bureaucrats have assumed a significant role in the administration of the planning process. The planning process was supposed to be consultative through the National Development Council (NDC), but the NDC proved to be a highly ineffective institution.\(^\text{18}\) The Administrative Reforms Commission observed but justified this invasion of state autonomy. It maintained, "[a]s planning has to meet national needs it must subscribe to national

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\(^{18}\) The National Development Council was created in 1952 by Cabinet Resolution, based on the Draft Outline of the First Five Year Plan. It included the Prime Minister and other Cabinet Ministers, the Chief Ministers, and the members of the Planning Commission. Its purposes were: 1) to review the National Plan; 2) "consider important questions of social and economic policy affecting national development;" 3) "to recommend measures for the achievement of the aims and targets set out in the National Plan" (GOI 1967, p.101). The Sarkaria Commission reported, however, that the NDC met only 39 times between 1952 and 1985, rather than the prescribed twice yearly meetings. Moreover, it has been dominated by Union Cabinet Ministers and the Planning Commission members who are much better versed in the intricacies of planning than the Chief Ministers, who were removed from the planning process and frequently only given the Council's agenda a few days prior to a meeting. The Administrative Reforms Commission concluded that the NDC has not been entirely satisfactory: "[t]wo factors have worked in the past to perpetuate the deficiencies mentioned above, namely uniparty control all over the country and the dominant personality of the first Chairman of the Planning Commission under whose aegis conventions were developed" (GOI 1967, p.104).
priorities. And of national priorities, the centre must be the final arbiter" (GOI 1967, p.92).

From the determination of state development priorities, to budgetary considerations and administrative implementation, the states became simple appendages of the Union planning process. The spirit of federalism enshrined in the constitution was rendered null and void. This analysis seriously challenges Frankel's conclusion that "under ordinary circumstances, the federal, legal, and administrative framework imposed severe limitations on the power of the central government to carry out programs of democratic social transformation" (1978, p.83). Indeed, "under ordinary circumstances," the Union government demonstrated an ability to circumvent the constitution with impunity. If a social transformation did not occur, it was not the fault of a rigid federal structure.

In sum, the entire planning process thus became solely a central prerogative. While the spending power in Canada has become less significant in recent years as the federal government reduced its massive budget deficits, the Planning Commission may have become less important since 1991 as the Union government has implemented policies of economic liberalization. Even if this is now true, however, both Canada and India have suffered the consequences of not respecting the federal principle in social programming and economic planning.

Financing the Plan: Circumventing the Finance Commission

State Plans have been largely financed by conditional grants transferred from the centre to the states through Article 282 of the Constitution, without consideration by the Finance Commission. Article 282 is the first clause under the sub-heading, "Miscellaneous Financial Provisions," in Chapter One, Part XII, of the Constitution. The Article reads, "[t]he Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which

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19 See, "Planning Commission, Academic Deadwood," India Today, April 15, 1997 (p.38-40). The sub-title of the article explains the story, "[w]ith the ongoing economic liberalisation, the think tank has become irrelevant."
Parliament or the Legislature of the State, as the case may be, may make laws." This provision clearly allows Parliament to provide conditional grants to the states for purposes that fall outside the Union government's sphere of jurisdiction.

The main question here is not one of purpose but scope. It seems clear that the primary revenue sources of the states emanate from Articles 268 through 272, and that transfers from the centre to the states are to be determined by the Finance Commission, as indicated by Article 280. The Study Team of the Administrative Reforms Commission argued that "Article 282 was intended, not to enable the centre to make regular grants to a state, but to serve as a residuary provision enabling the centre as well as the states to make grants for any 'public' purpose" (GOI 1967, p.73; emphasis added). Even Pylee, a strong supporter of the constitutional status quo, concluded that Article 282 "is virtually a saving clause which will enable the Union or a State to meet an unforeseen contingency" (1965, p.618; emphasis added).

Article 282, however, has not been employed as "a residuary provision." It has become the primary mechanism for transferring enormous conditional grants from the centre to the states to finance the plans. Justice A. S. Qureshi, in his vigorous note of dissent appended to the Second Report of the Ninth Finance Commission, stated that Rs 12,825 crores had been transferred from the centre to the states as "statutory" grants-in-aid under Article 275, while a massive Rs 67,497 crores were "discretionary" grants, passed primarily for plan purposes through Article 282 (GOI 1989, p.50-1). Thus only 16% of Union grants were under the auspices of Article 275 and the Finance Commission, while a whopping 84% were non-statutory grants. Indeed, the Sarkaria Commission reported that the Finance Commission approved only 40.1% of central transfers (34.9% taxes, 4.6% grants-in-aid, and 0.6% other) to the states over the entire period 1951-85, while the Planning
Commission was responsible for transferring 41.1% of all resources to the states. The remaining 18.8% of transfers were classified as "other," primarily loans but also specific grants for relief or other special purposes (GOI 1988a, p.324). The Sixth Finance Commission provided some rupee values to these transfers, as indicated in the following table.

Table 8.6: Resource Transfers from Centre to States, 1951-1974 (Rs. crores)

<table>
<thead>
<tr>
<th>Year</th>
<th>Finance Commission</th>
<th>Planning Commission</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951-56</td>
<td>447</td>
<td>880</td>
<td>104</td>
<td>1,431</td>
</tr>
<tr>
<td>1956-60</td>
<td>918</td>
<td>1,344</td>
<td>606</td>
<td>2,868</td>
</tr>
<tr>
<td>1961-66</td>
<td>1,590</td>
<td>2,738</td>
<td>1,272</td>
<td>5,600</td>
</tr>
<tr>
<td>1966-69</td>
<td>1,782</td>
<td>1,917</td>
<td>3,415</td>
<td>7,114</td>
</tr>
<tr>
<td>1969-74</td>
<td>5,316</td>
<td>4,230</td>
<td>5,307</td>
<td>14,853</td>
</tr>
<tr>
<td></td>
<td>10,053</td>
<td>11,109</td>
<td>10,704</td>
<td>31,866</td>
</tr>
</tbody>
</table>

(GOI 1973, p.6).

The Sixth Finance Commission attempted to portray this state of affairs as an indication of Union benevolence. It wrote,

[These figures can of course be interpreted in two ways. They can be looked upon as an indication of the increasing dependence of the states on the centre and therefore symptomatic of an unhealthy development in our federal polity. But a generous interpretation would be that despite the centralization of resources inherent in a growing economy, the centre has responded to the expanding needs of the states and thereby ensured the use of national resources in a decentralized fashion (GOI 1973, p.6).

Indian academics and bureaucrats have frequently been too "generous" in their analysis of Indian federalism. Deviations from the federal principle have been glossed over to the long term detriment of centre-state relations, either on partisan political grounds or as conforming to the "theory" of
"cooperative federalism." It is perhaps time that these deviations be examined with a more critical eye, for centre-state relations in India are now obviously less than harmonious.

The Study Team of the Administrative Reforms Commission concluded, on the one hand, that "there has been no large-scale misuse of Article 282 by the centre on the non-plan side" (GOI 1967, p.85; emphasis added). On the plan side, however, the Commission waffled. It conceded that the constitutional plan would be more complete if plan grants were made under Article 275 by the Finance Commission, "albeit on the recommendation of the Planning Commission." The Commission, however, cautioned that "this course is not yet practicable and will not be so for some time to come" (GOI 1967, p.119). It argued it was necessary for the centre to maintain the utmost flexibility in plan implementation and fiscal expenditure. In sum, it argued, "there is no purpose served in preferring Article 275 to 282" (GOI 1967, p.119).

The Sarkaria Commission predictably did not find fault with Article 282. It argued, "the Plan and other transfers which are labelled 'discretionary' do not amount to subversion of the Constitutional scheme...The large magnitude of Plan transfers should not pose any controversy in this regard as the framers of the Constitution could not anticipate the extent of development resource-needs under the plans of the states" (GOI 1988a, p.279). The Commission therefore concluded, "[w]e are of the view that the controversy between statutory versus discretionary transfers to the states is based more on theoretical than realistic considerations" (GOI 1988a, p.279).

The "purpose" of preferring Article 275, of course, is to maintain centre-state fiscal relations within the legal framework of the constitution. In a constitutional democracy, the means are as

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20 Pylee has argued, "[I]f planning, thus, has superseded in practice the federal theory that is embodied in the Constitution, the supersession has not been brought about by legal or constitutional means, but by agreement and consent. Hence it seems appropriate to call the federal system that exists in the country today by the name cooperative federalism" (1965, p.600; emphasis added).
important than the outcomes. The centre can legally provide the states with "miscellaneous" (conditional) grants with Article 282, but it is constitutionally unclear if large, regular grants can be made to the states with this provision. At the very least, the Union government has pursued the entire process of planned economic development through a constitutional "loop-hole." A loop-hole hardly seems to be a sufficient edifice on which to build a country. Moreover, as the Study Team of the Administrative Reforms Commission noted, the widespread use of Article 282 "raises the question whether the giving of large conditional grants as a regular measure year after year is consistent with the concept of the states being operationally independent units with clearly demarcated spheres of executive authority" (GOI 1967, p.71).

The Declaratory Power and Erosion of State Jurisdiction

The planning process, in addition to subverting the fiscal arrangements of the Constitution, has also served to erode the areas of state jurisdiction detailed in the second list of the Seventh Schedule. Certain items in List I of the Seventh Schedule, the list of federal powers, allows the Union government to declare items erstwhile in the state list to be of national importance and thus assume responsibility for them. Sarkaria quaintly describes these items in List I as having an "interface" with items in List II.\(^{21}\) This power is similar to Section 92 (10c) in the Canadian Constitution, except in this instance state powers are appropriated not just specific state works.

The Sarkaria Commission was uncharacteristically blunt in its analysis of the declaratory power. It observed, "[i]n India, the last thirty-seven years of the working of centre-state relations

\(^{21}\) Examples include entries 7 ("Industries declared by Parliament by law to be necessary for the purpose of defence or the prosecution of war"), 23 ("national" highways), 24 (shipping and navigation on inland waterways), 27 ("major" ports), 32 (government property), 52 ("industries...declared by Parliament by law to be expedient in the public interest"), 53 (oil resources), 54 (mines), 56 (inter-state rivers), 62 (museums), 63 (certain universities), 64 (scientific institutions), and 67 (historical monuments) of the Union List.
witnessed continuous expansion of the responsibilities of the national government. The role of the Union now extends into areas in the state list. This extension has come about as a result of the legislative and executive action of the Union" (GOI 1988a, p.13). The Industries Act of 1951 is one example. The Sarkaria Commission commented, "[t]he constitutional effect is that to the extent of the control taken over by the Union by virtue of this Act, the power of the State Legislatures with respect to the subject of 'Industries' under Entry 24 of the State List, has been curtailed" (GOI 1988a, p.13; emphasis added). Similarly, "[t]he legal effect," of the 1957 Minerals Act "is that to the extent covered by this Act, the legislative powers of the State Legislatures under Entry 23 of the State List have been ousted" (GOI 1988a, p.13; emphasis added). Finally, in a number of instances, "[t]o the extent, the Concurrent field is occupied by a Union law, the power of the State Legislatures to enact a law in variance with it, becomes inoperative" (GOI 1988a, p.14; emphasis added). If the Sarkaria Commission was so animated about the declaratory power, one can only conclude that the erosion of state areas of jurisdiction by this means is considerable.

The states have not only lost jurisdictional capacity, it seems also that Union bureaucrats have encroached in areas of state administration. The Sixth Finance Commission reported,

\[t]he role of the Central Ministries is primarily one of leadership, guidance and coordination in the fields which are constitutionally within the sphere of the States. While States should be only glad to draw on the expertise available with the Central Ministries in solving their problems, the fullest measure of latitude should be given to the States in shaping their plans and programs to suit their needs, as long as national priorities are not lost sight of. The Central Ministries...should cease to encumber themselves with routine administrative and supervisory functions which only annoy the states and result in avoidable duplication of effort and expenditure (GOI 1973, p.9).

At all stages of the planning process, political, financial, and administrative, the federal principle was
violated. The states have been reduced to simple administrative appendages of the Union government, much to their displeasure.

Reform of the Planning Process

The Sarkaria Commission on Centre-State Relations received considerable commentary from the states concerning financial relations and the planning process. Indeed, the chapter on financial relations constitutes the longest chapter in the Commission's report. The finance and planning chapters combine for almost thirty percent of the report (157 pages of 545). Over half the report of the Study Team of the Administrative Reforms Commission also focused on the planning and finance aspects of centre-state relations. Both commissions appear to have recognized the problems in the finance and planning arrangements but both offered only the most tepid prescriptions.

The Sarkaria Commission claimed that no state questioned the need for national planning, but many had complaints about how planning was effected. The states collectively regarded the Planning Commission as an extension of the Union government. They were concerned about the gradual erosion of state jurisdictions and the increasing dependence upon the centre for financial support. The states felt insufficiently involved in the crucial aspects of plan formulation and they largely agreed that the National Development Council was an inadequate forum in which to parley their concerns to the Planning Commission and the central government. Despite these serious allegations, the Sarkaria Commission concluded, "[w]e are of the view that the alleged overbearing approach of the Planning Commission, in the process of formulation, scrutiny, and finalization of state plans, is more apparent than real" (GOI 1988a, p.371; emphasis added).

Many states have indicated a desire to gain representation in the planning process. Only one state, Punjab, recommended properly federalizing the planning process. Punjab argued that just as
there are two orders of government in a federal system, the centre and the states, there should be two orders of planning, one for the centre's areas of jurisdiction and one for the states' areas of jurisdiction.\(^2\) In short, it argued, "[t]he planning process needs to be reorganized to ensure that the state level planning is duly autonomous" (GOI 1988b, p.985). The Sarkaria Commission flatly refused to entertain Punjab's proposal. It stated, "[i]f the statute, as is suggested by one state, sharply compartmentalizes its functions in regard to Union and State Plans, the planning process will be marred by conflict and discord rather than coordination and harmony. Such a statutory system of planning will be antithetical to the basic principles of cooperative federalism which its proponents claim to espouse" (GOI 1988a, p.378).

The Sarkaria Commission could not bring itself to support anything more than the status quo. It rejected proposals to make the Planning Commission a statutory body; it refused to recommend that the Commission become an impartial expert organization, like the Finance Commission, presumably because that would have entailed asking the Prime Minister to remove himself or herself from the Commission; nor did it recommend adding state representation to the Planning Commission; it did not think it was necessary to establish a permanent finance commission; and it rejected all proposals to transfer some union revenue sources to the states (GOI 1988a, p.264-9). The Commission recommended only that the National Development Council be reinstituted by Presidential Order under Article 263 of the Constitution, rather than executive fiat. This recommendation, however, was purely cosmetic. The Commission, in fact, conceded, "we do not suggest any major change in its composition and broad charter of work" (GOI 1988a, p.382). The problems of finance and planning in India, however, are much deeper than simple inadequacies in

\(^2\) See Punjab Memorandum to the Commission on Centre-State Relations, Volume Two, p.969-970.
communication and coordination; they are structural. The present arrangements are a violation of the federal principle and they have succeeded in alienating many of the states around India.

**Conclusion**

The federal principle, which suggests that each order of government ought to have independent and sufficient sources of revenue, was violated in the Indian Constitution itself. The states received insufficient resources to meet their constitutional obligations. Furthermore, the states did not possess many of the most lucrative income sources; they were shared with the central government. Over the fifty years of independence, the states' fiscal dependence on the centre has increased. This has resulted primarily from an underestimation of the states' expenditure requirements and the unanticipated scope of economic planning. The planning process has, in addition to increasing the fiscal dependence of the states, served to erode the jurisdictional powers of the states and seriously disrupt state priorities.

Many of the shortcomings of the fiscal provisions of India's fiscal provisions have been observed by public commissions or academics, but all too often these structural deviations from the federal principle have been ignored or politically justified. But centre-state relations in India are now so discordant that facile justifications for violating the federal principle can no longer be considered seriously. There seems, however, to be little political will at the centre to address the systemic shortcomings of Indian federalism. The Sarkaria Commission, the last major investigation of centre-state relations in India, steadfastly supported the status quo in all areas of India's federal system, legal, legislative, fiscal and planning. Much of the strain in Indian federalism emanates from the quasi-federal legislative and fiscal relations. These quasi-federal features have become more glaring with the rise of multi-party politics at the centre and in the states, as we shall see in Chapter 11.
Part V

Party Systems in Multinational Federations
Party systems have become an integral, albeit non-constitutional, institution of federalism. The division of sovereignty inherent in federal systems can be undermined by parties and party systems with non-federal political structures. In federal party systems, the sovereignty of the two orders of government will be vigorously defended. Whereas in a quasi-federal party system, the sovereignty of the states will be infringed by central party organizations, opening the possibility of nationalist resentment. While there may be vigorous political competition in a federal party system, it may also contain and institutionalize conflict. In quasi-federal party systems, conflict may well occur outside the democratic arena, and it may well be associated with considerable violence.

The Swiss party system is highly federal. The cantonal and federal parties maintain a high degree of political autonomy, and the cantonal and federal party systems are different. These characteristics of Swiss party politics serve to maintain the jurisdictional sovereignty of each order of government. At the same time, the Swiss practice of consensual party politics and the process of constitutional change have facilitated a high degree of intergovernmental cooperation. As with the other aspects of Swiss federalism, the party system has reinforced the federal principle and consequently protected the various national communities. Switzerland has thus experienced more than a century of political stability.

The party system has been the battleground of Canada's unity crisis, in both general elections and in Québec provincial elections and referendums. The Canadian party system has proven to be remarkably robust and it has successfully contained a deeply divisive political debate. This may be attributed to the highly federal character of the Canadian party system, the one aspect of Canadian federalism that has conformed closely to the federal principle.

The Indian party system has exhibited two distinct phases since independence. The first
phase, from 1947 to 1967, was the era of Congress party hegemony, which was quasi-federal at best. The Congress was, and continues to be, an integrated, hierarchical organization. Centre-state conflicts were generally resolved within the parameters of the Congress party during this phase but, when non-Congress regimes came to power, the central government employed the quasi-federal provisions of the constitution to control political opposition at the state level.

Since 1967, India has had a multiparty system, both at the federal level and in the states. Many of the new regional parties of the states have demanded a restructuring of the federal system in India, but the central governments have continued to respond with a strategy of control. Centre-state conflict has escalated with the declining capacity of the state and the proliferation of non-Congress state governments. While new parties have proliferated at the state level, the central government has continued to employ the quasi-federal provisions of the constitution to control the states. In particular, the central government has employed an authoritarian and repressive strategy against separatist parties and movements. In short, the party system in India has not been able, or allowed, to contain separatist tendencies from national minorities. India has instead endured a number of domestic insurgencies, with a huge loss of life. This political violence indicates that India is a much less stable federation than Switzerland, and even Canada.
Chapter 9

The Swiss Party System

Cooperative Federalism in Action
Swiss political history tends to be dominated by events and institutions; there is scant reference to individuals. Federal politicians are almost always technically proficient individuals, but they tend to be devoid of charisma. One Swiss authority has stated flatly that "[t]he politics of personality are unknown to Swiss political tradition" (Kriesi 1990b, p.42). Not even presidents or party leaders leave much of a historical impression. This stands in stark contrast to both Canada and India, where a handful of great leaders have deeply influenced the very structure of politics. The depersonalization of Swiss politics makes it difficult for an outsider to grasp.

Modern Swiss politics were born out of civil war. Stability in Switzerland has thus been carefully nurtured in a set of institutional practices. Federalism was the first institutional response designed to manage Swiss diversity. The federal political structure created enclaves for each of these historical diversities. As chapter Four has shown, the Swiss constitution guaranteed that the cantons would be sovereign in all matters, except those which were expressly delegated to the central government. The federal principle thus ensured that each diversity would have the autonomy it required to flourish without hinderance.

Political parties emerged as another institutional response to protect the various diversities that comprised Switzerland. Modern Swiss political parties, as institutions, began to emerge in the last decade of the nineteenth century. Although the radicals were the dominant political force in the country, the socialists were the first to create a party organization. The Social Democratic Party (SPS) was created in 1888. The radicals followed in 1894, forming the Freisinnig-demokratische Partei (FDP). After a number of fits and starts, the conservative Catholics finally managed to form a party in 1912, the Swiss Popular Conservative Party. This was renamed the Conservative Christian

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1 Codding states that one of the most important virtues for federal office is "modesty." He writes, "[t]he office must seek the candidate, not the candidate the office" (Codding 1961, p.89).
Social Party in 1957, which was reconstituted as the Christian Democratic (Peoples) Party (CVP) in 1971. A group of rural populists, known as the "farmers," arrived on the scene after World War One, although they did not form a party organization until 1937. In 1971, the farmers merged with the small Democratic Party to form the Swiss Peoples Party (SVP).²

The Swiss party system has been deeply influenced by the country's federal political structure. Political parties, aside from the Socialists, originated in the cantons and cantonal autonomy has remained an integral aspect of all Swiss political parties. Instead of separate cantonal and federal organizations, the Swiss parties have internalized the federal principle. While there are minor operational differences among the major parties, the cantonal units of each party have autonomy in their spheres of activity. In fact, the cantonal party organizations effectively determine the voter lists for federal elections as well. The structure of Swiss political parties appears to have reinforced the sovereignty of the cantons guaranteed in the constitution.

Swiss political parties initially represented particular segmented interests but, after the turn of the twentieth century, the parties were transformed into instruments of consensus building. The Swiss party system is characterized most notably by "amicable agreement." Jürg Steiner writes,

[i]n the model of amicable agreement discussion goes on until a solution is found that is acceptable to all participants in the decision-making process. If a vote is taken, the purpose is only to ratify a commonly accepted decision (Steiner 1974, p.5).

"Amicable agreement" may be regarded as the Swiss variant of consociationalism.

Switzerland, moreover, may well be "the only governing system in which the federal form corresponds completely to the concept of a consociational system" (Hadley et al 1989, p.91). The

² See Appendix 6 for a complete summary of French and German names, plus acronyms. In the period prior to the First World War it is common to refer to the various political factions with simple nouns, such as "the radicals" or "Catholic conservatives." Proper party names are generally only applied in post-World War One era.
The hallmark of consociationalism is the grand coalition. The advent of a stable four-party government in the middle of the twentieth century has ensured that virtually all of Switzerland's diverse interests are represented in the central government. Swiss consociationalism has thus provided further protection for Switzerland's various diversities. The institutionalization of cooperation among federal political parties has also been extended to intergovernmental relations. Conflicts between the federal and cantonal governments have certainly been minimized (Hadley et al, 1989, p.92).

The government of Switzerland has become, in keeping with its staid elected officials, a technocratic "system of administration, adjustment, aggregation, and consultation" (Steinberg 1996, p.103). In conceptual terms, the Swiss state has become a forum for social and political interaction. It has not projected itself into society to nearly the same extent as either the government of Canada or India. As Jean Laponce has argued, "Bern assumes that the best way to nation-build is for the centre to be inconspicuous" (Laponce 1992, p.276). The Swiss state, unlike Canada and India, has thus avoided disrupting social relations in the country.

Swiss political parties, as the superintendents of the state, may take credit for Switzerland's political stability. The Swiss parties have internalized the federal principle and transformed themselves from institutions for partisan conflict into instruments of consensus building. The historical development, organizational structure, and the behaviour of Swiss political parties have almost certainly contributed to the evolution of federal stability in Switzerland.

The Institutions of the Federal Government

The federal government is composed of the Federal Assembly and the Federal Council. The Assembly consists of the Nationalrat (National Council) and the Ständerat (Council of States), which are respectively the lower and upper houses of parliament. The Federal Council, or
Bundesrat, is a seven person executive that sits outside of the Assembly. No individual is permitted to sit on more than one of these councils concurrently (Article 77). The National Council is elected every four years, with representation by population. Each canton, including the half cantons, represents a single electoral district in Switzerland's proportional representation system. The Council of States, following the pattern of the American Senate, is composed of two representatives from each canton, which means that each half canton is entitled to only one Councillor. Each canton determines its own modalities for the election of State Councillors.

The two chambers of parliament enjoy "absolute equality." Both chambers may initiate legislation and constitutional amendments, and all laws must be approved by a majority in each council (Linder 1994, p.46). The facultative referendum, which gives the voters the last say on legislation, removes much of the immediacy from parliamentary debates in Switzerland. As a rule, "parliamentary debates in Berne are 'intolerably' dull. Extremism in language as in behaviour is universally condemned. Unanimity in decisions is the rule. Consensual procedures are so deeply ingrained that voice votes are the rule and roll-call votes the exception" (Kerr 1978, p.51).

The constitution states that "[s]ubject to the rights of the people and the Cantons (articles 89 and 123) the suprême power of the Confederation shall be exercised by the Federal Assembly" (emphasis added). Hughes has noted that the use of the word suprême in this article is, to say the least, curious. Taken literally, this article could virtually constitute "an alternative Constitution" (Hughes 1954, p.81). This dangerous line of interpretation is generally not accepted in Switzerland but, argues Hughes, "the Assembly's practice of granting Full Powers in an emergency to the Federal Council suggests that there is a sense in which the Assembly can claim the powers it effectively delegates" (Hughes 1954, p.81). The sweeping competences of the Federal Assembly, including
"measures for the external security of Switzerland" and "for internal safety and preservation of peace and order" (Article 85), also put the federal principle potentially at risk. However, apart from the delegation of full powers to the Federal Council in each of the great wars, the Federal Assembly has not exploited its potential powers. In other words, if the constitution does violate the federal principle in the powers accorded to the Assembly, political practice has not violated the federal principle, at least in peace time.

The Federal Council functions as the political executive of the government of Switzerland. It is a seven-person committee, elected every four years by the Federal Assembly, not directly by the people. Federal Councillors are reelected until they decide of their own volition to retire. There is, in fact, "no procedure whatsoever for expressing a lack of confidence in a member of the Federal Council, or in the council as a whole for that matter" (Codding 1983, p.15). Only twice (1854 and 1872) were councillors not reelected (Codding 1961, p.89). Furthermore, Federal Councillors have only twice resigned for political reasons. On each occasion, 1891 and 1953, the respective councillors resigned because their proposals were rejected by the voters in popular referendums (Codding 1983, p.15).

The Federal Council sits at the apex of the Swiss state. It has come to direct most of the

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3 Article 95 declares, "[t]he supreme executive and governing authority of the Confederation is a Federal Council composed of seven members." Hughes argues that the Federal Council was probably intended originally to be the executive office of the Federal Assembly but, with the passage of time, it has become "the nation's executive" (Hughes 1954, p.106). In any event, the Federal Council is a uniquely Swiss institution that is neither a "cabinet" in the British sense nor an "administration" like the American political executive (Steinberg 1996, p.118-9).

4 Proposals to expand the Federal Council and to make it democratically elected have been rejected, primarily from fears that either change would weaken the celebrated collegiality of the body (Codding 1961, p.99).

5 The powers of the Federal Council are detailed in Article 102. As with the Federal Assembly, these powers are quite sweeping and they could potentially violate the federal principle, especially with the Council's powers to supervise cantonal behaviour (see, Hughes 1954, p.112-116). In practice, however, the Federal Council has followed the federal principle scrupulously in peace time.
affairs of the Federal Assembly, and it also guides the federal bureaucracy. Switzerland's bureaucracy is organized in seven departments and each councillor is responsible for one department. These departments are Foreign Affairs, Interior, Justice and Police, Military, Finance, Public Economy, and Transport and Energy. The functions of these departments are very broadly defined (see, Appendix 7). The Federal Council is a collegial body; all decisions are taken in private and defended collectively in public. The principle of collegiality is taken very seriously; it is the hallmark of the Swiss government.

Every year, the Federal Assembly elects one member of the Federal Council to serve as president, and another as vice-president. The president cannot be elected in two consecutive years. The vice-president has generally been elected to succeed the president. The title of president, however, is essentially an administrative distinction. The main function of the president is to chair the meetings of the Federal Council. His powers are "nominal" and he is at most only a "titular" head of state (Coddington 1961, p.91). Oswald Sigg asserts that "Switzerland has no actual head of state." Indeed, he continues, "[w]hen a foreign head of state, or even a Queen, visits Berne, they are usually received by all seven members of the Federal Council" (Sigg 1997, p.33).

The Federal Council is a carefully constructed institution. Since 1959, the four largest political parties in the Federal Assembly have been represented on the Federal Council in a 2:2:2:1 ratio, the so-called "magic formula" (see below). While Federal Councillors are party members in good standing, it should be noted that they are not party leaders or even party spokespeople.

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6 The apex of the Swiss bureaucracy is the Federal Chancellery, which also serves as the secretariat for the Federal Council and the Federal Assembly. The Federal Chancellor is elected by the Federal Assembly for a four year term, although he or she is routinely reelected until he/she decides to retire. Despite the impressive title, "he [or she] is no more than a senior federal employee" (Coddington 1961, p.99), unlike the Chancellor of Germany. The Swiss Federal Chancellor is essentially the equivalent of the Clerk of the Privy Council in Canada.
The magic party formula is only a part of the Federal Council equation. A number of other important considerations predate the advent of multiparty power-sharing (Rappard 1936, p.77-8). At least two councillors must come from Switzerland's linguistic minority groups. As Italian-speakers constitute only 10 per cent of the population, they are not always guaranteed one of the seven seats. The two largest cantons, Berne and Zurich, are guaranteed one seat each, and usually one of the French-speaking members comes from the canton of Vaud. The Federal Council usually maintains a religious balance of four Protestants and three Catholics. The first woman was elected to the Federal Council in 1984, although she stepped down in 1989. Ruth Dreifuss was elected in 1993 and in December 1998, she became the first female President of Switzerland. Gender may yet become a new criterion for selection to the Federal Council.

All these considerations are part and parcel of the unwritten traditions that have evolved since confederation. With so many electoral qualifications to bear in mind for Federal Council election, the selection process is now as much a process of elimination as it is a search for the best "qualified" candidate. Nevertheless, these traditions have become critical aspects of Switzerland's impressive power-sharing arrangements and they are almost certainly integral to the country's political stability.

The Evolution of Power-Sharing in Switzerland

After the federal bargain of 1848, Switzerland was dominated by a political faction known

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7 The only legal limitations placed on the office are that no canton may have more than one representative and councillors can not be related by blood or marriage.

8 Italian and French speakers combined form 30 per cent of Switzerland's population; 30 per cent of seven results in only two seats for these groups.

9 Jürg Steiner notes that cross-cultural power-sharing pervades almost all public and private institutions in Switzerland, from the military to sporting associations. The military, for example, has seven three-star generals, four German, two French, and one Italian. Steiner adds, however, "[i]t is important to note that a group's right of representation cannot be enforced in court. In Switzerland, power-sharing is a political rather than a legal system" (Steiner 1991b, p.109).
as the "radicals," mostly Protestant liberals. While the defeated Catholic forces found refuge in cantonal enclaves, the federal government was structured according to the principles of majoritarian rule, to the benefit of the radicals. The radicals enjoyed a monopoly over political power from 1848 to 1891. Indeed, they have been accused of guarding their power and the majoritarian system "jealously," with such dubious tactics as "the intimidation of employees, exclusions from the voting register, and gerrymandering" (Kobach 1993, p.26).

The federal radicals soon became anxious to acquire more economic power than was accorded to the central government in the constitution of 1848. They thus initiated a "total" revision of the constitution in the 1870s. The first effort ended in failure in 1872, but the second effort in 1874 was successful. The new constitution succeeded in making Switzerland a single economic unit. For this reason, Dieter Fahrni argues, the new constitution may be regarded as a "triumph for liberalism." The quid pro quo for the creation of a single economic unit, however, was the introduction of the optional legislative referendum. This was "one of the most important turning-points in modern Swiss history," and "in terms of domestic politics it marks the end of the liberal era" (Fahrni 1997, p.75).

The facultative referendum served to provide the conservative Catholic minority, which had been essentially relegated to the confines of cantonal politics since 1848, an instrument with which to challenge the political hegemony of the radicals. Catholic conservatives employed the referendum to thwart liberal legislation and the centralizing tendencies of the radicals. Between 1875 and 1884, fourteen federal laws were challenged, and eleven were defeated (Kobach 1993, p.26).

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10 Dieter Fahrni argues that "[t]o be a conservative in nineteenth-century Switzerland meant something different from what it meant in neighbouring states. There was no conservatism based on large-scale landownership or on a military oligarchy. In Switzerland conservatism meant rather the defence of the local power structure and local cultural autonomy against a central government that was liberal or even radical" (Fahrni 1997, p.76).
p.27). While the radicals were frustrated by the thwarting of their legislation, they eventually tried to co-opt their Catholic opponents. When a vacancy opened on the Federal Council in 1891, a Catholic Conservative, Joseph Zemp, was elected. The election of a Catholic conservative was the first small step towards power-sharing, although it took another seventy years for the Swiss form of *konkordanz demokratie* to develop in its entirety. Kobach argues that "[t]he role of the referendum in bringing about this transformation is difficult to exaggerate. Without it, the Catholics and Conservatives would never have been able to force open the doors of power" (Kobach 1993, p.28).

The next step in the evolution of Swiss consociationalism was the adoption of a proportional representation electoral system. Both the Catholic conservatives and the social democrats were anxious to end the majoritarian electoral system, which worked to manufacture artificial majorities for the radicals in the National Council. The first two proposals to amend the constitution and secure a proportional electoral system, 1900 and 1910, ended in failure, when they were rejected in popular referendums. Proportional representation, however, was accepted in a referendum in 1918 and put into effect in 1919. The Swiss adopted "a flexible list system." After the adoption of

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11 *Konkordanz demokratie* might best be translated as "democracy of mutual agreement," and it is employed by Swiss political scientists to mean much the same thing as consociationalism (Lehmbruch 1993, p.43).

12 The majoritarian electoral system that was employed from 1848 to 1919 was not the simple Westminster first-past-the-post system. It was instead a multi-member district system with a second ballot. Voters had multiple votes according to the number of seats in each district. An absolute majority was required on the first ballot to be elected. Unfilled seats were subject to a second ballot, where a simple plurality would suffice to win (Coddington 1961, p.75-6).

13 The 1910 referendum is an interesting footnote in Swiss political history. The outcome reflected support from a majority of cantons, but not a majority of voters. It is the only constitutional amendment rejected by the peculiar electoral combination.

14 In the flexible list system, parties produce lists of candidates for each electoral district, which are the cantons in the case of Switzerland. The voter, however, is free to modify the list by crossing names off a party list and adding names from the lists of other parties. This is referred to in Switzerland as *panachage*. The voter may also cross a name off a party list and vote for another name on the list twice (*cumul*). Alternatively, the voter may obtain an official blank ballot and construct his or her own list of candidates but only from the official list of candidates (Steinberg, 1996, provides an excellent explanation of the Swiss voting system in Appendix A; see, Penniman 1983, Appendix A, for sample ballots). Like all proportional electoral systems a seat-filling quotient or formula is required. For an explanation,
proportional representation, the Swiss parties were finally represented in the National Council in accordance with their electoral strength.

The effects of proportional representation were felt immediately. The Radical party lost 45 of its 108 seats in the ensuing election. The Socialists jumped from 18 to 41 seats, while the Catholics gained only 2 to rise to 41 seats as well. The old Liberal Party obtained only 9 seats, while the new Farmers, Artisans, and Citizens Party, a break-away faction of the Radical party, won 25 seats (Codding 1961, p.116). With a new balance in the Federal Assembly, the way was paved for the representation of new parties in the Federal Council, although lingering suspicion of the socialists in the minds of the rather conservative Swiss delayed the election of socialists to the Federal Council for another twenty-five years.

During the interwar years, and for a time after World War II, the Federal Council was reconstituted a number of times to reflect the various strength of the major political parties in the Federal Assembly. The Catholics were immediately rewarded with a second seat in the Federal Council. The Farmers, Artisans, and Citizens party became entitled to one seat in 1929. The farmer's party, now known as the Swiss People's Party (SVP), has held a seat ever since, but it has never developed sufficient strength to warrant a second seat.

Although the socialists won as many seats as the Catholics in the Federal Assembly, they were considered too radical by the other parties to be included in the governing council. This is somewhat ironic given that modern Switzerland was shaped by self-described radicals. The socialists moderated their platform in the mid-1930s, and their patriotism became self-evident with their steadfast opposition to German Nazism. The socialists were consequently rewarded with a seat

see, Codding 1961, p.77-8.
on the Federal Council in 1943. The socialists lost this seat, temporarily, in 1953, when Max Weber resigned after his proposed tax scheme was rejected by the voters in a referendum (see Chapter 6).

Two socialists, however, were reelected to the Federal Council in 1959. Eventually, "the powerful Federal Council reflected for the first time, as much as its size can, the true alignment of Swiss political party strength" (Cudding 1961, p.117).

Table 9.1: Composition of the Federal Council Through Time

<table>
<thead>
<tr>
<th>Period</th>
<th>Composition</th>
</tr>
</thead>
<tbody>
<tr>
<td>1848-1891</td>
<td>7 radicals</td>
</tr>
<tr>
<td>1891-1919</td>
<td>6 radicals, 1 Catholic conservative</td>
</tr>
<tr>
<td>1919-1929</td>
<td>5 radicals, 2 Catholic conservatives</td>
</tr>
<tr>
<td>1929-1943</td>
<td>4 radicals, 2 Catholic conservatives, 1 farmer</td>
</tr>
<tr>
<td>1943-1953</td>
<td>3 radicals, 2 Catholic conservatives, 1 farmer, 1 socialist</td>
</tr>
<tr>
<td>1953-1954</td>
<td>4 radicals, 2 Catholic conservatives, 1 farmer</td>
</tr>
<tr>
<td>1954-1959</td>
<td>3 radicals, 3 Catholic conservatives, 1 farmer</td>
</tr>
<tr>
<td>1959-1998</td>
<td>2 radicals (FDP), 2 Catholic conservatives (CVP), 2 socialists (SPS), 1 farmer (SVP)</td>
</tr>
</tbody>
</table>

It is not difficult to understand Switzerland's political stability when it is realized that the party composition of the Federal Council has represented, on average, 77.8% of the electorate since 1959 (see, Table 9.2). The representativeness of the Federal Council has dropped slightly in the past two decades. Between 1959 and 1979, the parties on the Federal Council represented 80.9% of the electorate but, since 1983, the average has dropped to 73.3%. Even so, this stands in stark contrast to Canada and India. The government of Canada has only twice received 50% of the popular vote, and the government of India has never had the support of a majority of voters, even through all the years of Congress party dominance.15 With greater electoral support, albeit indirectly, it stands to reason that decisions of the Swiss government will have more legitimacy with the public.

15 John Diefenbaker's Conservatives received 54% of the vote in 1958, and the Conservatives also received 50% of the vote with Brian Mulroney's first victory in 1984. The best result for the Indian National Congress was in 1984 when Rajiv Gandhi swept to power in the wake of his mother's assassination with 48.1% of the vote.
Table 9.2: Popular Vote in Switzerland

<table>
<thead>
<tr>
<th>Year</th>
<th>SPS</th>
<th>FDP</th>
<th>CVP</th>
<th>SVP</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>26.3%</td>
<td>23.7%</td>
<td>23.3%</td>
<td>11.6%</td>
<td>84.9%</td>
</tr>
<tr>
<td>1963</td>
<td>26.6</td>
<td>24.0</td>
<td>23.4</td>
<td>11.4</td>
<td>85.4</td>
</tr>
<tr>
<td>1967</td>
<td>23.5</td>
<td>23.2</td>
<td>22.1</td>
<td>11.0</td>
<td>79.8</td>
</tr>
<tr>
<td>1971</td>
<td>22.8</td>
<td>21.5</td>
<td>21.0</td>
<td>10.0</td>
<td>75.3</td>
</tr>
<tr>
<td>1975</td>
<td>24.9</td>
<td>22.2</td>
<td>21.1</td>
<td>9.9</td>
<td>78.1</td>
</tr>
<tr>
<td>1979</td>
<td>24.4</td>
<td>24.1</td>
<td>21.5</td>
<td>11.6</td>
<td>81.6</td>
</tr>
<tr>
<td>1983</td>
<td>22.8</td>
<td>23.3</td>
<td>20.2</td>
<td>11.1</td>
<td>77.4</td>
</tr>
<tr>
<td>1987</td>
<td>18.4</td>
<td>22.9</td>
<td>19.7</td>
<td>11.0</td>
<td>72.0</td>
</tr>
<tr>
<td>1991</td>
<td>18.5</td>
<td>21.0</td>
<td>18.3</td>
<td>11.9</td>
<td>69.7</td>
</tr>
<tr>
<td>1995</td>
<td>21.8</td>
<td>20.2</td>
<td>17.0</td>
<td>14.9</td>
<td>73.9</td>
</tr>
<tr>
<td>average</td>
<td>23.0</td>
<td>22.6</td>
<td>20.8</td>
<td>11.4</td>
<td>77.8</td>
</tr>
<tr>
<td>deviation</td>
<td>+3.6</td>
<td>+1.5</td>
<td>+2.6</td>
<td>+3.5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-4.6</td>
<td>-2.4</td>
<td>-3.8</td>
<td>-1.5</td>
<td></td>
</tr>
</tbody>
</table>


The institutionalization of consultation and the practice of direct democracy have also contributed to the formation of highly legitimate legislation. The government of Switzerland abides by an impressive sounding principle known as *Vernehmlassungsverfabren*. Richard Reich states, "[a]lthough this is a difficult term to render adequately in English, it refers to the possibility to express one's views on government drafts of laws or decrees. It is, to put it rather simply, the right to be heard" (Reich 1975, p.120). Consultation and cooperation might be regarded as natural corollaries of coalition government but, in fact, they are both cultivated political practices. The principle of consultation was enshrined in Article 32 of the constitution in July 1947, as we saw in Chapter 7. Thereafter, the federal government was obliged to consult with the cantons and all interested economic groups in the process of drafting social and economic legislation. While "the

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16 Deviation here means simply the difference between best and worst results and the average. For example, the best SPS result was 26.3% of the vote in 1963, which was 3.6% above its 40 year average of 23.0%, and its worst result was 18.4% in 1987, or 4.6% below its average. The SPS deviation from its average is thus +3.6 and -4.6.
government is not obliged to abide by the views voiced" (Reich 1975, p.120), the process of direct democracy ensures that the government must have the support of a substantial majority of the population before it can implement legislation or constitutional amendments.17

The other remarkable feature of Table 9.2 is the stability of Swiss voting patterns. In the ten general elections since 1959, the four major parties have almost always been within plus or minus four percent of their average vote. In fact, the general pattern predates the development of the magic formula in 1959, by at least two decades. The vote for the Catholics and socialists has been virtually constant since 1919. The radicals dropped to their current levels of support in the 1931 election, while the farmers/populists dropped to their current level in the 1935 election. Since 1935, the pattern of voting among the four major parties has hardly changed. This unprecedented electoral stability may in fact cause a certain degree of voter apathy (Kerr 1983, p.63). On the other hand, it is a powerful indication of Switzerland's remarkable political stability. All major parties, groups, and regions are well represented in the Federal Assembly and governing executive. Consequently, Switzerland, unlike Canada and India, has not experienced the rise of cantonal, regional, or separatist parties. The predictability of Swiss elections is probably a fair price to pay for political stability.

**Federalism and the Swiss Party System**18

The federal principle would suggest that political parties in each order of the system should

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17 Capital and labour agreed in the 1930s to put their differences aside and cooperate in the defense of the nation (Linder 1994, p.30). Article 32 represents the institutional culmination of this agreement and consequently it might be regarded as the start of Swiss corporatism. Corporatism must also be seen as one of the institutions contributing to Swiss stability, but a discussion of corporatism falls beyond the scope of this work. For useful reviews of Swiss corporatism, see, Kriesi (1982), and Parri (1987).

18 Delley and Auer suggest, in the authoritative Manuel Système politique de la Suisse, that very little is known about federal-cantonal party relations. They state, "[o]n sait que les sections cantonales disposent d'une complète indépendance pour ce qui est des problèmes cantonaux et qu'elles revendiquent une large autonomie dans l'appréciation des affaires fédérales.....Mais c'est à peu près tout ce que l'on sait" (Delley and Auer 1986, p.101-2).
be separate organizations. The Canadian party system has evolved to this point to a considerable extent. In Switzerland, the federal and cantonal units of the major political parties are not separate organizations. Instead of maintaining separate organizations, Swiss political parties have structured their organizations according to the federal principle. Swiss political parties are loosely integrated, non-hierarchical organizations. Most scholars familiar with politics in Switzerland describe Swiss parties as "confederations of independent cantonal parties" (Codding 1961, p.127). In fact, a number of cantonal parties operate with names different from their federal affiliate.

While there are minor structural and operational differences between the four major parties, Swiss political parties at the federal level are essentially confederations of cantonal party units. In fact, it has been argued that "[w]ith the possible exception of the Socialist party, there are no really autonomous national parties in Switzerland" (Codding 1961, p.124). The reason for this unusual situation is largely historical. The federal political parties in Switzerland developed first in the cantons, again with the exception of the Socialist Party (Gruner and Pitterle 1983, p.31). In fact, it may be said that "the formation of the Swiss national party system was a process that started from the bottom and worked its way up" (Hadley et al 1989, p.83). Cantonal independence is still strongly stressed by the leading parties. In fact, "even today," the major political parties "are still usually umbrella organizations for autonomous cantonal sections" (Gruner and Pitterle 1983, p.31).

The essentially confederal structure of Swiss political parties is reinforced by the structure of the Swiss political system, especially the electoral system. As Codding notes, there are no nationwide elections that demand a national organization" (Codding 1961, p.126). The Federal Council

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19 See also, Rappard (1936, p.105); Gruner and Pitterle (1983, p.31); and Hadley et al (1989, p.83).

is elected by the Federal Assembly and the electoral districts for the Federal Assembly are the
cantons. Each party produces 26 electoral lists, one for each canton. Candidate recruitment is
performed mostly by cantonal units, and the nomination process is wholly a responsibility of the
cantonal party, as are election campaigns (Hadley et al 1989, p.94). In these matters, the central
offices of the Social Democratic Party and the Christian Democratic Party provide more direction
than either the Radical Party or the Peoples Party (Kerr 1987, p.168).

Federal party organizations thus largely function to coordinate the cantonal units for policy,
elections, referendums and to give direction to the party's parliamentary group. The federal party
organization may be considered as a "clearing house" or a "mediation" office for diverse cantonal
interests (Gruner and Pitterle 1983, p.32). Coddin maintains that "[t]he functions of the national
party organizations are mostly limited to discussion of major national issues.....decisions, however,
are not considered binding upon the cantonal parties or the party's representatives in parliament, but
rather recommendations for their general guidance" (Coddin 1961, p.127). Steiner adds that "[t]he
federal structure of the Swiss parties is also emphasized by the fact that their leading representatives
are not perceived as national party leaders" (Steiner 1974, p.40). Unlike Canada and India, the role
of the "great leader" is unknown in Switzerland. Political leaders are firmly rooted in their own
cantons, and are not generally known to citizens elsewhere.

While each party maintains a variety of committees (such as women, youth, and specific
policy groups), a basic four tier structure is employed to provide overall direction to the party. At
the base, each party maintains an assembly of delegates, which determines party policy and elects
party officers. The statutes of the Swiss People's Party, for example, declare that "[I]l'assemblée des
délégués est l'organe suprême du parti" (UDC 1998, p.11). In accordance with the principle of
subsidiarity, the party literature indicates that the delegate assembly "est compétente pour tous les objets qui ne sont pas expressément délégués à un autre organe" (UDC 1998, p.8).21

The party central committee is situated above the delegate assembly. It includes all the officers of the party, delegate representatives, and usually the parliamentary members. This institution links the mass base of the party with its central officers. The direction committee is composed of the central officers of the party, which in some parties includes the parliamentary group. This committee, as it name implies, largely determines party policy, subject to approval from the delegate assembly. Finally, each party maintains a permanent bureau, which includes the party presidents and the general secretary, to provide the party's day to day administration.22 This hierarchical structure, however, disguises the very real federal structure incorporated in the major political parties.

The Radical Party (FDP/PRD)

The Radical Democratic Party may be regarded as Switzerland's "grand old party" (Gruner and Pitterle 1983, p.35). The radicalism of the party was initially channelled towards the creation of a vibrant market economy and a modern liberal state. Once those objectives were obtained, the Radical Party positioned itself more as a defender of its creation. In other words, it became more conservative. In the process, the Radical Party has allowed its penchant for innovative legislation

21 This document, entitled "Informations Concerant L'Union Democratique du Centre," is not dated, but the text indicates that it was written in 1998.

22 In sum total, however, "the four major parties are but skeleton organizations. The total number of permanent staff members at both federal and cantonal levels is paltry by international standards" (Kerr 1987, p.163). The Socialist Party employ a total of 28 people full-time, while the SVP employs only 10 (combined federal and cantonal totals). In the mid-1970s, the Radicals had the largest organizational budget, with about 1.4 million US dollars, while the SVP had by far the smallest with about $350,000. About two-thirds of these budgets were for cantonal organizations, and only one-third for the federal parties. Kerr notes, however, that the four major parties have responded to declining voter support by increasing the size of their organizations.
to be appropriated by the Social Democratic Party (Coddington 1961, p.121). Indeed, the Radical Party has increasingly relied on its legacy as the founder of modern Switzerland to appeal to the voters (Gruner and Pitterle 1983, p.35). While the radicals worked tirelessly in the last half of the nineteenth century to create a central state and national economy, the FDP is now paradoxically the party that provides the greatest autonomy to its cantonal units.

The FDP has been described as "more an electoral coalition of contending interests than a coherent federation of like minded parties" (Kerr 1987, p.164), as Article 4 of the party statutes makes clear: "Le parti suisse se subdivise en partis cantonaux" (PRD Statuts, p.2).23 Members of cantonal parties are automatically members of the federal Radical Party. Indeed, individuals become members of the Swiss party through there membership in a cantonal organization (PRD Statuts, Article 5). While the FDP has an integrated federal-cantonal membership, cantonal party units "have their own organization manuals."24 In fact, for "historically founded" reasons, some cantonal affiliations of the FDP operate with a different name (PRD Statuts, Article 3). While Guido Schommer, an FDP spokesman, states that the cantonal and federal party organizations are "on the same track concerning content and thinking," Kerr maintains that the party's respect for cantonal autonomy has led to strong "factional opposition within the party over programmes and candidates" (Kerr 1987, p.164).25 Nevertheless, the FDP has broad support from across Switzerland, and

23 The relationship between the federal and cantonal units of the FDP is detailed in Article 24 of the party statutes. Article 24.1 illustrates the tensions inherent in the organization of a federal political party: "Les partis cantonaux qui sont organisations politiques autonomes et simultanément des sections du PRD s'engagent à respecter les principes et à réaliser les objectifs du parti suisse."


25 The FDP has incorporated a dispute resolution mechanism in its party statutes. Article 8 indicates that all disagreements within the party, including federal-cantonal disputes and inter-cantonal disputes, are to be referred to arbitration commission. The commission is composed of a president and four other members, (representing all three official language groups. The commission's mandate is described in Article 17 of the party statutes. The CVP/PDC also
operates in all cantons, except Appenzell Inner Rhodes, which is a partyless canton.

The Swiss People's Party (SVP/UDC)

The Farmer, Artisan and Bourgeois Party splintered from the Radical Party, first in Zurich in 1917, and the following year in Berne. Although the party obtained a Federal Council seat in 1929, it was not formally established as a political party until 1937. (UDC, p.4). The Farmer's party merged with the Democratic Party in 1971 to form the Swiss People's Party. While the party was initially oriented towards agrarian populism, it now tries to portray itself as a moderately conservative, non-denominational party. The party stresses this latter characteristic. It declares,

[l]es organisations affiliées à l'UDC Suisse rassemblent des hommes et des femmes de toutes origines sociales. L'UDC Suisse ambitionne de mettre sur pied une collaboration entre les forces vives de la population suisse sur la base du respect et de la tolérance réciproques (UDC 1998, p.5; Article 2.1, "Objets").

In short, the party tries to be a little to the right of the Radicals, but without the Catholic overtones of the Christian Democratic Party.

The SVP party manual clearly displays the party's cantonal origins. It declares that "[l]es sections cantonales constituent la base de l'UDC Suisse" (UDC 1998, p.6). In accordance with the federal principle, Article 5.3 states,

[e]n vertu des statuts et du programme politique de l'UDC Suisse, ainsi que de leurs propres statuts approuvés par le Comité central du parti, les sections cantonales disposent d'une totale autonomie juridique et organisationnelle (UDC 1998, p.6; emphasis added).

While the cantonal parties have a responsibility to extend the principles of the Swiss People's Party has an arbitration commission, although the party's manual also refers disputes to the federal party committee. This mechanism presumably leads to more partisan decisions. The SVP/UDC party manual, by contrast, does not detail a dispute resolution mechanism.
(Article 5.4), there is also a provision to allow cantonal deviations, with permission of the federal party office (Article 5.6).

The structure of party membership also highlights the confederal character of the Swiss People’s Party. The federal party is composed of cantonal parties. Before anyone can become a member of the SVP, a committee must be created in each canton and cantonal party statutes must be drafted. After reviewing the composition of the cantonal committee and statutes, the party's central committee decides whether or not to accept the cantonal organization into the party (UDC 1998, p.8; Article 8.5). The cantonal party unit is responsible for the recruitment of members (Article 5.4). Individuals thus become members of the party through the cantonal organizations. It is very difficult to determine if the party is an integrated organization or a federally structured party with separate organizations. Party spokesperson Pascale Strahm writes that a "member of a cantonal party is automatically a member of the federal party," but "the federal and cantonal organizations are not the same." It thus seems most accurate to describe the SVP as a confederal party.

The SVP is present in 21 of Switzerland's 26 cantons, covering all four linguistic regions, although only Berne and Zurich are able to maintain permanent secretariats (UDC, p.7). All cantonal parties assume one of the four official names for the party, depending on the language of the territory. While the structure of the SVP is as federal as that of the Radical Party, "its narrow appeal, its restricted geographic scope, and its strong ties with farm organisations make it easier for the national party to coordinate electoral activities from a central headquarters" (Kerr 1987, p.164-5).

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26 Unaffiliated individuals may become members of the federal party only after making a request in writing to the party's central committee (Article 8.8).

The Christian Democratic Party (CVP/PDC)

The Catholic conservatives were the leading force in the Sonderbund secession in 1847. After the formation of federal Switzerland in 1848, the Catholic conservatives were relegated to the confines of the Sonderbund cantons, where they vociferously guarded the sovereignty of the cantons against radical encroachment. The Catholics, however, were terribly divided. They tried three times between 1874 and 1894 to form a federal political organization, but each effort failed on account of internal factionalism (Gruner and Pitterle 1983, p.43). Although Joseph Zemp, a conservative Catholic, won a Federal Council seat in 1891, it was not until 1912 that the Catholics were able to put their differences behind them and form a federal political party. They gained a second seat on the Federal Council in 1919. Whereas the party's initial purpose was "to protect and preserve the doctrines and institutions of the Catholic church" (Coddington 1961, p.12), the party has more recently tried to project basic non-denominational Christian values, hence the change in party name. Their support, however, is still overwhelmingly derived from Catholic voters. The CVP is still perceived as a strong defender of cantonal rights.

The Christian Democratic Party has perhaps an even more impressive grassroots structure than the Peoples Party, but it also has stronger mechanisms of central control. The CVP statutes declare that "[l]es partis cantonaux sont les organisations faitières du PDC" (PDC 1997, p.9; Article 13.1). Each cantonal party has its own statutes, adapted to the conditions each respective canton. Each cantonal party is required to obtain recognition from the PDC central committee. Moreover, "les PDC cantonaux contribuent financièrement au parti suisse pour ses prestations centrales

28 When the first socialist councillor resigned in 1953, the radicals initially obtained a fourth seat but, later that year, it was transferred to the Catholics. From 1954 to 1959, both the Radicals and the catholics occupied three seats. In 1959, the socialists were elected to two seats, and the current 2:2:2:1 formula was established (see Table 9.1).
The PDC party statutes, however, oblige the cantonal parties to constitute local party units at the district level (Article 13.3). Fabien Crelier, a PDC party spokesman, writes, "[l]es sections locales, de district et cantonales sont indépendantes dans leur prises de position politiques ou le choix de leurs candidats pour les élections." Party membership, correspondingly, is derived from the local units. Crelier explains,

"[l]e PDC suisse n’est pas un parti de membres proprement dit, mais l’adhésion directe au parti suisse est cependant possible. En principe, on est d’abord membre du PDC de sa commune, ce qui implique automatiquement l’appartenance à la section de district, à la section cantonale et au PDC suisse.

The PDC is thus a confederation of cantonal parties, each of which accords local units considerable autonomy. In two cantons (Obwald and Valais), the PDC affiliates are known as the "parti chrétien-sociaux" but "ils co-existent et sont concurrence avec des sections PDC dans ces deux cantons." On the other hand, the party statutes make clear that the cantonal parties are expected to maintain "fidelity" to the Swiss party. Article 15.2 states, "[l]e comité du parti suisse peut exclure des partis cantonaux qui violent manifestement les principes, les statuts ou les intérêts du PDC suisse et leur contester le droit de porter le nom du parti (Art. 1)" (PDC 1997, p.10). With the possible exception of the Socialists, the PDC is the party most wedded to its principles.

The party's objectives declare that the party unites men and women who wish to defend the interests of the community, "conformément aux principes fondamentaux chrétiens" (PDC 1997, p.5).

While the party also declares its support for the principles of federalism and subsidiarity, the party's commitment to Christianity is almost certainly greater. In the event of a conflict within the party between Christian principles and the federal principle, it seems evident that the central committee would decide in favour of Christianity rather than federalism. This stands in contrast to the days before the Catholic conservatives joined the federal government when federalism was seen as the best defense of the party's religious interests.

The Social Democratic Party (SPS/PSS)

The Swiss Socialist Party was initially indoctrinated with the Marxist thinking of continental Europe. In the first two decades of the twentieth century, the Socialist Party united with labour unions to prepare for class warfare. By the end of the First World War, "the Swiss Social Democratic leadership stood quite close to Russian bolshevism" (Gruner and Pitterle 1983, p.45). While the party's popular vote declined from 31 per cent in the 1917 general elections to 24 per cent in 1919, the advent of proportional representation served to double their share of National Council seats from 11 percent to 22 per cent (Gruner and Pitterle 1983, p.46). Although the party had as many Federal Assembly seats as the Catholics, it was not granted a Federal Council seat until it moderated its platform during World War II. The responsibility of power has served to temper greatly the party's ideology. It is now no more radical than social democratic parties in other advanced democracies.

The SPS has been the least inclined of the major parties towards cantonal sovereignty. Socialist parties around the world have tended to regard federalism as inimical to the formation of a socialist economy. In relation to the Swiss Socialist party, Kerr has commented,

"the Socialist Party truly is a national party in the degree to which its
executive committee coordinates party activities at all levels of organization. It leaves considerable autonomy to the cantonal parties for the recruitment of members and candidates, but it ensures coherence of party policy and programmes through collective decisions at the annual conference Congress and through the definition of uniform standards (Kerr 1987, p.164).

In short, the SPS is the most integrated and hierarchical party in Switzerland. All the cantonal party units assume the same party name, according to the language of the canton. But, it is a question of degree. The SPS may not be quite as federal as the other major parties in Switzerland but, compared to political parties in other advanced industrial democracies, its character is very federal. François Masnata reported that in the SPS "[e]ach cantonal party has a tendency to consider itself as a whole and not a party of a whole" (quoted in Steiner 1974, p.40).³³

Fringe Parties

There are also a number of small parties in the Federal Assembly, covering the spectrum from the far left through the centre to the far right (see, Gruner and Pitterle 1983, p.49-58). The Liberal Democratic Party is the most important of these parties. After an illustrious history in the nineteenth century, the Liberal Party has struggled to maintain three or four percent of the popular vote in federal elections. The party, however, has remained significant in four cantons (Vaud, Geneva, Neuchâtel, and the German-speaking Basel Town). Gruner and Pitterle note that "[w]ith their center of gravity in French-speaking Switzerland, the Liberals have remained staunch defenders of linguistic and political minorities and vigilant guardians of cantonal rights" (Gruner and Pitterle 1983, p.39). The small parties, especially the Liberals, cannot be ignored by the governing parties. The small parties, and interest groups outside parliament, can easily enough exploit the instruments

of direct democracy to challenge unpalatable government legislation. The Liberal Party, in particular, can be expected to challenge legislation that egregiously violates the federal principle.

Federalism and Party Discipline

The non-centralized character of Swiss political parties is evident in the weak discipline of the parties in the Federal Assembly (Kerr 1978), although again studies have indicated that there are minor degrees of variation between the parties. Hertig has concluded that the FDP and the CVP have very low party discipline, while the SPS has moderate discipline and the SVP displays the greatest parliamentary cohesion (Hertig 1978, p.67). Weak party discipline in Switzerland stems from a number of sources. First, as in the United States, the removal of the executive from the Federal Assembly weakens party discipline, especially since there are no means by which to express non-confidence in the Federal Council. The parties are thus free to criticize the policies and actions of the Federal Council without risk of bringing down the government. Second, the institution of direct democracy, especially the facultative referendum, also weakens party discipline. When the people have the final word on legislation, it does not make sense for the parties to stake their reputations on any single piece of legislation. The consociational character of the Swiss government also means that the parties must be free to make frequent political compromises. The parties must therefore maintain flexible programs. The depersonalization of politics and the absence of 'national' leaders also weakens party discipline, and permits relatively stronger and more autonomous cantonal organizations.

34 The disproportionate influence that can be wielded by small parties is discussed by Steiner (1974, p.18-20). Kerr argues that interest groups are even more adept at exploiting direct democracy. They are better organized, better disciplined, and frequently better funded. Moreover, as they are more interest specific, it is easier for them to mobilize support for or against proposed legislation or for constitutional initiatives. For a further discussion, see Kerr 1987, p.113-4.
The relative weakness of parties at the federal level in Switzerland has almost certainly mitigated the need for separate cantonal party organizations. Even for federal elections, the cantonal parties have an almost unfettered ability to determine party candidates. They also have a high degree of latitude in modifying party policy to meet local conditions. There does not seem to be any question of the federal organization intervening in cantonal politics. Cantonal parties would appear to have all the autonomy they require to maintain the political sovereignty of the cantons they govern. This may explain the total absence of specifically cantonally based parties in the Federal Assembly, such as the Bloc Québécois in Canada.\(^{35}\) In short, federal political parties have worked with the federal principle in the constitution, not supplanted it. The structure and behaviour of federal political parties have thus reinforced the federal principle and contributed to the stability of the country.

The Cantonal Party Systems

Every canton has its own party system, and the federal party system is rarely replicated at the cantonal level. The "geography" of the cantonal party systems is inordinately complex. Cantonal party systems may be classified in two ways. First, one may look at the number of parties competing in the system. On this measure, the cantons range from the "partyless" Appenzell Inner Rhodes to the extreme multipartyism of Berne, which has over a dozen parties in its system.\(^{36}\) Only four cantons have two or fewer parties, while seventeen have five or more parties (Delley and Auer 1986, ...
The cantonal party system may also be classified according to the number of parties that participate in the executive council. The cantons range, on this score, from one-party government to five-party government. In Girod's famous study of the geography of the cantonal party systems in the early 1960s, only two cantons (Argovie and Thurgovie) had executive councils composed of the same four parties as the Federal Council, and even still the governing formulas were not the same as the federal magic formula.\textsuperscript{37}

The uniqueness of the cantonal party systems serves to enhance the political autonomy of the cantons. For one thing, "[t]he fact that all the major parties serve somewhere as 'junior partners' enhances interparty cooperation and compromise at the national level" (Gruner and Pitterle 1983, p.32). It has also prevented any of the major parties from becoming hegemonic, and consequently subverting constitutional federalism. Furthermore, in order to engage in coalition formation, it is accepted that the cantonal parties must be independent of their central organizations. This is understood to be an integral aspect of the culture of "amicable agreement." In short, the structure of the cantonal party systems, in addition to the structure of federal political parties, has helped preserve the sovereignty of the cantons.

**Social Cleavages and the Party System**

Switzerland has one of the most complex social structures of all advanced democracies. It is characterized by three major language groups, and one minor language group, with deep cross-

\textsuperscript{37} In each of these cantons in 1962, the governing formula was 2:1:1:1, with the Radical Party possessing the two seats in each case (Girod 1974, p.233). In two additional cases (Grisons and Glaris), the Radicals, Christians, and Socialists governed in partnership with the Democratic Party, which merged with the Farmers Party in 1971 to form the Swiss People's Party. Unfortunately, I have not been able to obtain current data for cantonal governments.
cutting religious cleavages. German-speakers account for more than two-thirds of the population, while French-speakers form only about one-fifth of the population. Italian is a distant third, with only about 5% the Swiss population, although the presence of many migrant workers from Italy doubles that figure to about 10% of the total population residing in Switzerland. Religion divides the country more evenly. In total, among citizens, Protestants form a bare majority of the population (about 51%), and the Catholics about 44%. The major language groups, however, are divided almost equally between Catholics and Protestants. German-speaking Protestants are about 40% of the population, and German Catholics about 29%. French Protestants constitute 9% of the population, while French Catholics make up 9.5% of the population (see, Appendix 8). Individual cantons are generally more homogeneous (see, Appendix 9). The various cleavages have allowed different coalitions to form according to the issue under consideration.

Religion was historically the main source of conflict in Switzerland. The Sonderbund alliance, which tried to succeed from the Swiss confederation in 1847, was composed of eight conservative Catholic cantons. It is interesting to note that the alliance included two predominantly French-speaking cantons (Fribourg and Valais). Catholic and Protestant communities remained suspicious of each other for many years after the war and the formation of the modern federal state. However, after 1919, when the Catholics gained their second seat in the Council, religious conflict all but dissipated. Linguistic tensions were raised briefly during World War I, when hostilities erupted between Germany and France, but they did not take root in post-war Swiss politics.

The four major political parties have been quite successful in achieving cross-cultural support, which has been all too elusive in other countries. The Radicals, Socialists, and Christian

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38 The eight Sonderbund cantons included Lucerne, Uri, Schwyz, Obwalden, Nidwalden, Zug, Fribourg and Valais.
Democrats run candidates in almost all cantons during federal elections, while the Swiss People's Party runs candidates in only about two-thirds of the cantons. In the 1995 election for the National Council (Lower House), the Radicals elected candidates in 22 cantons, the Socialists in 20 cantons, and the Christian Democrats in 19 cantons. The Swiss People's Party returned candidates from only 11 cantons. It should be noted that five cantons have only one seat, and another three have only two seats. Thus, even the major parties will not be represented in the National Council from all cantons.

More important, and more impressive, than the cross-cantonal support for the major parties is their cross-cultural support (see, Appendix 10). The Radical Party especially has very broad cross-cultural support, from French and German speakers, Protestant and Catholic alike. The Socialists draw support from all communities, but they derive somewhat less support from Catholic voters, especially German Catholics. The Christian Democratic Party is almost the mirror opposite of the Socialists. The CVP draws its greatest support from German Catholics, and it is rather weaker in Protestant cantons, but not wholly absent. The Swiss People's Party has the most limited cross-cultural support. Its candidates are elected mostly from German Protestant cantons. Indeed, more than half of the SVP seats come from Zurich and Berne, both predominantly German Protestant cantons. With the SVP's smaller base of support, it is appropriate that it only has one Federal Council seat, as opposed to the two seats held by each of the other three parties.

The exceptional cantons of Ticino and Grisons are interesting case studies. Ticino is the only fully Italian-speaking canton, and it is, not surprisingly, overwhelmingly Catholic. Grisons is the

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40 While Berne is officially a bilingual state, a consequence of the earlier Jura crisis, it is predominantly a German-speaking canton. About 85% of the population of Berne is German-speaking.
most diverse canton in Switzerland. It is the primary home of the unique Romansh language, although only about a quarter of the population speaks it as their mother tongue. Half the canton speaks German, and the rest Italian. It is evenly split between Protestants and Catholics. The three large parties are about equally present in each of these cantons. It is interesting to note that neither of these cantons has spawned locally based political parties. Italian is one of the three official languages of Switzerland, but only on "ceremonious occasions does it [the Federal Assembly] accord to spoken Italian the role of equality suggested by the Constitution" (McRae 1964, p.25). While most members of the Federal Assembly are bilingual in French and German, most members do not know Italian. Hughes, perhaps prone to exaggeration, suggests that Italian has a status "reminiscent of colonialism" (Hughes 1993, p.159). Romansh is an even more endangered language, but again no regional party has risen in defense of this ancient language. These cantons are perhaps the best testimony to the success achieved by the Swiss parties in integrating diverse linguistic and religious communities.

The analysis of referendum data, furthermore, has also not revealed a consistent alignment of communities. It seems rather that "shifting alliances are created according to the topic of each referendum" (Eschet and Schwarz 1989, p.106). The referendum is inherently a majoritarian instrument, but it seems to have worked in Switzerland to facilitate intercommunal harmony (Kobach 1993, p.173-4). There cannot be much doubt that the cross-cultural voting patterns exhibited in referendums "contributed considerably to the peaceful change in federal processes and structures, despite the strong subcultural segmentation within the political system" (Eschet and Schwarz 1989, p.106). The referendum, which is not strictly compatible with the elite driven model of consociationalism, has also forced elite decision makers to be more attentive to popular views.
It has thus reinforced consociationalism and inter-community decision making.

As discussed in a previous chapter, the Swiss cantons exhibit wide disparities in wealth. Once again, however, the cleavages do not line up neatly. The linguistic regions display a rough economic parity. All three language groups share in a part of Switzerland's powerful banking industry, and all three have poor mountainous regions to contend with (Steiner 1990, p.111). "With regard to religion," Steiner continues, "conditions are somewhat less favorable. Catholic regions are generally less affluent than Protestant areas" (Steiner 1990, p.111). Economic variables, however, have not historically influenced electoral patterns. Indeed, "[w]hat is striking in Switzerland is the relative absence of class as a vehicle for partisan feelings" (Kerr 1983, p.84). Only the Socialist Party, which derives a disproportionate share of the labour vote, exhibits a class bias.

The government of Switzerland divides the cantons into rich, medium, and poor for the purposes of determining equalization payments. The four major parties derive some support from all three economic regions, although not equally (see, Appendix 11). The Socialists, Radicals, and Peoples Party derive the majority of their support from the wealthiest and medium cantons, while the CVP wins a disproportionate share of the vote from the poorer cantons. This correlates well with Steiner's contention that the Catholic regions tend to suffer an economic disadvantage. It also confirms the observation made earlier that the Socialist party is the mirror opposite of the CVP. It is somewhat ironic, however, that the Socialists do so poorly in the economically deprived cantons. Although there are variations in voting over the economic regions, the major parties do obtain support in all three areas and this serves to minimize the salience of regional economic cleavages.

Conclusion

Switzerland's political stability is all the more remarkable when it is recalled that the modern
The constitutional framework was born out of a civil war. The politics of cooperation has been carefully nurtured and developed into a set of institutional practices, especially federalism and consociationalism. Although the federal principle was enshrined in the constitution, political parties have been responsible for maintaining the federal principle in the course of everyday politics.

The Swiss party system has evolved from Switzerland's federal heritage. While there are minor operational and structural differences among the four major parties, all the major parties in Switzerland grant their cantonal units considerable autonomy. The cantonal and federal party systems, furthermore, are substantially quite different. These characteristics of Swiss party politics have served to maintain the jurisdictional sovereignty of each order of government. The Swiss political parties have worked with the federal principle embedded in the constitution, instead of subordinating it in their quest for power. As with the other aspects of Swiss federalism, the party system has thus reinforced the federal principle and consequently protected the various national communities. Swiss political parties, moreover, have been remarkably successful at generating cross-cultural support. Switzerland has consequently experienced more than a century of political stability.

Political parties are usually designed for partisan conflict but, in Switzerland, parties have become instruments of consensus building. Switzerland therefore demonstrates that a party system may be highly federal and consensual. There would seem to be three keys to this unusual situation. First, if the two orders of government refrain from interfering in each other's jurisdiction, there is less likelihood of intergovernmental conflict. Second, when it is understood by all concerned that new intergovernmental relations must be proposed as constitutional amendments and approved by the people, cantonal parties have no reason to fear that the federal government will encroach upon
cantonal jurisdictions. Third, the practice of consociational government necessitates cooperation, as opposed to the conflictual form of Westminster government practised in Canada and India. In short, the principle of “amicable agreement” in deeply embedded in Swiss political institutions.

Federalism, finally, is often said to have contributed to the containment of conflict in Switzerland (Bogdanor 1988, p.74). The federal model has neatly segmented the various communities in Switzerland. While Switzerland as a whole is characterized by diversity, the cantons are largely homogeneous, both linguistically and religiously. Only eight cantons contain linguistic or religious diversity. Four are bilingual and four are bi-denominational. Grisons, of course, is both. It is thus thought that the various communities can live peacefully in their respective enclaves.

Federalism *per se*, however, is not sufficient to prevent communal instability. Canada and India are also federations but they do not display the stability that characterizes Switzerland. Only a *well structured federalism*, which guarantees the sovereignty of the constituent units, can maintain communal harmony. Minority communities require this guarantee of sovereignty in their spheres of jurisdiction to ensure their cultural well-being. Switzerland has provided this guarantee, in theory and practice, substantially better than any other multinational federation in the world. This has almost certainly contributed to Switzerland’s remarkable political stability.
Chapter 10

Federalism and the Canadian Party System:

The Containment of Political Conflict
The Canadian party system is characterized by a variety of traits -- disciplined but unintegrated parties and an asymmetrical system. Unlike the American system, the major Canadian parties -- the Liberals, the Progressive Conservatives, the New Democrats, and now the Reform and the Bloc Québécois -- exhibit a high degree of organizational coherence and discipline. This stems from the logic of parliamentary government. On the other hand, the two dominant parties in Canadian politics, the Liberals and Conservatives historically, are not well integrated with their provincial counterparts in most provinces. The Liberal and Conservative parties in most instances maintain separate organizations at the federal and provincial levels. In particular, there is now a total separation of federal and provincial parties in Québec. Thus, while the constitution and fiscal arrangements in Canada have been quasi-federal, the structure of Canadian political parties has been highly federal.¹

The structure of the Canadian party system, independent of individual party structure, is also highly federal. Each province maintains a distinct party system, which is different from the federal party system in most cases. Indeed, there has been considerable speculation that Canadians "balance" their votes, voting for one party at the provincial level and a competing party at the federal level. Ontario is the only province with a party system similar in structure to the federal party system. Again, the Québec party system bears little resemblance to the federal party system. The Canadian party system may thus be described as "asymmetrical" (Smiley 1980, p.121). In an asymmetrical federal party system, the parties are better able to defend the constitutional jurisdiction of their respective order of the system but, as such, an asymmetrical party system "may intensify

¹ When a federal party does not operate in certain provinces, we may call it a "truncated" party, at least in those provinces (Dyck 1989, p.186). The Conservative Party and the NDP are thus partially truncated parties. The Reform and Bloc, which operate only at the federal level, are fully truncated parties. For excellent descriptions of the federal-provincial party systems, see Smiley (1980); Smiley (1987); Dyck (1989); Dyck (1991); and Elkins and Simeon (1980).
territorial and intergovernmental conflict" (Gibbins 1982, p.131), even between governments with the same party name. We should not, however, be overly alarmed by party conflict. As David Elkins has noted, the *raison d'être* of parties is to engage in conflict, not to promote unity, and thereby manage conflict (Elkins 1991). The Canadian party system has accomplished this exceptionally well.

Since the formation of the Parti Québécois, the arena of party politics has been the battleground of Canada's unity crisis. After the October Crisis of 1970, Québec nationalists resolved to pursue their separatist project within the democratic framework. The Canadian state, which resolutely suppressed the violent separatist movement in 1970, permitted the separatists to engage in electoral politics. Indeed, the Parti Québécois has won four majority governments in Québec. The Parti Québécois, moreover, has held two referendums on sovereignty in which the federal government and federal political parties participated, giving further legitimacy to the (democratic) separatist process. While the referendum campaigns in Québec have been deeply divisive and emotional, the Canadian party system has proven to be remarkably robust and it has successfully contained conflict within the framework of democratic politics.

**An Overview of the Canadian Party System**

The federal party system was dominated by two parties -- the Liberals and the Conservatives. -- until 1993, when the Conservatives were badly defeated in the general election. The system has been characterized by long periods of rule by one party or the other, rather than a regular alteration. The Conservatives ruled for twenty-five of the first thirty years of Confederation, while the Liberals have formed the government for about two-thirds of the twentieth century. Third parties have appeared from time to time but have either faded of their own accord or been absorbed by the major
parties. The Cooperative Commonwealth Federation/New Democratic Party has been a regular feature of the federal party system since the Second World War but they have never been close to forming the government at the federal level, or even participating in government. The Bloc Québécois and the Reform Party are products of the 1993 election and it is too early to make any categorical statements about their influence on the party system or Canadian federalism.

The Canadian party system has been highly regionalised. In Atlantic Canada, the Liberals and the Conservatives have competed on an equal footing, with support swaying back and forth between the parties from election to election. The NDP has been marginal in this region, at least until the 1997 election when it achieved a modest breakthrough in Nova Scotia and New Brunswick. Ontario similarly has been a Liberal versus Conservative battle, but with a stronger NDP presence, particularly in urban, working-class constituencies. In the west, Liberal strength has steadily declined, with a slight reversal of misfortune in the 1993 election. For much of Pierre Trudeau's sixteen year rule, no Liberals were elected west of Winnipeg, despite usually winning about 20% of the vote. Liberal weakness in the west, exacerbated by the electoral system, curtailed western Canadian representation in the central government, compounding western discontent and regional conflict (Gibbins 1982, p.116). The Conservatives and the NDP have been the primary contestants in the west. Alberta has been solidly Conservative, while Saskatchewan has been the NDP’s main base of support. British Columbia and Manitoba have been split more evenly, with an advantage for the Conservatives. In the 1993 election, in which the Conservatives were decimated, the Reform Party dominated the west, with a sprinkling of seats for the Liberals and NDP.

For most of the century, the Liberals dominated federal elections in Québec. The Liberals have much more successfully integrated the French and English Canadian fragments. Since
Confederation the Liberals, for example, have had a tradition of alternating French and English leaders, while the Conservatives have never had a Francophone leader. Conservative support for the hanging of Louis Riel and conscription in both the world wars assured their marginalization in Québec. Just as the electoral system under-represented Liberal strength in the west for many years, it has tended to over-represent Liberal strength in Québec, once again exacerbating regional tensions.

The federal party system in Québec, however, appears presently to be in a state of flux. Pierre Trudeau's disdain for Québec's preferred constitutional options -- special status or sovereignty-association -- and his 'humiliation' of René Lévesque during the 1981-82 patriation exercise may have damaged the Liberal Party's long-term electoral success in Québec. In two successive elections, 1984 and 1988, Brian Mulroney, the first Conservative leader from Québec, supported special status for Québec and stole the province, with nationalist, even separatist, support. The Conservatives, however, lost Québec in 1993, replaced by the overtly separatist Bloc Québecois. The Bloc captured most of the province again in the 1997 federal election. The New Democratic Party has been irrelevant in Québec, notwithstanding the party's long-standing support for special status.²

Provincial Party Systems

The provincial party systems have followed a similar pattern (Gibbins 1985, p.270-4). In all four Atlantic provinces, a simple Liberal-Conservative two party system is in place, with each party winning power at various times. Ontario was long a Conservative strong-hold with Liberals and the NDP placing a distant second and third. Conservative rule was interrupted in the 1980s by a period of Liberal rule, followed by an NDP government. In the 1996 election, the province returned the

² Simeon and Robinson argue the NDP has supported special status for Québec because they realized that bilingualism and biculturalism were not popular in the west, their home base, and their centralist social policies could only be pursued if Québec was permitted to opt out (1990, p.189-190).
Conservatives to office. The three party system has also been present in Manitoba. In the post-war years, Saskatchewan was dominated by the Cooperative Commonwealth Federation. After the exhausting battle over medicare, the CCF was replaced by a Liberal government, but the NDP stormed back to power under Alan Blakeney. The Liberals have been marginal ever since. The Conservatives formed the government for much of the 1980s, but they too are now seriously depleted and the province has returned the NDP in two successive elections. Alberta has experienced long periods of Social Credit rule followed by an extended period of Conservative rule, with minimal opposition. British Columbia was dominated by Social Credit from the early 1950s to the late 1980s, with a short NDP interlude between 1972-75. Social Credit has all but collapsed and the centre-right vote seems to have coalesced under a Liberal banner. The NDP has formed the last two governments. In short, the federal-provincial party system has displayed a high degree of symmetry in Atlantic Canada and Ontario but less symmetry in western Canada. The Québec party system, as we shall see below, is highly asymmetrical; it bears little resemblance to the federal system.

Federal-Provincial Party Linkages

The federal and provincial wings of Canadian political parties have historically had a high degree of *de facto* independence, if not *de jure* separation. Steven Muller, writing in 1961 three years before the Liberal party split in Québec, wrote that provincial parties "may bear the same name as the national parliamentary party, but they are in fact nearly autonomous" (Muller 1967, p.149).³ Political independence allows a provincial government to defend more forcefully provincial interests and to bargain more vigorously with the central government, regardless of the party identity of either

³ Muller's article was first presented at the American Political Science Association conference in 1961 but not published until 1967.
government (Muller 1967, p.155; Stevenson 1989, p.218). The formal separation of federal and provincial parties was initiated in Québec as a result of that province’s uneasy relations with the federal government, and this process has subsequently been repeated in some of the other provinces.

Federal-provincial party linkages across Canada are highly varied. The Liberal Party has separate federal and provincial organizations in Québec, Ontario, Alberta and now British Columbia. The Québec party split in 1964 (see below), while the Ontario and Alberta wings split in 1976 and 1977 respectively (Dyck 1989, p.188-9). The B.C. party split in the 1990s, after Gordon Wilson, who rebuilt the party, was unceremoniously removed as leader and replaced by Gordon Campbell. On the other hand, the party is highly integrated in the four Atlantic provinces. In Manitoba and Saskatchewan, "the party has been so weak in recent years that the question of its basic orientation is almost irrelevant" (Dyck 1989, p.190). In short, "federal-provincial relations in the Liberal Party are so variable as to virtually defy generalization" (Dyck 1989, p.198).

The Conservatives are similarly varied. In short, the party is "somewhat integrated in the four Atlantic provinces, variable in Ontario, and more confederal in the Prairies" (Dyck 1989, p.198). There is no provincial Conservative party in Québec, and it is virtually non-existent in British Columbia. The federal party is thus truncated in these two provinces. With these highly varied relations it is nearly impossible to describe the Liberals or Conservatives as either wholly integrated or confederal. The NDP, by contrast, maintains a fully integrated federal-provincial organizational structure, except in Québec. Overall, the Canadian party system is more federal than party systems in most, if not all, other federations (Smiley 1987, p.117).

The Québec Party System

Québec-federal relations have varied according to the nature of the party system. When the
same party has formed the government at both levels relations have generally been amicable, and conflict has emerged when different parties hold the reins of power. Dorion's vigorous critique of the BNA Act was motivated in part by the considerations of party politics. As a Liberal Rouge, Dorion could not have been expected to be sympathetic to Macdonald's Conservatives or Cartier's Bleus. In the early years of Confederation, as we have seen, there was little tension between the Conservative administrations of Sir John A. Macdonald and les Bleus in Québec. Macdonald's decision not to stay the execution of Louis Riel in 1885 sparked a wave of nationalism in Québec, which led to the election of Honoré Mercier's Liberals in the Québec provincial election of 1886. Mercier, as described in Chapter 4, assumed the leadership of the provincial rights movement.

At the turn of the century, the Québec Liberals began forty years of consecutive government. The first of these years coincided with the prime ministership of Wilfrid Laurier -- a Quebecker, a Liberal, and sympathetic to provincial rights. As early as 1889, Laurier declared "[t]he only means of maintaining Confederation is to recognize that, within its sphere assigned to it by the constitution, each province is as independent of control by the federal Parliament as the latter is from control by the provincial legislature" (quoted in Brady 1968, p.339). In his fifteen years as prime minister, Laurier did not adhere strictly to the principles of divided sovereignty (Cook 1969, p.46), but he always seemed to be able to maintain solid support in Québec. From the mid-1890s to the mid-1930s, the JCPC was also strongly sympathetic to provincial autonomy. The governments of Québec thus had few complaints: the constitution was unfolding as they desired, and political friends

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4 This pattern began to dissolve during the Quiet Revolution, when Lean Lesage's Liberal government engaged in many jurisdictional disputes with Lester Pearson's federal Liberal government.
By the mid-1930s, the Québec Liberal party had become quite conservative. The depression presented an enormous challenge to the administration of Alexandre Taschereau. When his policies proved inadequate, a group of intellectuals formed the Ecole Sociale Populaire and in 1934 published a pamphlet, "Programme de Restoration Sociale, based on a combination of French-Canadian nationalism, European Catholicism, and corporatism" (Thomson 1984, p.9). Some Liberal members of the Ecole Sociale Populaire -- notably Paul Gouin, the son of the long-serving premier Lomer Gouin -- "formed a group within the party, the Action Libérale, translated the program into a set of legislative proposals, and tried to persuade the Taschereau government to adopt it. When they failed, they formed their own party, the Action Libérale Nationale" (Thomson 1984, p.9).

Maurice Duplessis, who became the leader of the Québec Conservative Party in 1933, proposed an alliance between his party and the dissident Liberal group. Duplessis and Gouin formed the Union Nationale in 1935 but, within a year, Duplessis skilfully removed Gouin. Duplessis subsequently stormed to victory in the 1936 provincial election, taking seventy-six of ninety seats. After the election, Duplessis removed the remaining radicals from the Action Libéral and consolidated his position by assuming the three pillars of traditional Liberal support: the church, big business, and farmers (Thomson 1984, p.10). Duplessis' victory was similar to Mercier's: "Like Mercier, Duplessis had created a new nationalist party by combining the weaker of the two traditional parties with a dissident faction of the stronger. This fact enabled both men to denounce Ottawa with somewhat fewer inhibitions than other premiers whose parties were organizationally

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5 The World War One conscription crisis is the only notable political conflict between Québec and the federal government during this period. It is not surprising that this conflict occurred between a Conservative federal government and a provincial Liberal administration. After the war, Quebec voters punished the Conservative Party for introducing the conscription bill. In the 1921 general election, the Liberals won every seat in Québec.
linked with federal counterparts. Both also benefited from the fact their provincial opponents bore the same party label as the federal government, and could thus be tarred with the same brush" (Stevenson 1987, p.103).

Duplessis could have ruled for more than twenty consecutive years but he rashly challenged the federal government's emergency powers at the onset of the Second World War and called an election in the fall of 1939. During the campaign, federal cabinet ministers from Québec "pledged that there would be no conscription as long as they were members of the government of Canada. They even threatened to resign if the voters did not return the provincial Liberals to power" (Verney 1986, p.285). This promise ensured the victory of Adélard Godbout's Liberals and his loyalty to the federal Liberals for the duration of the war. When the federal government reversed its position on conscription in 1942, Godbout's fate was sealed. The euphoria of total victory in Europe in May 1945, plus the revelations of the true extent of Nazi atrocities, allowed the Liberals to overcome the conscription crisis and win the 1945 election, albeit with only a slim three-seat majority. The Québec Liberal party, however, was not as fortunate: Godbout went down to defeat at the hands of Maurice Duplessis and his Union Nationale in the 1944 provincial election.

Duplessis assumed the position adopted earlier by Dorion and Mercier and argued for a classical system of federalism with strict lines of demarcation between the two orders of government. He objected to federal expansion, partly because he believed in provincial autonomy and partly because he did not believe in the welfare state. This could be described as the pursuit of "negative autonomy." Duplessis was a deeply conservative figure, and thus easily ignored by the federal government. Québec's uneasy relationship with the federal government, however, did not improve with Duplessis' death in 1959. Indeed, Jean Lesage later campaigned just as vigorously for
provincial autonomy because, in contrast to Duplessis, he wanted Québec to have its own system of social welfare. Lesage may thus be described as an advocate of “positive autonomy.”

Jean Lesage, the Quiet Revolution, and Federal-Provincial Relations

When Duplessis died in September 1959, the Union Nationale declined swiftly. As the desire for political change began to sweep Québec, a Liberal victory seemed imminent in the next provincial election. In the 1960 election, Jean Lesage led the Liberals to a narrow victory, capturing 51 of 95 seats and 51% of the popular vote. The Liberal election manifesto represented a comprehensive political program, which entailed education reform, development of natural resources, civil service reform, a royal commission to investigate Union Nationale corruption, and, proposals to improve federal-provincial fiscal relations (Thomson 1984, p.84-5). Finally, "[t]he key Liberal slogans were l'équipe de tonnerre -- the terrific team -- and c'est le temps que ça change -- it's time for a change" (Thomson 1984, p.85). After they were elected, the Liberals stormed into office with a great flurry of activity. The Liberals enacted so many changes so quickly, the Globe and Mail termed it a "Quiet Revolution." This phrase later signified the death of the ancien régime and the concomitant transformation of Québec society in the 1960s.

Lesage seemed to have an inconsistent perspective on federal-provincial relations. He never hesitated to announce constitutional support for provincial autonomy, but he was a fiercely partisan

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6 In marked contrast to Duplessis, Lesage argued, "[p]rovincial sovereignty must not be a negative concept incompatible with progress; it must be a truly living reality, a principle that is put in concrete form in institutions and by legislative measures destined to promote the welfare and the spiritual progress of the people. In short, sovereignty which is not positive and is confined only to opposition, cannot endure" (GOC 1960, p.125).

7 Jean Lesage became Liberal Party activist in his youth. He was first elected to the federal parliament in August 1945. He served as a backbencher during the last years of King era, before becoming a parliamentary assistant to the Secretary of State for External Affairs. He was later promoted to the cabinet by Prime Minister St. Laurent as minister of resources and development. Although Lesage retained his seat during the Diefenbaker landslide of March 1958, he was persuaded to become the leader of the Québec Liberal Party in May 1958 (Thomson 1984).
critic of Duplessis, and a staunch supporter of Prime Minister St. Laurent, notwithstanding the latter's penchant for expanding the Canadian state into areas of provincial jurisdiction (see, Chapter 7). Thomson suggests that Lesage was particularly perturbed by Duplessis' refusal to exercise the provincial prerogatives available to him, thus necessitating federal action to meet the social needs of the Québec people (1984, p.334). More than anything else, Thomson suggests, "he was a lawyer by training, and just as he had once represented the federal viewpoint as a member of Parliament, so as premier he would represent the provincial one with the same zeal" (1984, p.365).

One of the first items of business for Premier Lesage was the federal-provincial conference, convened by Prime Minister Diefenbaker in Ottawa at the end of July 1960. Mr. Diefenbaker reviewed the fiscal arrangements between the two orders of government, outlined their shortcomings, and he repeated twice in his opening address that "[t]he federal system must be preserved and maintained without centralization" (GOC 1960, p.14). Lesage was determined to be more cooperative than his predecessor but, in some ways, he was just as adamant. He insisted that "[f]ederalism in Canada...rests on the sovereignty of the Federal Parliament and of the Provincial Legislatures in their respective fields of jurisdiction. The respective sovereignty of the two spheres of government is the very foundation of Confederation" (GOC 1960, p.125; emphasis added).

Premier Lesage presided over an innovative and productive but also a fractious and tumultuous cabinet. It was an uneasy mix of old style politicians and young 'quiet revolutionaries,' quasi-socialist and fervently nationalist in outlook, with Lesage sitting precariously in the middle attempting desperately to balance the left and right sides. René Lévesque, a laconic young journalist, was one of the leading stars of the cabinet. He had entered politics with the firm desire to develop Québec's natural resources. He believed adamantly that the key to this process was the
nationalization of the province's hydro-electric facilities and by 1962 he was openly advocating this proposal to his cabinet colleagues. The projected cost of such a move was $400 million, an amount equal to the entire provincial budget just a few years earlier (Thomson 1984, p. 112). Unable to reach a cabinet consensus on the issue, Lesage proposed that he call a snap election in November 1962 as a sort of public referendum on the question of nationalization. The Liberals settled on the emotive "maîtres chez nous" slogan for the election campaign and they increased their popular vote from 51.4% to 56.5% and captured 63 seats, up from 51. The Union Nationale, under its new leader, Daniel Johnson, fell to 42% of the vote and 31 seats. The vote may be interpreted as a public endorsement not only of nationalization, but of the Quiet Revolution initiated by the Liberals.

In his second term of office, three distinct pressures were exerted on Lesage, forcing him to adopt a more nationalist and confrontational approach with the federal government. These pressures included the continued expansion of the federal government, the escalating costs of the Quiet Revolution, and the increasing nationalism of the separatist movement, the Union Nationale, and, indeed, his own cabinet. In order to appease the nationalists in his cabinet, Lesage challenged the federal government to provide Québec the fiscal space necessary to finance the Quiet Revolution.

Lesage threw down the gauntlet to the federal government in his first budget after his reelection, and just three days before the federal election. In a budget speech to the Québec legislature, Lesage stated,

I solemnly declare that I have no intention to continue to speak indefinitely of the needs of Québec, nor will I be satisfied to continue to present these demands to the central government in the hope that it will condescend to meet them. As I have just said, the matter is of primary importance and I do not intend, as Prime Minister and as Minister of Finance, to repeat myself year after year without tangible results. So this the last time that I will revert in those terms to this matter in a Budget Speech.
Twelve months will go by before the next Budget Speech. Either the central government, whichever party is elected on April 8th and I repeat whichever party is elected on April 8th, will have taken advantage of twelve months to meet Québec's requirements, or else, we, in Québec, will, during the same twelve months, see to it that the necessary action is taken in fiscal matters (1968, p.223; emphasis original).  

Although Lesage was not a separatist, his speech sounded suspiciously like a separatist ultimatum. He was forced to adopt this position by the fiercely nationalistic and nascent separatists in his cabinet. Lesage seemed to realize that only a federal system with fully divided sovereignty would appease his nationalist cabinet ministers.

Over the next year, the tension between the federal government and Québec mounted steadily. While the federal Liberal program articulated support for provincial autonomy, many of their social policies invaded areas of provincial jurisdiction. In the 1960s, the federal Liberals were determined to introduce medicare, the Canada pension plan, and expanded family allowances, among other things (see, Chapter 7). These objectives collided with the thrust of the Quiet Revolution (Thomson 1984, p.369-70). The contradictory objectives of the federal Liberal Party placed Lesage in a tenuous position, especially in relation to his highly nationalistic cabinet.

The Québec Liberal Party had felt tarnished by their federal namesakes as early as the mid-1950s, when the Union Nationale was at the height of its conflict with the federal Liberal government. In 1955, Québec Liberals formed the Québec Liberal Federation to create some political distance and organization autonomy from the federal Liberal Party (Behiels 1985, p.259; Thomson 1984, p.25). The friction between Québec Liberals and Louis St. Laurent, however, continued (Thomson 1984, p.26-7). After St. Laurent's humiliating defeat at the hands of John

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8 This speech has been reprinted in J. Peter Meekison (ed) (1968) Canadian Federalism: Myth or Reality, Toronto: Methuen.
Diefenbaker in the 1957 and 1958 elections, the federal Liberal Party began a concerted effort of renewal. The Liberals rebuilt, however, "in a way that made the federal party virtually independent of the various provincial Liberal parties" (Stevenson 1989, p.218).

The tension between the federal and Québec Liberals was renewed after the federal Liberals were reelected in 1963 with Lester Pearson as prime minister. Lesage ironically was friends with Pearson and they shared a similar political philosophy, especially the dualist understanding of Canada (Thomson 1984, p.127). When Pearson announced his cabinet, Lesage commented he had worked closely with over half the ministry (Thomson 1984, p.127). Lesage was thus highly sensitive to the opposition charge that as a Liberal premier he would simply be a junior partner to the federal Liberal administration. Lesage was consequently anxious to display some independence from the federal party. In the fall of 1963, the Québec Liberal Party rejected a motion at its annual meeting to separate from the federal organization (Thomson 1984, p.135). But after the stormy federal-provincial conference at the end of March 1964 (see, Chapter 7), it was clear to both wings of the party that separation was inevitable and necessary.

In July 1964, Lesage declared, "[i]t has become evident that the Canadian reality demands more and more that the political parties which work on the federal level be distinct from provincial parties and vice versa...In effect...the interests are too divergent between federal and provincial governments at the high political level" (quoted in Simeon 1972, p.33). In March 1965, "the new federal wing of the Liberal Federation of Canada was created and the Québec Liberal Federation became a purely provincial body" (Thomson 1984, p.135). Relations between the two organizations have remained uneasy. It is perhaps a little surprising that the Québec wing of the party maintained
the Liberal name; this is probably attributable to the party's venerable history in Québec.\footnote{In this regard, the contrast with Maurice Duplessis is instructive. Duplessis realized when he was the leader of the provincial Conservative Party that he was hampered by the name association with the federal party, especially after the federal party's support for conscription in the first world war. He thus moved to disband the Conservative Party in Québec and establish the Union Nationale as a new party. Unfettered by a name association with the federal Conservative Party, Duplessis went on to enjoy a twenty-year reign as premier of Québec.}

Despite the separation of the federal and provincial wings of the Liberal party, the nationalist pressure on Lesage was unrelenting. Lesage had long believed that patriation of the constitution with an enshrined amending formula would complete the Canadian project and dampen the emerging separatist spirit in Québec. In the summer of 1964, Lesage accepted the terms of the Fulton-Favreau amending formula. At the conclusion of the Fulton-Favreau agreement, Lesage announced to the press that it was "a significant victory for Québec" (Thomson 1984, p.349). His cabinet, including René Lévesque, gave their support to the agreement as well. However, "[f]or Daniel Johnson, the Fulton-Favreau formula was like a lifebuoy to a drowning sailor" (Thomson 1984, p.350). Johnson advocated allowing the BNA Act to die a natural death in London, to be replaced by a new constitution based on the equality of the two nations. He mounted an effective campaign suggesting the Fulton-Favreau formula would place Québec in a constitutional straight-jacket and stall the Quiet Revolution. As the nationalist pressure mounted in Québec, the more nationalist members of Lesage's cabinet began to feel uneasy. Lesage was thus forced to abandon the agreement.

Lesage was also forced to maintain his vigilance against the federal government. While many federal Liberals claimed to be sympathetic to Québec, they continued to push the expansion of the federal government, especially in social policy. At the July 1965 federal-provincial conference, Lester Pearson demonstrated the tension in the federal position in his opening remarks. He acknowledged that the constitution provides the provinces a large area of jurisdiction but, he
argued, "[o]ur constitution does not establish -- no constitution can establish, except at the price of impracticable rigidity -- absolute distinctions between the functions and powers of our respective governments. Our responsibilities are mingled at many points. Our concerns overlap even more" (GOC 1965, p.5). The prime minister's argument put Lesage in a vulnerable position. With the federal government and the Québec nationalists encroaching from opposite sides, he had very little room to manoeuvre.

All Lesage could do was defend Québec's space as vigorously as he could. At the July 1965 conference, he argued Québec had assumed heavy responsibilities in social policy -- education, health, welfare and regional development -- and these commitments required considerable financial resources. He added that future programs desired by Québec were "jeopardized, by inadequate revenues, as a result of a tax sharing still too heavily weighted in favour of the central government. True, the federal government has increased the provinces' share of certain tax fields in recent years; Québec maintains that the new distribution still falls far short of its financial requirements for matters within its jurisdiction" (GOC 1965, p.45). Lesage proceeded to criticize all the initiatives outlined by Pearson -- manpower training, the Canada Assistance Plan, and medicare -- and he made a special effort to obtain respect for provincial legislation. In an impassioned passage, Lesage stated,

the Québec government believes that it is high time to put an end to the tendency of the federal government to make excessive use of what is known as its ancillary power in order to encroach upon fields normally under provincial jurisdiction...it results in a situation where the federal government, even though its powers are limited, is in a position to set the pace and call the tune for the provinces, and even to commit them to expenditures which upset the order of priorities which they have set for themselves. In a nutshell, the federal government manages in this way to take the initiative, even in fields which are not normally within its jurisdiction (GOC 1965, p.56-7).

He acknowledged the other provinces might not object to the use of the federal spending power but,
he added, "it must be quite clear that Québec intends to be exempted" (GOC 1965, p.57).

Lesage's insistence upon classical federalism fell on deaf ears in Ottawa. Most Canadians outside Québec have long resisted the implications of a federal form of government. Federalism, during the rise of the welfare state, was seen, at best, as an inconvenience and not sufficiently progressive. In Québec, with the assertive rise of nationalism in the 1960s, classical federalism, the desire of the province since Confederation, was increasingly viewed as insufficient. Lesage's efforts were ultimately futile; he could not convince the federal government of the merits of federalism, while, on the other hand, he could not maintain the support of Québécois nationalists. In the 1966 election, Lesage campaigned on his record and ceded the nationalist ground to the Union Nationale.

The 1966 election witnessed the participation of separatist parties for the first time. Prior to 1960 only two fringe separatist groups were in existence, the "traditional right-wing" Alliance Laurentienne and the "radical" Action Socialiste pour l'indépendance du Québec (Thomson 1984, p.103). In the summer of 1960, a group of twenty young intellectuals formed the Rassemblement pour l'indépendance Nationale (RIN). Dr. Marcel Chaput, one of the founding members of the RIN, published a provocative pamphlet in 1962 entitled Why I am a Separatist. In September 1962, however, Chaput left the RIN and formed the Parti Républicain du Québec. The following year the RIN transformed itself from a "movement" to a "party" under the fiery leadership of Pierre Bourgault. At the same time the Front de Libération du Québec (FLQ) took responsibility for a bomb explosion in Montreal that left one man dead. The question of separatism had arrived quite literally with a bang. A survey in late 1963 suggested 13% of Québec supported independence, only 43% were opposed, 23% were undecided and 21% had not given the question any thought (Thomson 1984, p.105). In the 1966 election, the RIN gathered 6% of the votes but won no seats. Although
support for the separatists was weak, the presence of these separatist parties fundamentally altered the terms of political debate in the province.

Daniel Johnson, the leader of the Union Nationale, ran a highly efficient campaign. He calculated "[t]he Union Nationale needed fifty-five seats to win; he had them all ranked from the easiest to the toughest, and tackled them in that order" (Thomson 1984, p.154). He also effectively captured the nationalist vote. In the short term, he was adamant that the federal government would have to vacate the direct tax fields entirely and leave the provision of social security exclusively to the provinces. His long term constitutional solution was captured in the emotive slogan égalité ou indépendance. He argued that Canada's two nations must be made equal or Québec would have no option but to separate. His rhetoric resonated deeply in the Québécois imagination.

The election results were deeply shocking to Lesage and a surprise to most observers (Thomson 1984, p.159). It was one of those elections characterized by the vagaries of the first-past-the-post system. The Liberals captured 47% of the vote and 50 seats, while the Union Nationale captured 56 seats with only 41% of the vote. The Liberal vote was concentrated in the more populous urban constituencies, whereas the Union vote was spread out over the more numerous but less populous rural constituencies. Three days later Jean Lesage transferred power to Daniel Johnson and that evening he suffered a minor heart attack. Lesage was determined to recover and lead his party back to victory, but this proved to be impossible. He thus sought to ensure a transfer of leadership to his chosen successor, a young Robert Bourassa.

"Jean Lesage," reports his biographer, "was always a convinced federalist" (Thomson 1984, 10 Richard Simeon has argued that "it was not nationalism but resentment at the speed and cost of social change led by the Liberals that was responsible for the defeat" (1972, p.72).

Thomson concludes that "[t]he Liberal program was hardly revolutionary; Lesage's own goals can be described as modern efficient government and increased opportunities for French-Canadians. Nationalism was almost totally absent from the Liberal agenda" (1984, p.468; emphasis added). Thomson acknowledges that Lesage was forced by the prevailing political conditions in Québec to employ nationalist rhetoric on occasion but after 1965, Thomson argues, Lesage ceded this ground to Daniel Johnson and the Union Nationale (1984, p.468). While Lesage's famous maitres chez nous slogan undoubtedly elicited nationalist supporters, it can also be interpreted as a federalist slogan if the 'house' is understood to mean the area of provincial jurisdiction.

Lesage defended and promoted Québec's interests by advocating the adoption of classical federalism in Canada. Like previous Québec premiers Lesage realized that only a federal system that recognized the principle of divided sovereignty would be sufficient to fulfil nationalist aspirations in Québec. If he was unable to persuade the federal government to adopt classical federalism, he was determined to extricate Québec from Ottawa's policy initiatives. This was a political necessity for Lesage, given the separatist tendencies of much of his cabinet. After he lost the election in 1966, he was no longer able to restrain the separatists, as we shall see below. Lesage died in December 1980 from throat cancer. His last public act was to appear with Pierre Trudeau at a large federalist rally in May 1980 to urge Québécois to vote "non" in the first referendum on sovereignty.

Daniel Johnson and the Union Nationale

Although the Union Nationale mandate lasted until the spring of 1970, Daniel Johnson died in September 1968. In his short time as premier, however, he effectively disseminated the ideas he

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12 This, in fact, may have been what he meant by obtaining "special status" for Québec.
had developed earlier as leader of the opposition and he succeeded in changing the terms of political
"Canada," he argued, "is not merely a federation of the ten provinces. It is also the home of two
linguistic and cultural communities, that is, of two nations in the sociological sense" (Ontario 1968,
p.10). More specifically, he argued "[w]e believe that there is in Canada...a nation of French speech
whose home is in Québec" (GOC 1966, p.49; emphasis added). "To this end," he asserted,

the new Québec government is committed to the fundamental task of
obtaining legal and political recognition of the French-Canadian
nation; among other things, this will require a new constitution to
guarantee equal collective rights in our country to English-speaking
and French-speaking Canadians, as well as to give Québec all the
powers needed to safeguard its own identity (GOC 1966, p.50).

The new constitution he proposed would have recognized the equality of the two nations. He wrote,
"[c]ette constitution devrait, à mon sens, être conçue de telle façon que le Canada ne soit pas
uniquement une fédération de dix provinces, mais une fédération de deux nations égales en droit et
en fait" (Johnson 1965, p.116). Put another way, he announced to the federal-provincial conference
in February 1968, "the object of this constitution should be not only to federate territories but also
to associate in equality two linguistic and cultural communities, two founding peoples, two societies,
in other words two nations in the sociological sense of the word" (GOC 1968a, p.67).

It was, however, not at all clear what political structures and institutions he wanted to create
to achieve his objectives. In his manifesto Égalité ou Indépendance, he hinted that it might entail
the formation of a parliament with equal representation of the two nations. Johnson floated this idea
at the Confederation of Tomorrow Conference held in Toronto in November 1967:

I take for granted that Canada's next constitution will proclaim the
association of our two cultural communities and clearly set forth the
collective rights of both. In that case, what is to prevent us from
setting up a permanent body staffed by equal numbers of Canadians from each cultural community, to ensure respect for these collective rights? At present, there is no permanent body constituted on a binational basis, nor is there any agency to bring about the equal partnership which we feel is the only organization possible for the Canada of tomorrow (Ontario 1968, p.12; emphasis added).

In short, it seems Johnson wanted to transform Canada from a federation of provinces to a binational confederation. His proposal cleverly negated Québec's demographic disadvantage and made the province equal to the rest of the country. It is thus not surprising that his idea resonated well in Québec but not in the rest of Canada.

Johnson, like Duplessis before him, was not averse to employing Canadian nationalism to advance his goals. He claimed, at the federal-provincial conference in February 1968, "the new constitution will be the authentic work of Canadians. For the first time in our history, we shall have a constitution made entirely in Canada, by Canadians and for all Canadians" (GOC 1968a, p.57; emphasis added). He also invoked Canadian nationalism to reassure the rest of the country: "Québec's expectations are not aimed at destroying Canada. On the contrary, if met in time, they will ensure our country much better stability than it has now. English- and French-speaking Canadians will then be able to live in greater harmony" (GOC 1966, p.57).

Johnson's constitutional program was an example of studied ambiguity par excellence. While he indicated that his proposals were federal and would maintain a strong federal government, commitment to the federal principle always seemed much more equivocal than that of Lesage or even Duplessis. At the federal-provincial conference in February 1968, for example, he stated "that it is in no way necessary to break up the ten-partner Canada to build a two-partner Canada, but that it has become essential and urgent to create a two-partner Canada in order to maintain the ten partner Canada" (GOC 1968a, p.69). What this meant is an open question, but it is not likely that Johnson
had any desire to defend federalism. He was courting the nationalist and separatist vote in Québec not rebuild Canada. If Canadians were not receptive to his plan, he suggested that Québec's only alternative would be to pursue independence.

Johnson's ideas still resonate deeply in Québec. Indeed, his ideas form the basis of the constitutional platforms of the two major parties in Québec. René Lévesque and the Parti Québécois took the two nations thesis to its logical conclusion: parallel sovereignty. In this model, each nation should be fully sovereign. One sovereign body would reside in Québec City and the other in Ottawa. Sovereignty-association is still the preferred option of the Québec separatists, although now it is referred to as an economic and political partnership. Robert Bourassa, the enigmatic leader of the Liberal party for much of the 1970s and 1980s, demanded that Québec receive special constitutional recognition as a distinct society. This might be considered a softer version of the Johnson model.

In sum, the current Québec party system may be described as follows. On the one hand, the Liberal party continues to demand that Québec be recognized as a "distinct society," a constitutional position that has not obtained the necessary support outside Québec. The Liberals, however, show every indication of pursuing this policy until it is accepted by Canadians outside Québec. On the other hand, the Parti Québécois continues to pursue the goal of sovereignty-association. Although there appears to be insufficient support for the idea in Québec, the PQ seems determined to hold referendum after referendum until it is accepted by at least a bare majority of Québécers. Canadians, especially Québécers, seem destined to debate these two options ad infinitum. Meanwhile, the status quo, which nobody in Québec seems to support, continues unaffected.

After the death of Daniel Johnson in 1968, the Union Nationale suffered a steady decline. The party was devoid of leaders and the other parties had pirated its popular nationalist ideas. The
UN had benefitted tremendously in the 1966 election from the vagaries of the electoral system, which was still heavily skewed towards rural constituencies. The electoral map, however, was redrawn for the 1970 election and the party obtained only 19.6% of the vote and 17 seats (Lachapelle et al 1993, p.103). In the 1973 election, the Union Nationale received just 5% of the vote and was shut out of the legislature. "For all intents and purposes, it was a dead party, effectively replaced as the official opposition by the PQ" (Lachapelle et al 1993, p.103). In the 1976 election anglophone protest voters supported the UN "to punish the Liberal party for adopting Bill 22, which made French the official language of the province" (Lachapelle et al 1993, p.103). The UN won 18% of the vote and 11 seats. The relatively strong showing by the UN, at the expense of the Liberals, allowed the Parti Québécois to emerge victorious, much to the regret of disenchanted anglophones. The Union Nationale has subsequently disappeared and a stable two-party system has emerged in Québec with the Liberals and the Parti Québécois.13

The Formation of the Parti Québécois

After losing the 1966 election, Jean Lesage desperately tried to hold the fractious Liberal party together. Throughout his term of office, Lesage had tried to balance the federalists and separatists in his party. By the late 1960s, however, the tide of nationalism was sweeping Québec and Lesage could no longer contain the separatists in his party. At the party's policy convention in 1967, two constitutional positions were openly debated. The first option, supported by the party hierarchy, was official recognition of the two nations and special status for Québec. The second

13 A new party, the Action Démocratique Québec (ADQ), has emerged in Québec in the 1990s, under the leadership of Mario Dumont. Dumont won the ADQ's only seat in the 1994 provincial election. While the ADQ won a surprising 12% of the popular vote in the 1998 election, again only Dumont won a seat in the National Assembly. Dumont has strategically situated the ADQ to garner 'soft' nationalist support from both the Liberals and the Parti Québécois.
option was René Lévesque's sovereignty-association model. On the convention floor, Lévesque, sensing a defeat, withdrew his proposal before a vote and resigned from the party with a large entourage of followers. The party subsequently endorsed the call for special status.

After leaving the Liberal party in 1967, René Lévesque formed the Mouvement Souveraineté Association (MSA), a movement, rather than a party, committed to promoting Lévesque's concept of sovereignty-association. The separatist field, however, was already crowded. RIN, led by Pierre Bourgault, actively participated in the 1966 election, scoring 6% of the vote but winning no seats. There was the also an RIN splinter, the Ralliement National (RN). Lévesque worked assiduously to unite these three groups. The weaker RN agreed to amalgamate with the MSA in the fall of 1968 to form the Parti Québécois (PQ). Negotiations with the RIN proved more problematic, not least of which was the personality clash between Lévesque and Bourgault (Lachapelle et al 1993, p.102). In the end, the RIN voluntarily dissolved and its members migrated to the Parti Québécois. The electoral system was initially unkind to the PQ, which only managed to win 7 seats and 6 seats in the 1970 and 1973 elections respectively. The PQ's breakthrough came in the 1976 election when it won 71 seats and, despite losing the 1980 referendum, the PQ won the 1981 election, taking 80 seats.

The transformation of the Québec party system in the late 1960s is a classic case of political outbidding. When Lesage continued to fight against federal encroachment into areas of provincial jurisdiction, as Duplessis had done before him, the Union Nationale, under the leadership of Daniel Johnson, moved away from the classical federalism advocated by Duplessis towards a more nationalist orientation. The presence of fringe separatist parties also placed pressure on the major parties to adopt stronger nationalist rhetoric. Finally, René Lévesque pursued an end-run around the
Union Nationale and joined the separatists from the Liberal Party with the radical separatists in the RIN to form the Parti Québécois. It would seem that the expansion of the federal state into areas of provincial jurisdiction pushed the major Québec parties towards nationalism and separatism. In other words, the quasi-federal structure of the Canadian state precipitated a transformation of the Québec party system and the formation of an avowedly separatist party.

Claude Morin certainly argues in his memoirs that the expansion of the federal state provoked a separatist response in Québec:

"[t]he Québec choice and membership in the Canadian federal system as we know it are henceforth irreconcilable objectives. The two could coexist in the past, since federal and Québec powers were less in contact. Today they overlap; tomorrow they will overlap more. In a country with federal and provincial governments the effective performance of government and the welfare of the citizens require, here as elsewhere, that there only be one political institution with decisive legislative and administrative power, and that the authority of this power be unchallengeable. Otherwise, if both orders have comparable powers, if they share certain powers in neighbouring sectors, if neither government has general ascendancy over the other, we may find them both, for reasons of prestige, votes, or common rivalry, advancing contradictory measures and cancelling one another out in ceaseless bickering..." (Morin 1976, p.161).

Morin, furthermore, dismisses the special administrative arrangements devised between the federal government and Québec. "[M]ost of the Québec gains which were taken as meaningful at the time," he insists, "were achieved, not in areas that had previously been federal, but in provincial sectors that with time and the help of the spending power Ottawa had finally placed under occupation" (Morin 1976, p.71). Morin makes it abundantly clear that it was the transformation of the Canadian federal system that provoked nationalist resentment in Québec and the politics of separatism.

The new party system in Québec would thus seem to be a result of the central government's post-war reconstruction program. The federal government developed a Keynesian welfare state but,
unlike Switzerland, it failed to develop a Keynesian theory of federalism. It instead pursued an ad hoc approach that entailed spending federal monies in areas of provincial jurisdiction. This practice may be described as quasi-federal. Initially, the central government's determination to develop a welfare state trampled on social sensibilities in Québec, especially the belief in private or Catholic charity. Subsequently, it collided with Québec's desire to create its own welfare state. In both instances, the development of the federal welfare state provoked nationalist resentment in Québec.

Quasi-federalism in post-war Canada alone cannot account for the rise of Québec nationalism in the 1960s; Québec nationalism has much deeper social and historical roots. But the institutional structure of federalism in Canada was filtered through the lenses of Québec nationalism. After the rise of nationalism in Québec, the Canadian political structure, as it was practised, was too small or restricting for Québec. The provinces have substantial areas of constitutional responsibilities but, as Canadian federalism was practised, Québec was not assured of its sovereignty in these areas. Québec nationalists have resented this denial of sovereignty in areas of provincial jurisdiction. Québécois have thus increasingly come to believe that sovereignty should be located exclusively in Québec City. Federalism may no longer be sufficient to reconcile the two national communities in Canada.

Responses to Québec in the Federal Party System

The federal government's preferred strategy for dealing with Québec has been dialogue. In a very real sense, the Confederation Debates of 1865 are still being discussed. While the federal government forcefully suppressed the terrorism of the Front de Libération du Québec (FLQ), it has shown a willingness to engage in dialogue with the democratic separatists in Québec. The federal government's exceptional tolerance for democratic separatism has minimized political violence in
Québec, in stark contrast to the situation that exists in India.

The Front de Libération du Québec and the Suppression of Political Violence

The FLQ was inspired by the Front de Libération Nationale in Algeria, which was fighting for its independence from France. “The felquistes were a collection of more or less connected groups, whose ideology was a mixture of leftist nationalism and the decolonization ideas of Fanon,” and, like their Algerian counterparts, they believed they could achieve their objectives through political violence (Lachapelle et al 1993, p.157). The FLQ announced its formation in March 1963 when it detonated bombs at three military armouries in Montreal. Throughout 1963 a number of other explosions occurred, usually “targeted against mailboxes, bearing the insigna of the Royal Mail, in Westmount, traditional symbol of Anglo dominance” in Québec (Johnson 1994, p.47). A second wave of bombs erupted in 1966. Later, “[w]ith FLQ cells taking the lead, incidents of bombing and robbery (including arms and dynamite) increased sharply through the summer and autumn of 1970” (McNaught 1988, p.318). In October 1970, James Cross, a British diplomat, was kidnapped and detained for two months; Pierre Laporte, a Québec cabinet minister, was kidnapped and murdered a week later; the federal government, at the request of the government of Québec, imposed the War Measures Act, which suspended civil liberties in Québec.

The October Crisis seems to have been provoked, in part, by the poor showing of the Parti Québécois in the 1970 provincial election. The PQ polled 23% of the vote, but it only won 7 seats, in contrast the Liberals, which won 72 seats with 41.8% of the vote. Even the other minor parties did better than the PQ: the UN won 17 seats with 17% of the vote, and the Créditistes managed to win 12 seats with 11.1% of the vote. After the excitement of the Quiet Revolution and the establishment of a separatist party, it suddenly became clear to Québec nationalists that the
democratic path to independence would be painfully slow, if not impossible. In his provocative little book, *The History of Québec: A Patriote's Handbook*, Léandre Bergeron wrote, "[t]he disillusionment was great. The Québécois were slowly learning that bourgeois democracy is bourgeois dictatorship; and that any contest for power that follows the rules of those will not relinquish it is as predictable as a stacked deck of cards" (1971, p.229). He continues, "[s]ome young Québécois, angered by the outcome of the elections, resumed bombing" (1971, p.229). Even René Lévesque warned ominously, "I think that the last democratic chance will be in the next election" (quoted in McNaught 1988, p.317).

Kenneth McRoberts has concluded that the FLQ was "a highly marginal phenomenon" 1993, p.200). He estimates that no more than 100 people were involved (McRoberts 1993, p.200), and others have suggested that "[t]here were only about twenty active terrorists during the 1960s" (Lachapelle et al 1993, p.76). The FLQ was undoubtedly a youthful and exuberant by-product of the heady radicalism and the popular sentiment at the time for "direct action," but its significance should not be underestimated. First, it is estimated that 176 "violent events," including 90 bomb explosions, can be attributed to the FLQ; furthermore, "nine deaths can be linked to the political violence of the period" (Lachapelle et al 1993, p.157). Second, FLQ terrorism had profound political consequences. While the FLQ may have initially captured the imagination of young Québec nationalists, the mafia-style execution of Pierre Laporte repulsed almost all Québécois; it certainly

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14 The Parti Québécois, ironically, is now the beneficiary of the same electoral system. In the 1994 election, the PQ and the Liberals had almost identical popular votes, but the PQ obtained a substantial legislative majority. In the 1998 election, the Liberals actually won more votes than the PQ, but the PQ maintained its large majority in the National Assembly.

15 Richard Gwyn reports that 3,000 students rallied in support of the FLQ at the Paul Sauvé Arena in Montreal on October 15, after James Cross and Pierre Laporte had been kidnapped. Even still, pro-FLQ graffiti can be seen on the streets of Montreal.
thwarted the enthusiasm for “direct action” in Québec.

The federal government, furthermore, responded very forcefully to the FLQ challenge. The War Measures Act made the FLQ an outlawed organization and it banned political rallies; it suspended *habeas corpus*; and it permitted the police to detain suspects for up to ninety days without charge. Before the crisis concluded, almost 500 people were arrested, although only sixty-two people were charged with criminal offences, and less than a dozen were convicted (Gwyn 1980, p.109). While the federal government almost certainly over-reacted, it signalled that non-democratic separatism would not be tolerated and that the price for such activity would be substantial.

At the same time, however, the federal government had already indicated its willingness to tolerate organizations and parties committed to Québec separatism; indeed, it permitted the RIN and the PQ to participate in the 1966 and 1970 provincial elections respectively. Subsequently, the federal government has engaged Québec separatists in two referendums on sovereignty. In the summer of 1998, furthermore, the Supreme Court of Canada ruled that the federal government would have an obligation to negotiate sovereignty with the government of Québec, if a majority of Québécois expressed a *clear* desire for sovereignty in a referendum. Thus, while the government of Canada prohibited political violence, it has expressed a willingness to discuss separatism in Québec. In short, the government of Canada has managed to channel the movement for Québec separatism into the arena of democratic party politics. As we shall in the next chapter, the government of India has refused to discuss separatism; separatists in India are thus left no choice but to pursue separatism outside the arena of democratic politics.

**Constitutional Responses**

While Québécois separatists have elected to pursue sovereignty through the referendum
process, the various federal governments have searched for possible constitutional solutions to appease nationalists in Québec. Pierre Trudeau's major contribution to Canadian constitutional development was the patriation of the constitution and the entrenchment of the Charter of Rights and Freedoms. The Charter, however, does not contain either of Québec's preferred constitutional options, special status or sovereignty-association. It thus has become almost an accepted 'truth' in Québec that Trudeau 'betrayed' the province during the patriation exercise. Some have interpreted Trudeau's promise, made during the 1980 referendum, to "renew" federalism to mean that he would provide Québec special constitutional status. Trudeau has responded that he has argued against special status for his entire life and that he consequently would not have made such a promise. The people of Québec, however, could have reasonably expected Trudeau to renew federalism along the classical lines he had advocated prior to entering office.\(^\text{16}\) It would have been difficult for Lévesque, especially after losing the 1980 referendum, to reject an offer of classical federalism, in which sovereignty would have been divided between two orders of government. In this sense, patriation was not a betrayal so much as it was an opportunity lost.\(^\text{17}\)

The federal Progressive Conservative Party has demonstrated a willingness to grant Québec special constitutional status. Indeed, while prime minister, Brian Mulroney made it the centrepiece of the two constitutional accords he negotiated -- Meech Lake and Charlottetown.\(^\text{18}\) In these two

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\(^{17}\) Although he had advocated classical fiscal federalism in the 1950s, he did not substantially restructure Canadian fiscal federalism during his sixteen years as prime minister. Trudeau, in fact, provided the authoritative statement of the federal spending power in 1969 (see, Pierre Elliott Trudeau, *Federal-Provincial Grants and the Spending Power of Parliament*, Ottawa: Government of Canada).

\(^{18}\) The Meech Lake and Charlottetown accords included relatively minor restrictions on the federal spending power, in accordance with the demands of Robert Bourassa. While in power, however, the Conservatives did not improve the division of fiscal resources between the two orders of government, and they continued to enforce the 'national' standards attached to conditional grants.
accords, Québec was described as a "distinct society." The distinct society clause, however, encountered stiff resistance in the rest of the country. The Meech Lake Accord was defeated in June 1990 in Newfoundland and Manitoba, where provincial Liberal leaders, Clyde Wells and Sharon Carstairs respectively, campaigned assiduously against the accord. The Charlottetown Accord was resoundingly rejected by Canadians in a country-wide referendum in 1992. Although it is now clear that the distinct society clause has insufficient support outside Québec to provide a viable solution to Canada's unity crisis, Joe Clark, recently reelected as the party's leader, continues to advocate this solution to Canada's constitutional conundrum.

The failure of the Meech Lake Accord precipitated a transformation of the federal party system. In an effort to secure the ratification of the accord, "a parliamentary committee headed by Conservative MP Jean Charest tabled a report that recommended a number of additions to the Meech Lake Accord" (Archer et al 1995, p.438). Four days later, Lucien Bouchard, a close personal friend of Prime Minister Mulroney, quit the Conservative caucus, claiming that Charest's proposed revisions were unacceptable to Québec. After the failure of the Accord on June 23, 1990, five Conservative MPs and one Liberal MP joined Bouchard to form the Bloc Québécois. Shortly thereafter, Gilles Duceppe, now the leader of the Bloc, won a by-election in Montreal. The party was consolidated in the 1993 federal election, when it was returned to Parliament with 54 seats. The party won 44 seats in the 1997 election. The Bloc essentially represents the federal wing of the Parti Québécois. The relationship of the two parties is certainly close, as evidenced by the fact that Lucien Bouchard is now the leader of the PQ, and the premier of Québec. The people of Québec now have the option of voting for federalists and separatists at both the federal and provincial levels.

19 The Bloc, in fact, won the second greatest number of seats in Parliament, which ironically allowed it to become "Her Majesty's Loyal Opposition."
The Bloc thus provides a certain symmetry in the federal-provincial party system in Québec. The Bloc certainly keeps the pressure on the federal government to be mindful of Québec’s interests.

The current government, led by Jean Chrétien, has followed the established Liberal pattern. Chrétien is a pragmatist and he would grant Québec distinct society recognition if it would appease Québécois. Stephane Dion, Chrétien's hand-picked minister of intergovernmental affairs, is a tireless advocate of the distinct society clause, but he is making little progress with the concept, inside or outside Québec. It is clear that Chrétien is ambivalent about the matter. He would prefer to ignore the issue and hope it goes away. In short, he has adopted a strategy of abeyance.

On the question of fiscal relations, Chrétien has presided over a process of governmental contraction, rather than expansion. The reduction of federal activity has meant less intrusion into areas of provincial jurisdiction. The primary rationale for this general policy position, however, has been deficit control and not political unity. Paul Martin, Chrétien's minister of finance, has imposed large expenditure cuts. Fiscal transfers to the provinces, in particular, have been slashed from over $20 billion to $12 billion per year. In exchange, the federal government has provided the provinces greater legislative autonomy. In short, the provinces have been granted more latitude to determine how to spend less money. The federal government has thus continued to disturb provincial legislative priorities, much to the displeasure of the provinces, especially Québec.

Canada appears to be presently suffering from constitutional inertia. Successive federal governments have not substantially altered the quasi-federal constitutional practices developed in the post-war reconstruction years. Meanwhile, in Québec, another referendum on sovereignty appears inevitable. Once again, Québécois will be asked to choose between sovereignty and the

20 The government of Québec has reacted negatively to Chrétien's proposed millennium scholarship fund announced in the 1998 budget.
constitutional status quo. The outcome of the next Québec referendum will likely depend upon situational variables, especially the prevailing economic conditions in Québec, the various personalities involved in the process, and possibly the reaction in the rest of the country. If Québécois are suffering from constitutional fatigue at the time of the next referendum, the status quo may prevail but, on the other hand, if Québécois are suffering from constitutional frustration, they may choose to terminate this endless loop and exit confederation. The balance of Canada would thus seem to hang between political fatigue and frustration in Québec.

Conclusion

The Canadian party system has been the one arena where the federal principle has prevailed. Long before the dominant parties, the Liberals and Conservatives, separated their federal and provincial wings, there was a high degree of political autonomy between the two. Moreover, there was an alternation of parties at each level. While John A. Macdonald and the Conservatives dominated the first thirty years of Confederation, there was one Liberal administration, 1873-1878. But more importantly, the Liberals were able to assume power at the provincial level and a healthy rivalry ensued between the two orders of government. Over time, new parties emerged at the provincial level and when they assumed office, the independence of the provinces increased. Before the Second World War, the federal-provincial rivalry was less evident when the same party governed both orders of government but, since the war, the institutional responsibilities of governing each order have surpassed partisan loyalties.

The expansion of the Canadian state after the Second World War had a profound effect on party politics in Québec. Maurice Duplessis vigorously opposed federal encroachment into the provincial domain and Jean Lesage, albeit for different reasons, also opposed federal encroachment.
Lesage, always sensitive to the charge that he was simply a junior partner of the federal Liberal government, moved to separate the Québec wing of the Liberal party from its federal counterpart in 1964. Lesage won some small concessions from the federal government, namely the ability to opt out of federal programs. In the end, however, his staunch federalist position gave way to the more enticing nationalist and separatist rhetoric. Daniel Johnson and the Union Nationale developed the nationalist platform to unseat Lesage in the 1966 election, but the UN was quickly overtaken by the real nationalists and separatists, René Lévesque and the Parti Québécois. Since the formation of the Parti Québécois, and especially since it first became the government in 1976, many Québécois have come to believe that sovereignty ought to be located exclusively in Québec.

The truly federal nature of the Canadian party system has been the one mitigating factor in the practice of Canadian federalism. The constitution, certainly before judicial interpretation, was quasi-federal and fiscal relations in Canada have always been quasi-federal, but the Canadian party system has been remarkably open and tolerant. Political conflict has become institutionalized in the arena of party politics. Even the intense and emotional politics of nationalism and the quest for sovereignty in Québec has been subsumed by party politics, instead of consumed by war. The Canadian party system has successfully institutionalized the separatist conflict within the parameters of democratic party politics. This is a remarkable accomplishment, rarely witnessed anywhere else in the world. As we shall see, India has not been as fortunate.
Chapter 11

The Indian Party System:

Conflict and Disunity
Since independence, there have been two distinct party systems in India. In the first phase, 1947-67, the system was characterized by Congress party hegemony. In the first three general elections the Congress party enjoyed a comfortable majority with a weak and highly splintered opposition. At the state-level, the Congress won almost every election, except in Kashmir and a few other temporary exceptions. This era is often regarded as a period of "cooperative" federalism. But, while there was little opposition at the state-level, the central government was not afraid to employ the quasi-federal features of the constitution to control the opposition. At the first hint of separatism, the central government moved to outlaw secession. In sum, this dominant party phase was perhaps not as cooperative as it has been portrayed by some.¹

The second phase, from 1967 to present, has been marked by the rise of a multiparty system, including the rise of many regional parties. Unlike the first system, parties and coalitions other than Congress have been able to govern the centre. Moreover, non-Congress parties, including regional parties, have been able to capture power at the state-level. The central government, however, has tried to continue its strategy of control. Moderate nationalists have been controlled by the quasi-federal provisions in the constitution, while the police and army have been deployed to control militant nationalists, who have been forced underground by the outlawing of secessionism. This second phase has been characterized by a high degree of conflict, including considerable violence. In sum, the Indian state has failed to channel separatist movements into the democratic party system.

**Federalism and the Congress System**

The Congress party was a mass-based, hierarchical political organization (Weiner 1967;

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¹ See, Morris-Jones (1964, p.143); Pylee (1965, p.641); Austin (1966, p.187); and Franda (1968, p.179).
Rajni Kothari’s description of the Congress system under Nehru’s leadership is well known.\(^2\) The "Congress occupied not only the broad centre of the political spectrum, but most of the left and right as well" (Manor 1988, p.65). Smaller parties were scattered to the left and right of the Congress and they served to place pressure on like minded factions within the Congress. The Congress system was thus an almost wholly unique hybrid of a western multiparty democratic system and a post-colonial one-party state system.

While India adopted at least a quasi-federal constitution, the Congress party has never had a federal political structure. There was no separation of the federal and state units of the party; it was a single, integrated unit. At its base, members were organized into state units of the party, where "the locus of power was the Pradesh Congress Committee" (Hardgrave and Kochanek 1986, p.200). All the members of the Pradesh Congress Committees attended the Annual Congress Session, where the All-India Congress Committee was elected. The Working Committee of the party consisted of the President, plus twenty members, 13 selected by the president and 7 elected by the All-India Congress Committee (Hardgrave and Kochanek 1986, p.201).\(^3\) While the party had a substantial base, the apex of the party was very powerful. The Working Committee was, in fact, referred to as the "High Command." Through his time as prime minister, "Nehru sought to use the Working Committee for the direction of state Congress ministries" (Hardgrave and Kochanek 1986, p.201).

Bombwall suggests that the superiority of the High Command was established well before independence. In the 1937 provincial elections, Bombwall writes, "[i]t was the High Command that drew up the Congress election manifesto and determined and directed the party's electoral..."  

\(^2\) See, Kothari (1964; 1967; 1970; 1974); see also, Morris-Jones (1967).

\(^3\) The Congress party maintains the same political structure, at least *de jure*, but in fact much of the system has collapsed (Kohli 1990).
programme, strategy, and tactics. After the elections, it was the High Command that made the choice of Chief Ministers and decided who should be included in the ministries" (1967, p.220). Thus, "[f]rom the outset, Congress ministries in the Provinces were under rigid central party control" (Bombwall 1967, p.220). The senior members of the High Command, Nehru and Sardar Vallabhbhai Patel, did not hold government office; they directed the provincial governments from Gandhi's ashram. In short, "constitutional federalism was superseded by political unitarianism" (1967, p.221). Bombwall asserts, finally, that "this centralized party control over local governments...created a tradition which spilled over into the post-independence era and has had an important impact on the working of Indian federalism under the new constitution" (1967, p.220).

The system worked reasonably well when the Congress party controlled both orders of government. In fact, the Congress won all the general and almost all state elections between 1950 and 1962. As such, centre-state conflict was minimized. Indeed, a number of scholars posited that a system of "cooperative federalism" was emerging in India. One particularly exuberant Indian scholar even described India as "a shining example of cooperative federalism" (Sharma 1967, p.49). Centre-state conflict was certainly minimized during this period. It would seem that the quasi-federal structure of the Congress party was compatible with the quasi-federal constitution and fiscal systems. This overlap masked the structural deficiencies in the Indian federal system, at least until the dominance of the Congress party waned.

While intergovernmental conflict was minimized, it is clear in hindsight that Nehru did not tolerate dissension at the state-level. Nehru's distaste for regional dissent was evident during the

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4 "The supreme instance of the unitarian control of the highest party organs over provincial governments," Bombwall argues, "came in October 1939 when Congress ministries were taken out of office and the experiment of provincial autonomy brought to a stop as a result of a decision taken not by the provincial Congress ministries but by the party High Command" (1967, p.220).
integration of the princely states. Under the Raj, 562 states, occupying some two-fifths of India, remained out of the direct purview of British rule and were governed by "independent" princes. These princes, however, had surrendered some important powers to the British, and were thus politically subordinate to the British. When the British departed in 1947, some of the princes attempted to exploit the lapse of British paramountcy and resume their 'sovereignty' (Chanda 1965, p.31). But Nehru had indicated as early as April 1947 that "any state which did not come into the Constituent Assembly would be treated by the country as a hostile state. Such a state, he added, would have to bear the consequences of being so treated" (Menon 1956, p.78).

After intense negotiation, cajoling, and outright coercion, Sardar Vallabhbhai Patel, chairman of the Constituent Assembly's States Committee, and V. P. Menon, secretary of the states department, succeeded in obtaining the accession of all 554 princely states, which were in Indian territory, except Kashmir, Hyderabad, and Junagadh, by Independence Day. Hyderabad and Junagadh were later subdued by "police actions" (Menon 1956, p.139ff; p.334ff). The integration of Kashmir was obtained only with considerable political skullduggery, the consequences of which are still reverberating in modern India. Within the first year of independence, the Government of India thus provided an indication of how it would react to regional dissent.

While the integration of the princely states may have been historically unique, similar patterns can be observed with the few states that deviated from the Congress Party system. In March

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5 Maharaja Hari Singh and subsequently Sheikh Muhammad Abdullah of the National Conference tried to assert Kashmir's sovereignty after the collapse of British paramountcy. Nehru apparently orchestrated the removal of both Hari Singh and Abdullah, and negotiated a special constitutional arrangement (Article 370) with a rump faction of the National Conference, led by Bakshi Ghulam Mohammad (Teng 1990, p.119-121). The government of India, however, has not honoured the spirit of the agreement. This may well be a contributing factor to the civil war that has ravaged the state since 1989 (Tremblay 1995; Ganguly 1996).
1953, President's Rule was imposed in PEPSU after a dispute with the United Front government of the territory led by the Akali leader Gian Singh Rarewala. In November 1954, President's Rule was imposed in Andhra Pradesh even though the opposition may have been able to form a viable ministry. President's rule was imposed in Kerala (then Travancore-Cochin) in March 1956 after the Congress minority government was defeated. After the 1957 election the Communist Party of India was able to form a slim majority government in Kerala but President's Rule was reimposed on the state just two years later. It is thus clear that Nehru was generally unwilling to accept any dissent at the state-level. Indeed, no non-Congress regime lasted a full term under his rule (Dua 1981, p.264). In fact, even Congress regimes were at risk, if they were at variance with Nehru.

Nehru's response to separatist tendencies was rather authoritarian. The most significant separatist movement Nehru had to contend with was the dravida nadu campaign in the state of Madras, later renamed Tamil Nadu. The movement was led by the Dravida Munnetra Kazhagam (DMK), which was formed in 1949 by C. N. Annadurai. While the DMK won only fifteen seats in the 1957 election, it made a dramatic breakthrough in the 1962 election, winning 50 seats. The Congress Party, which had governed the state since independence, won another majority government, capturing 138 seats, led by the charismatic Kamaraj Nadar (Barnett 1976, p.124-5).

The central government, however, was clearly alarmed by the rise of the DMK. After the war with China in October 1962, the central government was exceedingly insecure. In October 1963, the central government passed the sixteenth constitutional amendment, which effectively outlawed

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6 Patiala and East Punjab States' Union was an amalgamation of eight princely states. It was later merged into Punjab.

7 Presidential rule was first employed in June 1951 in Punjab, when a Congress government was in power. Dr. Gopi Chand Bhargava, a confident of Sardar Patel, became Chief Minister of Punjab in October 1949. After the death of Patel in December 1950, Bhargava came into conflict with Nehru. After two years of intra-party factional conflict, Nehru forced Bhargava's resignation in June 1951. When the minority Congress faction was unable to form a majority government, the state was placed under President's rule (Dua 1979, p.89-90).
secessionism. As a result of this amendment, the right of free speech would not extend to the subject of secession and all political candidates have henceforth been required to swear that they will "bear true faith and allegiance to the constitution" and that they will "uphold the sovereignty and integrity of India." Ambedkar had told the Constituent Assembly that the Indian "federation is a Union because it is indestructible" and as such "no state has the right to secede from it" (GOI 1948/9, p.43). The sixteenth amendment put these sentiments into law. The sixteenth amendment may have thwarted Tamil nationalism but it has subsequently served to exclude separatist politics from the democratic arena and party system. As such, separatist conflicts have occurred outside the democratic framework, usually with considerable violence.

Nehru died in May 1964, just six months after the passage of the 16th amendment. Nehru was succeeded by Lal Bahadur Shastri, who died just two years later at which point Indira Gandhi became the leader of the Congress party. Mrs. Gandhi soon encountered stiff opposition to her leadership, and she consequently forced a split in the party. She took possession of the parliamentary wing of the party, while her opponents, known collectively as the Syndicate, maintained control of the party organization. The Congress organization later formed the nucleus of the Janata Party, now known as the Janata Dal.

Mrs. Gandhi presided over the deinstitutionalization of the Congress party. Without a party organization, Mrs. Gandhi increasingly turned to political populism during election campaigns and

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8 Oath of office, Third Schedule, Constitution of India.

9 The Constituent Assembly had considered a clause to prohibit secession but refrained. An amendment to this effect was also considered at the time of the linguistic reorganization of states but again it was never enacted (Barnett 1976, p.117).


personal contacts with local strong-men. As prime minister, she increasingly relied on the more coercive, quasi-federal, aspects of the constitution to control her political opponents. The use of Article 356, for example, skyrocketed during her administration. Under Nehru and Shastri, President's Rule was only employed eight times, while Mrs. Gandhi was responsible for 42 deployments of Article 356, frequently for partisan purposes.\(^\text{12}\) There were also increasing complaints about the politicization of state governors.\(^\text{13}\) The declaration of a national emergency, and the exploitation of Article 352, marks the culmination of her authoritarianism.

**The Federalization of the Party System in the Post-Nehru Era**

In the 1967 elections, the allure of the Congress Party had begun to fade. At the centre, the Congress Party emerged victorious, with Indira Gandhi as prime minister, but with a much reduced majority (a slim 54% of the seats). At the state-level, various multiparty systems emerged, many of which include regional and covertly separatist parties. These elections thus mark the end of the Nehru era. With the proliferation of regional parties in 1967, there was a conspicuous rise in centre-state conflict in India. In short, the regionalization of the party system at the state-level clashed with the quasi-federal structure of the union. The all-India political parties, furthermore, remain integrated, hierarchical, or quasi-federal, organizations and they have continued to rely on the quasi-federal provisions of the constitution to control the states. The federalization of the party system is thus incomplete; it has occurred only at the state-level.

The state party systems in India were transformed by the 1967 elections. In Tamil Nadu, the

\(^{12}\) From 1950 to 1992, Article 356 was used 99 times in total (Thakur 1995, p.83). It has been used a few more times since 1992.

\(^{13}\) See, Sorabjee (1985); Ghelot (1985); Mathur (1988); Dahiya (1979); and Sinha (1992).
DMK won the election; in West Bengal and Kerala, communist-left front ministries were formed; in Punjab, the Akali Dal, the party of Sikh nationalism, led a United Front government; a United Front ministry also came together in Bihar; in Orissa, the Swatantra Party led a coalition ministry. Between 1967 and 1969 there were as many as nine states that were governed by parties or coalitions other than the Congress, although only the DMK in Tamil Nadu had a working majority. Many of the coalitions were unstable and six states experienced President's Rule for varying lengths of time during these years. In the 1969 mid-term polls, the Congress was able to form coalition governments in some states, but United Front ministries were reestablished in Punjab and West Bengal. The Indian party system has subsequently become characterized by a plethora of parties, including a number of regional parties. The constitutional structure, both in form and in practice, has remained quasi-federal. Centre-state relations have consequently become more conflictual.

Between 1967 and 1977, there were four major demands for renewed federalism. In 1967, the Left-Front government of Kerala issued a report on centre-state financial relations, which demanded that the states have more independence in the collection of revenue. The DMK appointed P. V. Rajamannar to undertake a study of centre-state relations and his report was released in 1971. In 1973, the Akali Dal in Punjab adopted the Anandpur Sahib Resolution, which called for a major transfer of powers from the centre to the states. And in 1977, the government of West Bengal, led by the Marxist Communist Party (CPM), also weighed in with a report demanding devolution. These statements and resolutions severely condemned the quasi-federal provisions in the constitution. In short, these parties represented new regional aspirations and national identities and they resented the limitation of their sovereignty imposed by India's quasi-federal system.

The Kerala Memorandum
After the 1967 state election, the new United Left government of Kerala submitted a memorandum on "centre-state financial relations" to the National Development Council. The memorandum noted "with the formation of non-Congress governments in several states, the political framework of the federal structure has assumed a different complexion necessitating a review of the centre-state relationship in all aspects" (Kurian and Varughese 1981, p.230). This was the first major challenge to the structure of Indian federalism and the government of Kerala was careful to state that the memorandum was being submitted "only to provide a basis for purposeful discussion" (1981, p.230).

The Kerala government's primary concern was centre-state financial relations and it identified especially the processes of economic planning as the main factor disturbing centre-state fiscal relations. The planning process, the memorandum maintained, undermined the constitutional role of the finance commission, left the states with inadequate fiscal resources, and led the states to be heavily indebted to the central government. The memorandum described the central government as a "financial Leviathan," which subverted the spirit of federalism. The government of Kerala noted,

[i]n our enthusiasm for accelerating development, it should not be forgotten that we have chosen a federal type of government so that each region may develop itself according to its own genius. Within the broad objectives of the national plan, the states should be able to formulate schemes and implement them without the imprimatur of the central ministries...It is high time to reverse this trend in the interest of fostering proper union-state relations (1981, p.248).

In sum, the Kerala memorandum argued that the union government had become the "dispenser of bounties," while the state governments have become financially subordinated to the centre. "Such attitudes," it maintained, "tend to vitiate the relations between the union and the constituent units and are repugnant to the very spirit of federalism" (1981, p.234).

14 The Kerala memorandum has been appended to Kurian and Varughese (1981). All references to the memorandum are from this source.
Tamil Nadu Report on Centre-State Relations

The DMK, as discussed above, abandoned its separatist rhetoric before the 1967 state elections but, after assuming power, it became an ardent critic of India's quasi-federal political structure. The government of Tamil Nadu initiated an Inquiry on Centre-State Relations, chaired by Justice P. V. Rajamannar, and its report was released in 1971. Rajamannar had previously served as the chairman of the Fourth Finance Commission. Indeed, he had appended a scathing indictment of centre-state fiscal relations to the report of that Commission. He was thus well positioned to examine the intricacies of Indian federalism.

The long, twenty-one chapter report of the Tamil Nadu Inquiry on Centre-State relations recommended sweeping changes to the Indian constitution. These changes were intended to remove all quasi-federal aspects of the constitution and to empower the states. The committee recommended that the following articles be dropped from the constitution: Article 249 (the power of parliament to legislate with respect to a matter in the state list in the national interest), Article 256 and 257 (state executive power required to conform to national executive power and union laws), as well as most of the Emergency provisions, Articles 356, 357, and 360. The Tamil Nadu committee on centre-state relations also recommended a significant transfer of power from the centre to the states. Finally, Rajamannar advised that "[t]he residuary power of legislation and taxation should be vested in the state legislatures" rather than the Union parliament (1981, p.217).

In fiscal matters, the Tamil Nadu report recommended a widening of state revenues by a mandatory sharing of all major revenue sources -- corporation tax, customs and export duties, tax on the capital value of assets, and all excise duties (1981, p.218). The Rajamannar report also boldly recommended that "the existing Planning Commission should be abolished" and replaced by a
statutory body (1981, p.219). Rajamannar was emphatic that the planning commission ought to be free from political interference from the Union executive; indeed, he asserted that "[n]o member of the Government of India should be on it" (1981, p.219).

Tamil separatism may have been thwarted by the sixteenth amendment but the DMK quickly became a leading critic of the structure of Indian federalism. The DMK objective, as with the United Left Front in Kerala, was to move India towards a classical federal polity with due autonomy for the states. It is not surprising that a state like Tamil Nadu, with a well-developed national identity, sought to obtain the sovereignty inherent in a genuine federal system.

Communism and Federalism in West Bengal

In the 1977 state election, the Communist Party of India (Marxist) made a stunning breakthrough in West Bengal, capturing 178 of 293 seats in the state assembly. Jyoti Basu, the CPM leader, became Chief Minister. Twenty years later, the CPM is still in power and Basu remains Chief Minister. The 1977 election, thus, brought an end to a decade of turbulent politics in West Bengal. The CPM in West Bengal has also become a leading advocate of renewed federalism in India. The CPM was highly sensitive to political interference from the Union government. The CPM had attempted to form governments after the inconclusive elections of 1967, 1969, and 1971, but all three episodes were terminated by President's rule.\footnote{The CPM did participate in the short lived United Front Governments after the 1967 and 1969 elections, while the Congress formed a wobbly government after the 1971 election. In the 1972 contest, after Mrs. Gandhi's successful campaign in East Pakistan, the Congress boasted a landslide victory -- 216 seats and 49% of the vote. The CPI won 35 seats (8.4% of the vote), and the CPM won only 14 seats but managed 27.5% of the vote.} It consequently advocated the deletion of the emergency articles (356, 357, and 360) from the constitution (1981, p.213). After the CPM won a majority government in 1977, it felt its freedom of action in a number of areas -- land reform...
and industrial development -- to be unduly restricted by the constitution and the political practices of the Union executive. In a 1977 report on centre-state relations, the CPM declared that state autonomy in India had been "reduced to a farce" (1981, p.209) and that "[t]he state legislatures must be made supreme in the state sphere and no interference by the centre in this sphere should be allowed on any ground" (1981, p.213; emphasis added).

The CPM argued that the preamble to the constitution should describe India as a "federal" democratic republic and that the word "union" should be replaced throughout the constitution with the word "federation." It further recommended an amendment to Article 248 to ensure that the states had the "exclusive power to make any law with respect to any matter not enumerated in the union or concurrent list" (1981, p.211). Moreover, it stated that "Article 249, giving power to parliament to legislate on a subject in the state list under the plea of national interest, should be deleted" (1981, p.211). It suggested, furthermore, that "Articles 200 and 201, which empower the governor to resolve [sic] bills passed by the assembly for [the] president's assent, should be done away with" (1981, p.213). The CPM also wanted to have the residuary power transferred from the centre to the states. In fact, the CPM suggested that "nothing beyond foreign relations, defence, communications, currency and related matters should be [in] the exclusive domain of the centre" (1981, p.211).

Ten years later, when the Sarkaria Commission on Centre-State Relations was constituted, the CPM made an even more vigorous demand for a substantially renewed federalism. Its submission stated emphatically, "[t]he constitutional provisions in regard to the respective obligations of the Union and the States need basic restructuring" (GOI 1988b, p.599; emphasis added). The government of West Bengal argued that "the Union government has made steady

\[16\] In this passage, the word "resolve" should presumably read "reserve."
encroachments into areas reserved for the states" (1988b, p.599). The submission continued, "a constitutional arrangement, which provides for a very large measure of devolution of resources and responsibilities to the constituent states, is *a paramount necessity*" (1988b, p.599; emphasis added). Jyoti Basu warned the commissioners that "without a comprehensive restructuring of centre-state relations, there is every fear that social and economic tension will multiply" (1988b, p.610).

In conclusion, the CPM challenged the oft held assumption that the states are parochial and retrograde. The CPM argued forcefully that "it would be unreasonable to assume that the state governments are *per se* unmindful of the national or public interest; they too are capable of defending and furthering the interests of the nation" (1988b, p.615). As the political institutions of India continue to decay, the CPM claim now appears even stronger. West Bengal has remained one of the few places in India with a semblance of good government and Jyoti Basu has emerged as one of the most credible politicians in the country. Even at the advanced age of 81, Basu has been repeatedly touted as a possible future prime minister of India, although it is unlikely that the CPM would agree to lead a coalition from a minority position.17

While the Communists in Kerala and the DMK in Tamil Nadu have drifted away from their calls for renewed federalism, the CPM in West Bengal has continued to advocate a federal restructuring of the constitution. There was much discussion about the federalization of the Indian polity when the United Front Government came to power after the May 1996 election. While there

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17 The CPM determined in the 1960s that it would only enter a coalition government if it was the dominant party. It was only from a dominant position that the CPM could be certain its program would be accepted and from a position of strength the CPM could move to "steadily weaken and finally eliminate the non-Communist elements" (Sen Gupta 1972, p.210). When asked prior to the May 1996 general election if he would consider being prime minister for a United Front Government, Jyoti Basu told the BBC, "No, no. We are realists; as Marxists, we are realists. Are we able to influence them in the way we can do in our state? At the moment, no. But, we have told them, if you get together, we want you to get together, for a third alternative, we shall help you in every way to implement your program..." See, "End of a Legacy," broadcast on The National/Magazine, CBC television, May 8, 1996.
may have been some slight attitudinal changes at the centre during the United Front’s tenure, no substantive changes were made in the structure of Indian federalism.

Punjab: Indian Federalism in Crisis

Punjab has been a politically tumultuous state since independence, when the state was partitioned. Linguistic reorganization of the state, which finally occurred in 1966, was more troublesome in Punjab than elsewhere. In the 1970s, Punjabis offered some of the greatest resistance to Mrs. Gandhi’s authoritarian rule, and finally, in the 1980s and into the 1990s, a vicious separatist conflict was waged by Sikh extremists. Since independence, the Akali Dal, the party of Sikh nationalism, has been a critical actor in most of these disputes.

The Akali Dal was formed in 1920. Its raison d'être was to defend the political interests of the Sikh community. The Akali Dal has consistently exhibited a religiously inspired nationalism, and there have often been separatist undertones in Akali rhetoric. This was well illustrated by the rhetorical question posed by its leader, Master Tara Singh, at the time of partition: "the Muslims got Pakistan; the Hindus got Hindustan; what did the Sikhs get?" The legacy of partition, however, placed two issues outside the boundaries of acceptable political discourse in India. First, the government of India made clear that demands for the political reorganization of the Indian state along religious lines would not be entertained. Second, it was made equally clear that separatist claims would not be tolerated (Brass 1974, p.17-19; 1990, p.146-152). The religious nationalism of the Akali Dal has thus been vigorously resisted by the Indian state.

Since the linguistic reorganization of Punjab, when the Sikhs became a majority in the state, the Akali Dal has formed the government on five occasions. The Akali Dal led coalition governments in 1967, 1969, 1977, and majority governments in 1985 and 1997. The Akali strategy
against the centre has alternated between an overtly Sikh nationalism and a secular Punjabi nationalism. While in power the Akali Dal has pursued a relatively secular strategy and while in opposition, as the party has attempted to solidify its base in the Sikh community, it has tended to revert to its time-honoured Sikh nationalist rhetoric. When the Akali Dal was trounced by the Congress in the 1972 state election, the party reverted to its traditional position: Sikh religious nationalism and opposition to the centre. At a party meeting in the Punjab town of Anandpur in October 1973, the Akali Dal drafted the controversial Anandpur Sahib Resolution, which described the Sikh community as a *qaum* or *nation* and demanded a democratic devolution of power from the centre to the states.

The Anandpur Sahib Resolution has assumed proportions beyond its substantive merit. For those who focus on the "Sikhs are a nation" thesis, "the Anandpur Sahib Resolution clearly provides the ideological basis for the demand for Khalistan" (Kapur 1985, p.195). Chand Joshi, on the other hand, states emphatically that "[t]he Akali Dal was not seeking separation from the Indian union but more autonomy for a Sikh dominated Punjab...A perusal of the three different versions...would show that not a single one talks of a 'sovereign state'" (Joshi 1984, p.44). A more balanced view argues that the Anandpur Sahib Resolution "is not simply a struggle for restructuring of Union-State relations. Nor, conversely, does it necessarily signify an urge for a Sikh homeland." It is, rather, "a comprehensive statement which includes the Akali Dal's basic assumptions and beliefs and religious and political goals. Like most political manifestos, consistency or logic are not necessarily its strong points" (Puri 1983, p.47-8).

The Anandpur Sahib Resolution begins with a clear and emphatic statement of the Akali

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18 At least three drafts of the resolution are known to exist, as well as multiple translations (Puri 1990, p.28).
Dal's perceived relationship with the Sikh community: "The Shiromani Akali Dal is the very embodiment of the hopes and aspirations of the Sikh nation and as such is fully entitled to its representation." The Resolution continues by stating the party's *raison d'être*:

The Shiromani Akali Dal shall ever strive to achieve the following aims: 1) Propagation of Sikhism and its code of conduct, [and the] denunciation of atheism; 2) to preserve and keep alive the concept of [a] distinct and independent identity of the *Panth* and to create an environment in which [the] national sentiments and aspirations of the Sikh *Panth* will find full expression, satisfaction, and growth.

The Resolution proceeded to detail a number of religious, political, and economic demands intended to fulfil these aims.

Among these broad, and often vague, demands, the Akali Dal insisted that centre-state relations were in need of fundamental restructuring. The Resolution stated,

[i]n this new Punjab,\(^\text{20}\) and in other states, the Centre's interference [jurisdiction] would be restricted to defence, foreign relations, currency and general communications; all other departments [subjects] would be in the jurisdiction of Punjab (and other states) which would be fully entitled to frame their own laws on these subjects...The Shiromani Akali Dal would also endeavour to have the Indian Constitution recast on real federal principles with equal representation at the Centre for all the states.\(^\text{21}\)

In short, the Akali Dal advocated a devolution of power and the establishment of state sovereignty.

While the Anandpur Sahib Resolution has been highly controversial, it was more a reassertion of the traditional Akali platform than a radical break from the past. The declaration that

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\(^{19}\) All references to the Anandpur Sahib Resolution are from Joshi 1984.

\(^{20}\) The reference to a "new Punjab" meant a territorial readjustment to complete the 1966 reorganization of the state. It is not clear, however, that a second territorial adjustment would serve the purposes of the Akali Dal; most of the Punjabi-speaking areas currently outside Punjab are majority Hindu regions (Puri 1983, p.54).

\(^{21}\) This latter demand referred to a reconstituted Rajya Sabha, or Council of States. The Akali Dal accepted the principle of representation by population for the lower house, the Lok Sabha.
the Sikhs are a nation only reiterated statements made by Master Tara Singh at the time of partition. In 1968, the party claimed that "the Central Government's interference in the internal affairs of the states and the obstacles it places in the proper functioning of the state machinery are detrimental to the unity and integrity of the country," and it therefore declared that "the constitution of India should be on a correct federal basis and that the states should have greater autonomy" (quoted in Puri 1984, p.262).22 The Akali perspective on centre-state relations, furthermore, was not dissimilar to the critiques being developed by non-Congress parties elsewhere in India, notably the CPM in West Bengal and the DMK.

After the arrival of Sikh militants in the late 1970s, especially the fiery preacher Sant Jarnail Singh Bhindranwale and his supporters in the All-India Sikh Student's Federation, "to be against the Anandpur Sahib Resolution was almost to be opposed to the Sikh religion itself" (Jeffery 1986, p.129). The Akali leaders, who had written the document in large measure to maintain support in the Sikh community after their ill-fated coalition governments, were compelled by the militants to vigorously pursue the radical restructuring of the federation envisioned in the Resolution. The Akalis were thus on a collision course with the centre.

When Indira Gandhi returned to power in January 1980, she dismissed nine non-Congress state governments, including the Akali Dal in Punjab, under Article 356. The Akalis, after losing the ensuing state election, immediately began a series of agitations against the centre culminating in September 1981 with the declaration of forty-five demands and grievances based on the Anandpur

22 In October 1978, Gurcharan Singh Tohra, the president of the SGPC, also published a sixteen-page pamphlet entitled "A Plea for a Federal Polity," in which he argued that a multinational federation requires a classical form of federalism. He stated, "[i]t is only in such a federalized set up that the Sikh community (which is a nation, sui generis, as well as a national minority) and other nations, nationalities and minorities can hope to keep their identity intact and inviolate" (quoted in Puri 1984, p.266). "The crux of the matter," he argued, "is that of sharing political sovereignty" (quoted in Puri 1984, p.266).
Sahib Resolution. The core demands concerned centre-state relations, the territorial boundaries of Punjab, especially the transfer of Chandigarh to Punjab, and the division of river water. These demands, "with a few exceptions were not drastic, nor were they expected to change the balance of power within the Indian political system" (Malik 1986, p.353).

The Akali leaders met with Gandhi three times between October 1981 and April 1982 to discuss the demands articulated in the Anandpur Sahib Resolution.\(^{23}\) The talks were a complete failure. Indira Gandhi flatly rejected the notion of a Sikh qaum. She apparently could not distinguish between the moderate, democratic nationalism of the Akali Dal and the more extreme nationalism of Bhindranwale and his supporters in the All-India Sikh Student Federation (AISSF).\(^{24}\) She consequently refused to reach a settlement with the Akalis. She was apparently afraid of alienating the voters in the Hindi-heartland. Punjab, with only thirteen seats in the federal parliament, was expendable. The stalemate between the Akalis and the federal government, however, strengthened Bhindranwale and his supporters in the AISSF and sent Punjab spiralling towards a political crisis.

Just after the imposition of President's rule in October 1983, Bhindranwale audaciously shifted from the Golden Temple guest house to the Akal Takht, the seat of temporal and spiritual authority in the inner sanctum of the Temple. From here, Bhindranwale directed his murderous campaign against the Akalis and the central government. In June 1984, the government of India made the fateful decision to deploy the army in the Golden Temple. Bhindranwale and his key

\(^{23}\) The meetings were held on October 16, 1981, November 29, 1981, and April 5, 1982. The Congress (I) government of Punjab, led by Darbara Singh, was ignored as the Akalis chose to deal directly with Mrs. Gandhi.

\(^{24}\) Later, in its submission to the Sarkaria Commission, the Congress asserted, "[o]nce stability was restored at the Centre and several states in 1980, the defeated forces took to the streets once again, especially in Punjab. The Akali Dal raised untenable and unconstitutional demands, which had the effect of putting a premium on secessionism and taking recourse to extremism and employing the methods of terrorism" (GOI 1988b, p.663).
supporters were killed, but so too were hundreds of innocent pilgrims. The Temple was also heavily
damaged. The entire Sikh community was devastated by Operation Bluestar, the code name for this
military action. Six months later, Indira Gandhi was assassinated by two Sikh bodyguards.

Indira Gandhi was succeeded by her son Rajiv Gandhi, who won a landslide election just a
month later. Rajiv Gandhi negotiated a peace accord with the moderate Akali leader Sant Harcharan
Singh Longowal in the summer of 1985. As part of the Accord, the Akali complaints about the
structure of centre-state relations were referred to the Commission on Centre-State Relations, chaired
by Justice R. S. Sarkaria, which had been appointed in March 1983, largely in response to the
emerging crisis in Punjab. The memorandum submitted to the Commission by the Akali government
of Surjit Singh Barnala is 122 pages long and it represents one of the most comprehensive critiques
of centre-state relations in India.

The Akali Perspective on Centre-State Relations

The Punjab memorandum to the Sarkaria Commission on Centre-State Relations posits from
the outset that India is a multinational federation. It argues, "[w]ith the reorganization of the states
on a linguistic basis, these are no longer m[e]re administrative sub-divisions of the country with their
boundaries for the most part a historical legacy. These are now deliberately reorganized homelands
of different linguistic-cultural groups. These groups are, in fact, growing into distinct nationalities"
(1988b, p.864; emphasis added). While the memorandum admits there is no dominant nationality
in India, it fears that "there are zealous Hindus-Hindi-Hind [sic] chauvinists who want to impose
their religious, linguistic, and political domination over the whole country" (1988b, p.864). From
this perspective, the Akali memorandum argues,

[a]t present the main threat to India's unity and integrity comes not
from outside but from the real possibility that the present relentless centralization drive and lack of due regard for the distinct sentiments, interests and aspirations of the various minority nationalities, communities, and ethnic groups may alienate millions and sap their will for a united India. An authoritarian and coercive approach to this perspective will inevitably erode political democracy (1988b, p.868).

The memorandum continues to argue that the only way a multinational society might be united is to adopt a "genuinely federal form of government" (1988b, p.869). It argues that "[t]he danger to the country's unity and integrity lies not in going the federal way but failing to do so..." (1988b, p.871).

"In a genuine federal structure," the document states, "the constituent units are autonomous within their constitutional jurisdiction" (1988b, p.951). The memorandum summarizes that "[t]he essential characteristics of the federal constitution are: i) there is the supremacy of the Constitution, ii) the division of sovereign powers between the national and regional levels of government is defined in the Constitution and is unalterable except by an amendment of the Constitution...iii) the Constitution is interpreted by the judiciary" (1988b, p.866). It continues, "[t]he Indian Constitution meets conditions (i) and (iii) but condition (ii) is met substantially but not wholly" (1988b, p.866).

In India, the memorandum argues, the states' "heavy financial dependence on the Centre, together with the serious constitutional limitations on their legislative and executive authority, even with regard to matters which are within their jurisdiction under the constitution, has subordinated them to the centre to a degree which is obviously inconsistent with the federal concept" (1988b, p.951).²⁵

The memorandum attributed the financial weakness of the states to the constitution itself.

²⁵ The memorandum notes cleverly that "the character of the Indian constitution is always discussed in terms of how federal it is and hardly ever in terms of how unitary it is. In other words, the issue is always discussed in terms of departures from the federal concept and never in terms of exceptions to the abstract unitary type" (1988b, p.868). It thus concludes that India should move to delete the obvious deviations from the federal principle and become "genuinely federal."
It stated, "[t]he crucial problem then is the too narrow tax base of the states and not, as is commonly postulated, the relative inelasticity of their aggregate tax revenue" (1988b, p.918). This is a critical point. Many commentators have suggested that the states have inelastic revenue sources but the Sarkaria Commission demonstrated that this is not the case. The problem is that the constitution does not accord the states sufficient revenue sources, as the Punjab memorandum maintains.

The memorandum proceeded to outline how the fiscal resources could be reapportioned so as to provide the states sufficient revenue to meet their constitutional obligations. It noted that 97.8% of the centre's revenue is derived from customs duties, income tax, corporate tax, and excise duties (GOI 1988b, p.952). As such, any attempt to rebalance centre-state fiscal relations must examine how these taxes might be redistributed. At present, the Union government retains 100% of customs and corporate taxes, 55% of excise taxes, and 15% of income tax. The Akali memorandum suggested that the Union should retain sole proprietorship of customs duties, but that the other three taxes should be shared equally between the centre and the states (GOI 1988b, p.954).

This scheme would realize a transfer to the states of Rs 12,853 crores. Under present arrangements, as of 1984/5, the centre transfers Rs 8,620 crores to the states. The Punjab proposal thus envisages a net additional transfer to the states of Rs 4,593 crores. Total central revenue would thus decline from Rs 22,696 crores to Rs 18,103 crores (GOI 1988b, p.954). The Punjab scheme would net the states a much larger revenue but it would not eliminate the problem of centre-state haggling over resources. As such, it would not be a full realization of the Akali Dal's desire for a "genuinely federal" political structure, although it would temporarily alleviate the financial shortcomings of the states.

The Punjab memorandum first dispels the myth that Indian planning represents a socialist
development path. It states perceptively,

[notwithstanding all the claims and declarations with respect to the adoption of a socialist pattern of development, the country has been pursuing all along a capitalist pattern of development. In the private sector which is the source of 85% of GDP [sic] (1988b, p.966).

As with fiscal relations, the memorandum argues that the planning process, dominated as it is by the centre, has violated the federal principle and interfered with state areas of jurisdiction. The Akali Dal suggests that "[t]he planning process needs to be reorganized to ensure that the states have due autonomy within their jurisdiction to determine their development activities" (1988b, p.974). In accordance with the federal principle, the memorandum posits, that there must be two levels of planning, centre and state, corresponding to the two orders of government (1988b, p.984).

The Punjab memorandum to the Sarkaria Commission also suggested a number of amendments to the division of powers, although the demands were a far cry from the near total devolution envisaged by the Anandpur Sahib Resolution. The Akali Dal now stated that its objectives were to restore to the states powers lost to the centre, to limit the centre's ability to appropriate further powers from the states, and "to transfer such matters to the states as may best be handled by the states" (1988b, p.978). The Akali Dal thus suggested that 26 items should be moved from the concurrent list to the state list (1988b, p.978-9). The Sarkaria Commission, however, rejected all amendments to the division of powers suggested by the Punjab memorandum (1988, p.25).

In fact, the Sarkaria Commission categorically rejected all the suggestions proposed by the Punjab memorandum, even though the Akali Dal had been assured by Rajiv Gandhi, in his accord with Sant Longowal, that the party's position on centre-state relations would be fairly considered by the Commission on Centre-State Relations. After its exhaustive study of centre-state relations, the
Commission concluded that the structure of the "constitution [is] basically sound" (GOI 1988, p.544).

On fiscal relations, the Commission stated emphatically that "[w]e are of the firm view that the basic scheme of the constitution, dividing the field of taxation between the Union and the states and incorporating adequate arrangements for sharing of resources between them, is sound, and no major modification[s] in it are called for" (1988, p.271). The Commission's response to the Akali Dal's proposed changes to the planning process was sarcastic. It wrote,

> [i]f the statute -- as is suggested by one state government -- sharply compartmentalizes its functions in regard to Union and state plans, the planning process will be marred by conflict and discord rather than coordination and harmony. Such a statutory system of planning will be antithetical to the basic principles of cooperative federalism which its proponents claim to espouse (GOI 1988, p.378).

In short, the Commission supported the constitution's quasi-federal character, much to the dismay of the Akalis and other federalists.

The Commission's conclusions were entirely predictable. The Commission was first constrained by its terms of reference, which stated that the Commission was to "have due regard to the scheme and framework of the constitution which the founding fathers have so sedulously designed to protect the independence and ensure the unity and integrity of the country which is of paramount importance..." (GOI 1988, p.iii). It is not clear from these terms that the Commission could recommend any significant constitutional changes. Furthermore, the Commission refused to adopt a coherent definition of federalism. It stated cryptically, "[e]ach country adapts and moulds the federal idea to its peculiar conditions and needs" (1988, p.104). As the Commission refused to define and operationalize the federal principle, it did not have an external test with which to assess the Indian constitution. It was thus free to reject any and all federalizing proposals.
The political crisis in Punjab is illustrative of a number of critical points. The first fundamental problem is that the Government of India steadfastly refuses to tolerate separatist claims, even from democratic parties. While there were often hints of separatism in Akali rhetoric, the Akalis were not separatists. As their memorandum to the Sarkaria Commission demonstrates, they are democratic nationalists and federalists. Sant Jarnail Singh Bhindranwale, the first leader of the militants, was always coy on the question of separatism. His stock reply to this question was,

I neither support Khalistan, nor am I against it. We want to stay with Hindustan. It is for the central government to decide whether they want us with them or not. This is the job of the centre, not mine. Yes, if they give us Khalistan, we will take it. We won't make the mistake of 1947. We are not asking for it but we'll take it if they give it to us.\(^{26}\)

Subsequent militants, who were avowedly separatist, were forced to stay underground. The party system was thus not allowed to contain or coopt the Sikh separatist movement. The separatist movement was consequently fought on the militants' terrain and not in the democratic arena.

Second, the employment of Article 356 of the Indian constitution further closed the democratic space in Punjab. President's rule was imposed in Punjab in October 1983, and it remained in effect until February 1992, with the brief exception of the period from September 1985 to May 1987. When Article 356 was invoked, the Congress government in Punjab was discredited and the Akali Dal opposition was marginalized. The two primary democratic forces in the state were thus sidelined, leaving the militants to dictate the political agenda in the state.

The political dynamics in Punjab at the time were such that the imposition of Article 356 was

\(^{26}\) Quoted in *Sunday*, May 15-21, 1983, p.28.
ineffective in containing Sikh militancy. The problem in Punjab did not lie with elected, democratic political parties. The culprits were extra-parliamentary militants, yet it was the government and democratic political parties that were punished. Legitimate political space was closed and the Government of India found itself facing a shadowy, underground enemy. While President's rule was ill-advised and ineffective in Punjab, it continues to be the weapon of first strike for the Government of India in these situations. The Government of India still seems to consider it necessary, if insufficient, to assume direct control of the state to restore law and order.

Third, the intransigence of the central government exacerbated the crisis. While Rajiv Gandhi negotiated a settlement with Akali leader Sant Harcharan Singh Longowal in 1985, he failed to implement the commitments he had undertaken, much to the detriment of Punjab.27 Thereafter, the central government doggedly pursued a police/military solution to what was at root a political crisis. The central government refused to negotiate a settlement with the democratic nationalists in the Akali Dal, and it simply refused to meet Sikh militants. In short, the government of India opted to fight a war of attrition with Sikh militants. It has made the same decision in Kashmir.

The Punjab crisis finally dissipated in 1993, after ten years of violent conflict with over 20,000 deaths. The central government's decision to fight a war of attrition with Sikh militants thus proved "successful" in the long run, but with tremendous social, economic, and political consequences. The people of Punjab witnessed the dismissal of their democratically elected government, the desecration of their holiest shrine, a decade of police rule, followed by sham

27 After he had negotiated his peace accord with Sant Longowal, Rajiv Gandhi began to fear a backlash in the Hindi-heartland, the largest electoral area in India. When the city of Chandigarh was not transferred to the state of Punjab on the stipulated date, the Accord was effectively scuttled.
elections. The authoritarian response to separatism has been repeated in other states, notably Kashmir, Assam and the micro-states of the northeast region. In these states, the government of India has encountered a severe crisis of legitimacy.

In sum, the Akali Dal objected to India's quasi-federal political structure. Akali governments in Punjab were denied sovereignty in their spheres of jurisdiction by the constitution and the political practice of the central government. The centre, furthermore, steadfastly refused to renegotiate the terms of centre-state relations. In short order, the Akalis were outbidden by more militant Sikh nationalists. The Indian state refused to permit separatists in the democratic party system. Separatists thus had no option but to pursue their struggle through extra-parliamentary means. Unlike Canada, which has successfully incorporated Québec separatists in the democratic arena, the Indian democratic party system proved incapable of containing militant Sikh nationalism.

The Insecurity Dilemma

It is important to consider for a moment what motivated the Government of India to behave in such an authoritarian manner towards the states. While it has been argued that India's federal system was relatively harmonious under Nehru because of his accommodative style, we have seen that Nehru in fact did not tolerate dissent at the state-level. If Nehru had presided over an emerging multi-party system, it is likely that he would have been just as authoritarian as his successors. Rajni Kothari has argued persuasively that partition socialized India's political elite "to place a very high value on unity and order, on the need at all costs to preserve central authority, and on the political necessity to hold the country and its diverse elements together" (Kothari 1970b, p.321).

28 The authoritarian response to the Punjab crisis included the holding of an enforced legislative election in February 1992. The Punjab Congress party claimed victory even though the Akali Dal boycotted the election and voter turn-out was only 21.6%.
More generally, Brian Job has argued that "threats to national security," in third world states, "have internal rather than external manifestations" (Job 1992, p.3). In the contemporary third world, "conflicts arise from the irreconcilable demands of ethnic, religious, [and] national community aspirations" (Job 1992, p.3). It is the "regime rather than the state," which is most frequently challenged, he maintains. Put another way, Stephen Krasner has suggested that "[p]olitical weakness and vulnerability are fundamental sources of Third World behaviour" (Krasner 1985, p.3). Third world regimes, in short, suffer from an "insecurity dilemma," and they consequently attempt to govern by control rather than cooperation.\(^{29}\)

The government of India, ever fearful of fissiparous tendencies, has always responded to movements it considered to be "anti-national" with a strategy of political control. The threat of Tamil separatism was met by outlawing secession. Later separatist movements, which by definition are now illegal, have been met with force. As the capacity of the Indian state has declined in the last few decades, the centre has grown more authoritarian. The centre has not been able to develop democratic responses to separatism. Harish Puri has placed his finger on the key concern:

\[
\text{[t]he issues raised here point to the complexity of the problem of restructuring federal relations in India. As the Indian state is itself weak and insecure, a resistance against decentralization of power is inevitable (1990, p.31-2).}
\]

The centre has been loath to accord the states autonomy, let alone sovereignty, in their spheres of jurisdiction. The denial of sovereignty, however, only fuels national resentment. The application of force against nationalist movements creates martyrs. Sant Jarnail Singh Bhindranwale and

\[^{29}\text{Ian Lustick has argued that, as opposed to consociationalism, "a control approach would focus on the emergence and maintenance of a relationship in which the superior power of one segment is mobilized to enforce stability by constraining the political actions and opportunities of another segment or segments" (Lustick 1979, p.328). Lustick situates the control strategy between a strategy of cooperation and force.}\]
Operation Bluestar are cases in point. While a strategy of cooptation may not always be successful, it is likely to be much less bloody. The strategy of cooptation has kept Québec in Canada for the past thirty years, with the loss of only nine lives.

A Typology of Centre-State Relations in India

Thirty years after the shift from a Congress dominant party system to a multiparty system, the states in India have followed different trajectories in their relations with the central government. If we accept that India is a multinational federation, the largest national grouping is the Hindi-speaking fragment located in the six central states surrounding New Delhi -- Haryana, Himachel Pradesh, Uttar Pradesh, Madhya Pradesh, Bihar, and Rajasthan. People in this region generally do not distinguish between their Hindi nationalism and their Indian civisme. The two identities have become merged, much to the consternation of nationalists around the periphery of India. Hindi nationalists tend to regard Delhi as the proper locus of sovereignty and consequently they tend to favour the status quo in centre-state relations.

In the non-Hindi-speaking periphery, centre-state relations have pursued a variety of trajectories (see Table 11.1). A few states have remained, for the most part, loyal supporters of the federal status quo, even when parties other than the governing party at the centre have come to power in these states. Even Gujarat, which provided the initial base of the Congress party split and the locus of events leading to Mrs. Gandhi's declaration of Emergency in 1975, has remained in the group of status quo supporting states, although the state has frequently been governed by parties other than the Congress. Although Gujarat and Maharashtra are wealthy industrial states, other members of this group, namely Orissa and Goa, are economically deprived states.
Table 11.1: A Typology of Centre-State Relations in India Outside the Hindi-Heartland

<table>
<thead>
<tr>
<th>Status Quo</th>
<th>Renewed Federalism</th>
<th>Nationalist: Rhetorical Separatist</th>
<th>Nationalist: Violent Separatist</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maharashtra</td>
<td>Karnataka</td>
<td>Tamil Nadu</td>
<td>Punjab</td>
</tr>
<tr>
<td>Gujarat</td>
<td>West Bengal</td>
<td>Andhra Pradesh</td>
<td>Assam</td>
</tr>
<tr>
<td>Orissa</td>
<td>Kerala</td>
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<td>Kashmir</td>
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<tr>
<td>Goa</td>
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</table>

The remaining states in the non-Hindi-speaking periphery have opposed the quasi-federal aspects in the constitution but there are also important differences among them that allow them to be classified in three separate groups. The first group has demanded only that the constitution be amended to incorporate the federal principle in its classical form. This group of states may be described as supporters of renewed federalism. These states included Kerala and West Bengal, and Karnataka. These states, by Indian standards, are relatively well-governed and reasonably prosperous. The critique of Indian federalism provided by these states is primarily legal and not tinged with nationalist rhetoric. While each of these states has made its arguments against the federal status quo forcefully, there have never been separatist hints from any of these states.

Another group of states, which includes Tamil Nadu and Andhra Pradesh, have not only made demands for renewed federalism but they have also been distinctly nationalist in their orientation. In Tamil Nadu, this nationalism has been articulated by the DMK and the AIADMK since the 1960s. Telugu nationalism was first evident in the early 1950s when Telugu speakers demanded the creation of a linguistic state of their own. Andhra Pradesh was created as a result in 1953 and Telugu nationalism dissipated until the arrival of N. T. Rama Rao and his Telugu Desam Party in the early 1980s. As nationalists, there have been hints of separatism emanating from these

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30 Sikkim and the micro-states of the northeast frontier have been omitted due to their small size and remoteness.
states at various times, although most politicians have been very mindful of the constitutional prohibitions against advocating secession. We might describe these nationalist parties as rhetorical separatists.

The final group of states have experienced violent separatist movements. Punjab, Assam, Kashmir and some of the micro-states of the northeast frontier could be included in this category. Nationalist leaders in Punjab, Assam, and Kashmir have all demanded the elimination of the quasi-federal aspects of the Indian constitution. However, mainstream politicians in these states, as we saw in the case of Punjab, have been caught between radical nationalists in their states and an intransigent centre. In a desperate attempt to prevent outbidding from militant nationalists, moderate leaders have frequently campaigned for state "autonomy," but they have had to be careful to stop short of advocating secession in order to avoid incurring the wrath of the central government. In many instances, moderate nationalist politicians have made vague insinuations in favour of separatism to appease their constituencies and they have thus frequently been arrested and detained by the police. Militant nationalists have flouted the law with gleeful abandon and thus positioned themselves as more vigorous "defenders" of their nation. When the political control strategy fails, the state has been compelled to respond with force. This, of course, is the danger of relying on a strategy of control: there is very little room for manoeuvre.

India's New Party System and the Future of Indian Federalism

The federal party system in India has come to be dominated by three broad groupings, the fading Congress party, the disparate United Front, and the strident Bharatiya Janata Party (BJP).

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31 Kashmir's special constitutional relationship to India (detailed in Article 370) makes this state somewhat unique.
Each group has led minority coalition governments in the 1990s. The last two elections demonstrate conclusively that none of these groups has sufficient support to obtain a parliamentary majority. After half a century of majoritarian rule, India has entered an era of coalitional politics.

India's chaotic new party system will likely influence the volatile federal relations in the country. Riker's theory of federalism would predict that as the party system federalizes the states would gain greater autonomy, but there are indications that the states in India may become pawns in the coalitional bargaining at the centre. A brief review of each party's perspective on federalism suggests that centre-state relations in India will remain volatile. The BJP's understanding of federalism is particularly ambiguous, suggesting that the current government of India is unlikely to have any better success managing centre-state relations than previous governments.

The Congress Party

The Congress party, invoking its legacy as the paramount organization of the independence movement, has frequently attempted to present itself as the embodiment of the Indian "nation." In fact, Indira Gandhi "often suggested that since Congress represented the nation, opposition parties should be seen not just as anti-Congress but as anti-national...[this] is still a reality with which opposition and especially regional parties must reckon" (Manor 1993, p.3). The singular nationalism of the Congress party, despite its genuine secularism, has been very damaging to centre-state relations. The refusal to recognize India's quintessential multinational character has served to alienate minority nationalities around the country. Instead of "nation-building," the Congress may have unwittingly engaged in "nation-destroying" (Connor 1972). The Congress shows no indication of abandoning its singular nationalism in favour of a more encompassing multinationalism or *civisme*. 
Furthermore, the Congress, as a nationalist party, has not been able to accept the proposition that sovereignty may be divided. It has insisted that the central government is the only proper locus of sovereignty and it has repeatedly exploited the quasi-federal aspects of the constitution to subordinate the states to central rule. The party's ambivalence about federalism was evident in its submission to the Sarkaria Commission. In the introduction to its submission, the Congress party postulated, "[t]he men who were members of the Constituent Assembly envisaged India as a sovereign democratic republic of a united nation" (GOI 1988b, p.662; emphasis added). In a revealing passage, the party stated, "[i]t is the Congress culture to view the nation as a whole for development" (GOI 1988b, p.673). Consequently, "there is no justification for any change in the present pattern adopted for economic and social planning and development" (GOI 1988b, p.673).

In fact, the Congress party argued in its submission to the Sarkaria Commission that in light of "the present visible fissiparous tendencies and the numerous serious challenges to our unity and integrity," it could "brook no weakening of the centre" (GOI 1988b, p.663). In fact, it argued that "[t]here are several areas in which the inadequacy of the centre's existing powers has been demonstrated in recent years" and therefore there is a "need to empower the central government to take more effective steps to meet the said situations whose complexity is, if anything, expected to increase, given the determined efforts of disruptionist forces operating within the country under various guises and destabilising forces operating from abroad" (GOI 1988b, p.663). As such, the Congress was even prepared to defend President's Rule. The party argued "if every case of exercise of power under Article 356 is examined on its own merits, one can justifiably assert that the power . . ."

32 As for fiscal relations, furthermore, the party stated, "the most equitable stand that can be taken in respect of financial matters is to continue the policy of [the] existing system" (GOI 1988b, p.673). The party thus appears to be wholly committed to the constitutional status quo and quasi-federalism.
was exercised in the larger public and national interest" (GOI 1988b, p.668; emphasis added). The Congress evidently cannot imagine any modalities to manage regional movements short of force.

The Congress regime of Narashima Rao, 1991-96, seemed somewhat more predisposed to providing the states greater political autonomy, at least under normal circumstances. On the other hand, the Rao regime crushed Sikh militancy with a ruthlessness that might be described as only quasi-democratic. Rao's government similarly pursued a hard line in the troubled state of Kashmir. Rao steadfastly refused to negotiate a political settlement in these crises, even with the democratic parties in each state.

The Congress party is now in a precarious position. The party received 28.1% of the vote in the 1996 election, for a total of 136 seats. In 1998, after withdrawing support to the United Front and forcing a new election, the party captured only 25.4% of the vote, and 140 seats. In each case, political support was spread evenly over the country, meaning that a further drop of popular support might eliminate the party from parliament. The party is devoid of imagination; the only claim it seems able to make is its long association with the Nehru-Gandhi dynasty, hence its desperate appeal to Sonia Gandhi, the Italian-born widow of former prime minister Rajiv Gandhi, to lead the party. The Congress party remains an integrated, hierarchical and sychophantic party that displays no indication of having become more sensitive to the federal principle. If the Congress party cannot learn to better accommodate regional aspirations, it may be speculated that the support for the party will drop further and it will continue to have difficulty attracting coalitional partners. The party's recent reversal of fortune in state elections is likely more attributable to the depravity of the other
parties rather than a genuine political revitalization of the Congress.\textsuperscript{33}

**The Janata Dal and the United Front**

The Janata Dal is the smallest and least coherent of the three major parties in India, and it has only ever governed in broad based coalitions. The Janata Dal aligned with three regional parties in 1989 to create the National Front, which formed the government between 1989 and 1991. In the 1996 general election the National Front joined forces with a number of left wing parties to form the United Front. While most of these parties are vaguely federalist and committed to the poor, "the main ideological thrust of the United Front remains anti-BJPism."\textsuperscript{34} After the BJP failed to win the confidence of parliament in 1996, the United Front formed a thirteen party coalition government that was still dependent on outside support from the Congress. The United Front fell in late 1997 when the Congress withdrew its support and forced a new general election.

The Janata Dal has been described as "India’s first genuinely federal party."\textsuperscript{35} Unlike the other major parties in India, the Janata high command is subservient to the state branches of the party. The state units have assumed this position of importance as a result of having formed governments in various states, notably Bihar, Orissa, and Karnataka. Meanwhile, the United Front "does not claim to be a national party in the sense of a centrally controlled organization. Rather it describes itself as a national coalition of regional parties."\textsuperscript{36} Put another way, the United Front is not

\textsuperscript{33} In November 1998, the Congress won dramatic elections in Rajasthan and Delhi, and it was reelected in Madhya Pradesh. *Frontline* reports that “the Congress (I) triumph is qualified by certain important considerations. In all the states concerned, it was the only available alternative to the BJP” (www.the-hindu.com/fline/fl1525/15250040.htm). The article attributes the Congress success primarily to the failure of the BJP in the centre to govern effectively.

\textsuperscript{34} *India Today*, June 15, 1996, p.39. See also, James Manor (1993, p.7).

\textsuperscript{35} Chandan Mitra, "Wheels within JD's wheels," *Hindustan Times*, November 27, 1994, p.12.

\textsuperscript{36} *India Today*, June 15, 1996, p.39.
a "federal party" but a "confederation" of parties. "Each of these parties is led by a strong leader whose principal concern is not so much setting a national agenda as enhancing or protecting the interests of his state." While some members of the United Front are committed to genuine federalism, others appear more interested in controlling state-level opponents from the centre through exploitation of the quasi-federal aspects of the constitution.

The Janata Dal/United Front is the only major party in India to make federalism a central plank in its election manifesto. The party's 1991 manifesto stated,

> true federalism alone can broaden and deepen the bonds of unity and integrity of our great nation. The National Front believes that the strengthening of the States need not be at the expense of the Union and would, in fact, enable the Union to discharge its responsibilities more effectively (1993, p.93).

The party argued further that the "states ought to enjoy genuine autonomy, political, legislative, economic, fiscal and administrative, within the federal framework."

The inconclusive outcome of the 1996 election was quickly interpreted as a demand for renewed federalism. India Today editorialized,

> the substantial chunk of votes shared by regional parties and the lack of a clear mandate for any single national party in the recent general election are indications of a pivotal twist in India politics: the voter is tired of policies that discriminate against the state governments and regional aspirations by concentrating powers in the Leviathan -- the central government.

The Common Minimum Programme developed by the United Front after the election identified several core concerns in centre-state relations and announced modest proposals to rectify the

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The United Front promised to limit the misuse of Article 356, restore the credibility of state governors, and minimize presidential review of state legislation, as recommended by the Sarkaria Commission. The United Front promised only to subject the other contentious issues in centre-state relations to review. This included studying the division of powers and the devolution of fiscal resources, including the operation of the Finance and Planning Commissions.\textsuperscript{41}

In its eighteen months in office, however, the United Front was not able to effect any structural changes in centre-state relations, despite its commitment to renewed federalism. The United Front is now an incoherent, disorganized, undisciplined party that suffers from rampant factionalism.\textsuperscript{42} With so many contending nodes of power, the United Front has no centre; it is constantly overwhelmed by its constituent units. If the United Front wishes to implement structural changes in Indian federalism, it first must concentrate on party building. Indeed, without a stronger party structure, the United Front itself might not survive.

The 1998 general election may well have spelled the end for the United Front and the Janata Dal. The United Front was returned with less than 100 seats, and some of its component parties began flirting with the idea of supporting the BJP.\textsuperscript{43} The Janata Dal was reduced to a mere six seats. While the United Front appears to have the greatest commitment to genuine federalism, it seems to have the least political capacity to accomplish this objective and it may have squandered its one and

\textsuperscript{40} See, "Changing Equations," \textit{India Today}, June 30, 1996; p.80-3.

\textsuperscript{41} \textit{India Today}, June 30, 1996, p.83.

\textsuperscript{42} Two journalists have sarcastically suggested that the Janata's "leaders have worked tirelessly to consign themselves and the party to political oblivion." See, J. M. Ansari and F. Ahmed, "Requiem for a Doomed Party," \textit{India Today}, July 16, 1994, p.66.

\textsuperscript{43} Chandrababu Naidu, the leader of the Telugu Desam Party and Chief Minister of Andhra Pradesh, perceives the Congress to be the primary political threat in his state and consequently is reluctant to do "anything that directly or indirectly helps the Congress" (see, "Kingmaker's Dilemma," \textit{India Today}, March 23, 1998; p.40).
only opportunity to renew the Indian federation. The United Front has the misfortune of representing the dysfunctionality engendered by extreme coalitional politics.

The Bharatiya Janata Party

After failing to sustain a government in 1996, the BJP succeeded in cobbling together a diverse, and almost wholly opportunistic, coalition government in 1998. The ruling coalition's National Agenda for Governance is even more vague than the United Front's Common Minimum Program. The BJP's perspective on centre-state relations remains especially unclear. It often echoes moderate demands to renew federalism in India but, at other times, it announces support for the status quo and yet at other times its nationalism suggests that it might not respect the federal principle at all. In short, the party's position on centre-state relations is ambiguous and highly inconsistent.

In its submission to the Sarkaria Commission, the BJP exclaimed, "a vast country like India can be administered only through regional governments. The existence of states as political units is, therefore, inevitable. It is desirable as well....decentralization of political power is imperative both to strengthen democracy, and to ensure efficient governance of the country" (GOI 1988b, p.619). L. K. Advani, the party's leading ideologue and now Home Minister, has also opined that the states have wholly insufficient financial resources to meet their responsibilities while the central government obtains an excess of resources. Thus, he concludes, "there is a clear case for devolution of greater financial powers in favour of the states" (Advani 1992, p.179). This echoes the party's submission to the Sarkaria inquiry (GOI 1988, p.620).

The party's 1991 election manifesto stated in the preface that "[s]tate-centre relations are

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seriously strained" (1993, p.121). The party thus promised to implement the recommendations of the Sarkaria Commission. The party also promised, if elected, only to invoke Article 356 in the event that the state constitutional machinery has collapsed "and not to promote any partisan interest" (1993, p.123). Furthermore, the BJP indicated a commitment to create an "inter-state council" under Article 263 to resolve inter-state and centre-state disputes. These statements suggest that the BJP is rather sympathetic to the federal principle and the subordinated states.

The BJP, however, does not seem wholly committed to classical federalism. In its submission to the Sarkaria investigation, the party stated, much like the Congress, "nothing should be done that may weaken the unity of the country" (GOI 1988b, p.619). The BJP, furthermore, supported the quasi-federal construction of the constitution. It said to the Commission,

> India's constitution makers did not conceive of India as a classical federation and made the constitution federal in form but essentially unitary in content. We think this approach is sound, and do not favour changes that undermine this arrangement (GOI 1988b, p.619).

On the most contentious issue concerning the Indian constitution, the BJP is of the opinion that Article 356 has been frequently misused for partisan political purposes (Advani 1992, p.179), but the party stops short of demanding its elimination. It would seem that the BJP does not oppose the structure of the constitution *per se*, only the way it has been employed by the Congress party.

The BJP's apparently ambivalent perspective on centre-state relations must be further scrutinized against the party's explicit nationalism. The BJP has made it clear that it regards India as a single Hindu nation, as opposed to the secular one-nation thesis of the Congress. Despite its stated commitment to "genuine secularism," the BJP expects religious minorities to accept without qualm this supposedly fundamental characteristic of India. The party, moreover, attempts to subordinate all other cultural markers, such as language, race, caste and region, to this imagined
unifying notion of Hinduism. Hindus outside the central heartland of India, especially in the south, tend to interpret the BJP's ideology as a projection of Aryan chauvinism. Instead of representing all of India, as it claims, the BJP represents, at most, only the largest national fragment of a multinational India.

The BJP, however, will not accept the suggestion that India might be a multinational federation. In response to the Akali Dal, L. K. Advani has written, "I regard [the Sikh] 'Homeland Thesis' as a very dangerous thesis. If the 'two-nation theory' led to the partition of India, acceptance of this multinational theory can lead to the balkanization of the country. I am happy that the Sarkaria Commission categorically rejected this thesis" (1992, p.177). The BJP's singular Hindu nationalism does not bode well for India's minorities or centre-state relations.

There may, on the other hand, be slight indications that the BJP is moderating its tone and becoming more federal. The fractionalization of the electoral arena has forced the BJP to engage in coalition politics. Even Advani has acknowledged that the major task facing the party is to forge working alliances with other parties while preserving "the core" of the party's "ideological thrust." The long time alliance with the Akali Dal in Punjab is perhaps the best indication that the BJP can work successfully with strong regional parties. While the BJP is the "party in which the ascendancy of the national high command is most apparent," the formation of BJP governments at the state-level may have caused a de facto, if not de jure, federalization of the party (Manor 1993, p.17). Only time will tell if coalitional politics will fully federalize the BJP.

In sum, it is not possible to make a definitive statement about the BJP's perspective on federalism. While the party is becoming more pragmatic as it is forced to engage in coalitional

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politics, the party does not seem wholly committed to the federal principle. It seems to accept and endorse the quasi-federal character of the constitution. Furthermore, the party is clearly committed to its nationalist project. This is a core ideological belief of the party; federalism is not. It may be speculated that the party's narrow nationalism will hinder its ability to govern in coalition with regional parties, and it may well lead to tension in centre-state relations. Moreover, if the BJP ever has the opportunity to govern alone, it would seem likely that the BJP would allow its nationalism to override the federal features in the constitution and to exploit the quasi-federal clauses to preserve its vision of India's "national" integrity.

The Coalition Party System and the New Pathology of Centre-State Relations

A few new trends, some logical and others pathological, have emerged in centre-state relations with the new coalitional party system. First, the state-level party system has become a critical determinant in coalitional bargaining at the centre. While this does not have to be an ominous development, some political entrepreneurs are demanding that the quasi-federal aspects of the constitution be employed to control their political opponents in the states as their price for supporting a coalitional bid to form a government in the centre. Other state politicians are seeking to have the centre drop corruption investigations and charges as their price for joining a coalition government.

State-level party systems are generally one of three sorts: Congress versus United Front, Congress versus BJP, and BJP versus United Front. When parties engage in coalition-building in the centre, they are mindful of their state-level opponents. While the BJP and regional parties may appear to have inimical views as to the character of India, they may cooperate at the centre so as to avoid assisting state-level opponents. The Akali Dal in Punjab, for instance, regards the Congress
as its primary opponent in state elections and it therefore prefers to support the BJP at the centre, as well as in state politics. For the Communist parties, ideology may be a more important determinant for coalition formation, but, for most parties, the state-level party system will be a critical variable in coalition formation.

Considerations of the state-level party system may, however, lead to pathological coalition behaviour. For example, when the government of Uttar Pradesh fell in October 1997, and the BJP established a new government, parties in the central United Front government from Uttar Pradesh immediately demanded that the Prime Minister place the state under President's Rule.\textsuperscript{46} Prime Minister Gujral, concerned that his coalition might crumble, asked the President to dismiss the constitutionally established government of Uttar Pradesh. The newly appointed President, K. R. Narayanan, however, refused to accede to the Prime Minister's request. He was of the opinion that the constitutional machinery of the state had not failed and therefore he could not invoke Article 356. The President's decision to employ his discretionary powers to uphold the constitution was unprecedented and it may signal an attitudinal change in centre-state relations. On the other hand, it indicates that India's political parties are not adverse to the partisan exploitation of the quasi-federal powers of the constitution and that this may indeed become a lever for coalitional bargaining.

The desire to control state-level opponents through coalitional bargaining at the centre was evident after the 1998 election when the BJP struggled to form a minimum winning coalition. The maverick former chief minister of Tamil Nadu, Jayalalitha, brazenly demanded that the DMK government in Tamil Nadu be dismissed by the President.\textsuperscript{47} Janata Dal dissidents, Georges

\textsuperscript{46} \textit{India Today}, November 3, 1997, p.21.

Fernandes and Ramakrishna Hegde, also asked for the governments of Bihar and Karnataka respectively to be dismissed as the price for lending their support to the BJP. Advani dismissed these demands outright, saying tersely, "[i]t was possible for the Congress to take such actions a decade ago. Today, the courts can overturn similar willful decisions in just two days. To any demand of dismissal, my response is it cannot be done. It turns public opinion against you." However, another party in the future, facing a hung parliament, may well capitulate to this sort of intimidation.

There may be more insidious dimensions to this perversion of centre-state relations. Jayalalitha, for example, is being prosecuted for corruption by the state government of Tamil Nadu. With rediscovered popularity of her AIADMK party in the 1998 general election, she may have calculated that she could win a fresh state election and subvert the charges against her, if she could orchestrate the dismissal of the present government from the centre. Similarly, Laloo Prasad Yadav, the erstwhile irascible chief minister of Bihar, withdrew his support from the previous Janata Dal government in an attempt to disrupt an investigation of corruption against him. One might speculate that the debasement of Indian politics is complete when the evasion of corruption allegations becomes the objective of democratic coalition bargaining.

The one-party dominance of the Congress has ended, and it seems that an era of multi-party coalition government has begun. This development almost certainly indicates that federalism in India will experience a transition. It may mean that the states will experience greater autonomy. However, it is still the case that all the major parties -- the Congress, the BJP, the Janata Dal, the


CPM and the CPI -- are structured on the principle of “democratic centralism.” In other words, these parties are non-federal in their internal structures. This does not bode well for the future of centre-state relations. Nor does the fact that many Indian political parties, including the regional parties, have little internal democracy. Raju has remarked, "the successful working of federalism in India demands greater democratization in the organization and working of political parties" (1988, p.8).

Conclusion

Ambedkar warned, when he moved the constitution in the Constituent Assembly, that a constitution can only be as good as the people who are elected to govern (GOI 1949a, p.975). Some have argued that the Indian people have failed the constitution. Writing in the *Times of India*, N. A. Palkhivala lamented that "if any nation has proved itself totally unworthy of its constitution, it is India."50 Another Indian journalist has lamented that all too often "problems in this country are superseded not solved and challenges are bypassed not met."51 Such pessimism is not warranted. India and its constitution have survived for fifty years, through famine, war, and political assassinations. India is more diverse and much less developed than Europe yet it is institutionally more integrated and there is a much higher sense of Indian *civisme* than European identity. These are accomplishments to be celebrated not berated. At the same time, however, India has had to endure a significant degree of civil conflict.

The constitution worked well when there was a one-party dominant system. In short, the quasi-federal system was compatible with the quasi-federal party system, but this only masked the structural deficiencies of Indian federalism. The collapse of the Congress system disrupted the


pattern of centre-state relations. The Study Team of the Administrative Reforms Commission noted this disruption but concluded that "[i]n a few years, as this experience is assimilated, the difficulties presented by its sheer unprecedentedness should be gradually solved by proper adjustments in responses from the body politic" (GOI 1967, p.2). Thirty years later, the Indian federal system still seems to be trying to adjust to the new multi-party system. In short, the party system has become regionalized but not federalized. The major political parties in the centre remain integrated, hierarchical, or quasi-federal, organizations. Conflict will likely continue until the central parties federalize as well.

An influential body of opinion suggests that India needs merely to return to the halcyon days of Nehruvian constitutionalism. In the Presidential Address to the 45th All-India Political Science Conference, K. H. Cheluva Raju argued "[t]here is [a] need to reconstruct union-state relations in accordance with the letter and spirit of the constitution" (1988, p.7). Even Ramakrishna Hegde, who as Chief Minister of Karnataka proposed significant amendments to the constitution, has remarked that "the constitution must be restored to what its framers intended it to be" (Hegde 1991). And the Sarkaria Commission concluded, "[i]n our view, it is neither advisable nor necessary to make any drastic changes in the basic character of the constitution" (GOI 1988, p.544).

The Indian constitution, however, is structurally flawed. In short, as the party system has become regionalized, the constitution, both in form and in practice, has remained quasi-federal. The constituent units of the federation, some of which conceptualize themselves as nations, do not enjoy sovereignty in their constitutionally assigned spheres of jurisdiction. The new parties that captured power in the states after 1967 quickly discovered that the Congress government in New Delhi could still exploit the quasi-federal aspects of the constitution to frustrate their objectives. Indeed, all the
major political parties at the centre exploit the quasi-federal provisions of the constitution. Attitudinal change will only be sufficient if the most egregiously non-federal aspects of the constitution are allowed to atrophy completely. At a minimum, President's rule, the reservation of bills, and the dispatching of central police forces to troubled areas without the permission of state governments, are conventions that need to be abandoned before centre-state relations can begin to improve.

India is quintessentially a federal society, as Rajni Kothari has eloquently noted:

India has all along been a federal society even if not a fully functioning federal polity. Its innate diversity, its penchant for a pluralist mode of cultural expression, its rich continental texture have all endowed it with characteristics that make India, conceived as a national entity, federal in both form and spirit (1988, p.193).

These diversities require autonomy, indeed sovereignty, in their constitutional spheres of jurisdiction in order to flourish. Amitav Ghosh, an Indian novelist, has written,

[w]hat is really at issue is the question of finding a political structure in which diverse groups of people can voice their grievances through democratic means. It seems...that India is indeed lurching in fits and starts toward finding such a structure. The frequent changes of government, so different from the long periods of one-party rule in the 1960s and 1970s, is a sign of this (Ghosh 1990).

The fractionalized party system "doesn't represent fissiparous tendencies among the voters, but it does represent the need to take the aspirations of various regions into account" (India Today, June 31, 1996, p.6). If India is indeed a federal society the constitution should reflect the federal principle.

This should not be perceived as a threat to the unity or integrity of India. Raju has argued, "[s]ince federalism is a reconciliation between nationalism and regionalism, regionalism to a certain extent must be accepted as a part of [the] democratic process" (1988, p.9). The incorporation of
regional movements should strengthen the integrity of India. When the centre incorporates ethnic movements, conflict tends to subside but when ethnic movements are excluded, conflict is exacerbated (Das Gupta 1988). Harish Puri has poignantly articulated the conundrum: "[a] strong centre is not built on weak units or the suppression of regional urges" (1977, p.182).

The quasi-federal constitution adopted in 1950 may well have allowed India to overcome the difficulties surrounding partition but, fifty years later, the political context has changed enormously. India's greatest challenge now is to accommodate the minority nations clamouring for renewed federalism. It would seem that it is time for India to begin the transition from quasi-federalism to federalism proper or, as Ramakrishna Hegde (1991) has suggested, "India should not merely be a union of states, but in reality it should be [a] United States of India." The transition will not be easy. Indeed, Indian leaders appear highly reluctant to move in this direction. The demand for renewed federalism is a problem that cannot be ignored, if India is to remain united in the next millennium.
Part VI

Conclusion
Comparative Analysis

This study set out to demonstrate that the institutional structure of federalism is a critical determinant of stability or instability (presence or absence of secessionism) in multinational federations. The findings appear to support the hypothesis. Swiss federalism closely follows the federal principle and Switzerland is the most stable of the multinational federations investigated. While Canadian federalism follows the federal principle in some regards, insufficient attention to the federal principle may account for the strong separatist movement in Québec. Indian federalism conforms least to the federal principle, and India suffers most seriously from secessionist movements, as indicated by the staggering level of political violence in the troubled states of Punjab, Kashmir, and Assam. In sum, the differing structure of the federal arenas in these three countries has given rise to different political games. The legal-institutional approach developed for this study has thus successfully explained the research problem established at the outset.

Some may question whether Switzerland, Canada, and India are really comparable cases. The differences between these countries are perhaps more obvious than their similarities. This raises the question of political culture, which was not discussed explicitly in this study. If culture determines politics, one might argue that the comparative project is not possible because every society has a different culture. If one accepts that proposition, the comparative project becomes merely entertainment; general theories about politics cannot be sustained. The study of political culture, furthermore, is highly problematic. A proper comparison of cultures requires survey data to determine what people really think, or it risks being impressionistic. It was not possible to conduct such surveys for this study, nor was it possible to rely on other surveys. Such surveys would
not have been designed for the question being investigated here. Moreover, one would have to rely on separate surveys from the three cases being examined here. This would raise problems about the comparability of data. A direct comparison of cultures was thus considered impossible in this study.

The comparison of institutions, by contrast, is relatively unproblematic. Constitutions, for example, may be placed side by side and examined clause by clause. The data for fiscal relations can also be gathered and compared. Parties and party systems are also relatively comparable. Furthermore, if culture determines politics, it may be speculated that it will have its greatest influence in the formation of a society's political institutions. An institutional analysis will thus indirectly account for political culture. It is important to remember, moreover, that the objective of this study was not to investigate the origins of these institutions but to examine their consequences on the politics of Switzerland, Canada, and India. These institutions must now be tested against the study's dependent variable, which was political stability or instability, defined as the presence or absence of secessionist movements.

**Constitutional Systems in Multinational Federations**

The ideal model of federalism developed in Chapter Two suggested that federal constitutions in multinational federations should reflect the principle of divided sovereignty, or what we might call the federal principle. Unlike the other constitutions examined in this study, the federal principle is explicitly enshrined in the Swiss constitution. The sovereignty of the cantons, within their sphere of jurisdiction, is assured in Article 3. There have been two important consequences of Article 3. First, it indicates that the federal government is only entitled to the powers expressly delegated to it and that all residual powers lie with the cantons. Second, it has prevented the federal government

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1 Surveys in India, furthermore, are highly unreliable. Surveyors in India can only reach a fragment of the population and the opinions of this fragment may not be representative of the larger, poorer, populace.
from acquiring new powers without a constitutional amendment. Cantonal sovereignty is thus not a constitutional fiction; it has been respected in practice.

The preamble of the Canadian constitution indicates the desire of the provinces to be "federally united" with "a Constitution similar in Principle to that of the United Kingdom." While the constitution established two orders of government with a range of specified political powers, a number of provisions were also quasi-federal and these were exploited by the federal government, at least until judicial review circumscribed them. It is thus difficult to determine the exact nature of Canadian federalism. Wheare argued that Canada was quasi-federal in form, but federal in practice. The Tremblay Commission in the province of Québec, on the other hand, concluded the Canadian constitution was federal in form, but quasi-federal in practice. The Canadian constitution is thus ambiguous. In short, it does not conform as closely to the ideal model as the Swiss constitution.

The Indian constitution was intended by its framers to be quasi-federal. The constitution, in fact, never mentions the word federal; India is described throughout as a "union" of states. The government of India has not been reluctant to employ the quasi-federal provisions of the constitution. President's rule, for example, continues to be a routine feature of Indian federalism, much to the displeasure and detriment of many states. Reservation and disallowance continued in Canada for seventy-five years after confederation, but they were used very infrequently after the fifty-year point. India has just celebrated its fiftieth anniversary of independence, but there is little indication that these quasi-federal features are in decline. Of the three countries studied, the Indian constitution least conforms to the principle of divided sovereignty.

The process of constitutional change has also been an important determinant of stability in Switzerland. The Swiss have relied heavily on formal constitutional amendment and the amendment
referendum, which requires a double majority vote. This has ensured that amendments to the constitution have a high degree of legitimacy. The Swiss project to undertake a total revision of the constitution is a testimony to its strength. Canadians, by contrast, have been so paralysed by relatively simple constitutional amendment proposals that they could not imagine a total revision of the constitution. The omission of an amending formula in the B.N.A. Act, in fact, seriously hampered the early evolution of Canadian federalism and it has bedevilled the operation of federalism in Canada for most of the twentieth century. Federalism in Canada has evolved more in keeping with the Westminster tradition of precedent and gradualism, possibly at the expense of alienating Québec. The ease with which the central government in India has amended the constitution has undermined the authority of the states, and consequently destabilized the federation.

In sum, the Swiss constitution has more successfully reconciled contending nationalisms than either the Canadian or Indian constitutions. Swiss stability stems from the constitutional recognition of divided sovereignty. Cantonal sovereignty, in particular, has been respected in practice. Minority nationalities in Switzerland have thus felt secure in the confederation. The principle of divided sovereignty has not been recognized in either Canada or India. Minority nationalities have thus felt insecure in Canada and India, and they are consequently suspicious and resentful of central authority. This has caused considerable instability in both countries.

Fiscal Systems in Multinational Federations

The ideal model of federalism developed in Chapter Two suggested that, for the principle of divided sovereignty to be realized in multinational federations, each order of government would have to possess independent and sufficient revenue sources to meet its jurisdictional obligations. Unlike the other federations examined in this study, Switzerland has developed a highly federalized fiscal
system. The two orders of government largely rely on separate revenue sources. The central government has relied almost exclusively on indirect taxes, while cantonal governments have relied almost wholly on direct taxes, particularly income tax. The process of constitutional change has served to constrain the central government in Switzerland: it has not been able to exploit a far superior spending power, as has the government of Canada. While the maintenance of dual sovereignty in Switzerland was threatened during the Great Depression and World War II, the central government retreated from its quasi-federal practices after the war. A similar process ensued in Canada, but the federal government refused to abandon its superior fiscal position after the war.

The Canadian fiscal system is quasi-federal. While the framers of the constitution may have intended the central government to collect only indirect taxes, they actually allocated to the central government all modes of taxation. The provinces were accorded only direct taxes, a minuscule source of revenue in the nineteenth century. Now, however, both orders of government in Canada tax the same major sources -- income and corporate taxes, retail sales taxes, and hidden taxes on tobacco, alcohol, and gasoline. This is a recipe for conflict: the two orders of government must coordinate their tax efforts while at the same time they compete for the same resources. The need for fiscal coordination has impelled the development of "executive federalism." Québec objected to this quasi-federal fiscal system and it opted out of Canada's tax sharing arrangements.

In both Switzerland and Canada, federal transfers comprise about 20% of cantonal and provincial revenues, and about half of these transfers are conditional. In both countries, there is also a fair degree of jurisdictional overlap in social programming. In Switzerland, however, fiscal relations and joint programs were developed by intergovernmental consensus, proposed as constitutional amendments, and approved by the people. They thus had a high degree of legitimacy,
even if the federal principle was infringed on occasion.

In stark contrast to Switzerland, the federal government in Canada initiated social legislation after World War II, usually against the objections of the provinces, by exploiting its superior financial power. The federal government was able to exploit its superior fiscal power, at least in party, because the constitution did not recognize the sovereignty of the provinces. The lack of an amending formula also complicated the situation. Without a defined process of change, the federal government was free to pursue its objectives, even if it could not obtain the consent of the provinces. Quebec objected to this federal intrusion into areas of provincial responsibility and it has sought to extricate itself from the tangled web of federal-provincial fiscal and social policies.

Fiscal relations in India have also been quasi-federal. The states have inadequate revenue sources, and they are consequently dependent on transfers from the central government. Moreover, central funding for state plans, administered by the Planning Commission, has been wielded much like the federal spending power in Canada. Just as Canada did not develop a Keynesian theory of federalism when it developed the social welfare state after the Second World War, India failed to create a truly federal planning process. While the spending power in Canada has become less significant in recent years as the federal government reduced its massive budget deficits, the Planning Commission in India may have become less important since 1991 as the Union government has implemented policies of economic liberalization. Over the last fifty years, however, the planning process has seriously strained centre-state relations in India.

As with the constitution, respect for the federal principle in Swiss fiscal relations has contributed to Switzerland's remarkable stability. Switzerland, in contrast to Canada and India, has been willing to accept a high degree of tax diversity. This would seem to be a natural corollary of
the federal ambition to establish "unity with diversity." Canada and India, by contrast, have sought to develop a more uniform fiscal system. Indeed, Richard Bird has described Canada's fiscal system as "blandly homogeneous" in comparison to Switzerland's (Bird 1986, p.41). Furthermore, the Canadian provinces and Indian states have been financially dependent on the central government and they have consequently been forced to accept central initiatives as a result of the central government's superior spending power. In short, the federal principle has not been respected in the fiscal systems in Canada and India. Both countries have consequently suffered strained intergovernmental relations and marked instability, especially in India.

Party Systems in Multinational Federations

The ideal model of federalism developed in Chapter Two suggested that the structure of political parties in the system should be congruent with the federal principle, if stability was to be ensured in multinational federations. Switzerland demonstrates that a party system may be highly federal and consensual. There would seem to be three keys to this unusual situation. First, if the two orders of government refrain from interfering in each other's jurisdiction, there is less likelihood of political conflict. Second, when it is understood by all parties that changes to the structure of intergovernmental relations must be proposed as constitutional amendments and approved by the people, cantonal parties have no reason to fear that the federal government will encroach upon cantonal jurisdictions. Cantonal parties thus do not have to position themselves as the guardians of cantonal sovereignty. As a result, there are no regional political parties in Switzerland, in contrast to Canada and India. Third, the practice of consociationalism necessitates cooperation, as opposed to the conflictual form of Westminster government practised in Canada and India. Over the century, the principle of "amicable agreement" has become deeply embedded in Swiss politics (Steiner 1974).
The Canadian party system, on the other hand, might be described as an example of "amicable disagreement." While provincial parties traditionally possessed a high degree of de facto autonomy from their federal counterparts, the major parties initially maintained integrated organizational structures. The federalization of the Canadian party system began in Québec in the 1930s, when Maurice Duplessis disbanded the Conservative Party and established the Union Nationale. The Québec Liberal Party separated from the federal organization in 1964. Similar disengagements followed in other provinces, especially west of Québec. Only the New Democratic Party has remained fully integrated, except in Québec. The separation of federal and provincial parties allowed the provincial units to better defend the jurisdictional autonomy of the provinces.

The Congress party and the other major parties in India have always been integrated, hierarchical organizations. The long period of Congress hegemony, from 1947 to 1967, masked the structural defects of Indian federalism. After 1967, regional political parties proliferated in the states but the Congress continued to govern the centre most of the time. The non-federal structure of the Congress thus began to clash with the federalization of the party systems at the state level. Centre-state conflicts have subsequently become endemic, often with considerable violence. These conflicts will likely continue as long as the central political parties maintain their non-federal structure.

The evidence from Switzerland and Canada indicates that a federalized party system facilitates conflict management, but this is less clear in the Indian case. Conflict has increased in India as the system has 'federalized.' India appears to lend support to William Riker's contention that integrated party systems contribute to stability, while instability increases when different parties control each order of government (1964, p.130; 1975, p.137). The Congress system (1947-1967), in fact, might be considered as Riker's ideal model. Without necessarily disputing Riker's
observation, there would seem to be two structural problems in India. First, as regional parties have proliferated at the state level, the central parties have remained integrated, hierarchical organizations. In other words, the federalization of the party system is incomplete; it has occurred only at the state level. Thus, we might say that the Indian party system has 'regionalized' but not 'federalized.' The second problem is the incompatibility of the federal system and the party system. The Indian case demonstrates that a quasi-federal constitutional system can work if it is governed by a dominant quasi-federal political party. If, however, the party system federalizes, it follows that the constitutional and fiscal systems should federalize as well. In sum, quasi-federal parties in the centre have been employing the quasi-federal provisions of the constitution to govern a polity that has federalized in the regions. There has thus been considerable intergovernmental conflict in the Indian federal system.

Illustrated Conclusion

The findings of this study are diagrammed schematically on the next page (See Figure 12.1). In short, Switzerland most closely approximates the ideal model developed in Chapter Two, and Switzerland enjoys the greatest stability. The Canadian case is more complex. The constitution is ambiguous; fiscal relations are quasi-federal; but, the party system is highly federal. Canadian federalism thus does not correspond as closely to the ideal model as Switzerland, and it is less stable. In India, all three institutions of federalism are quasi-federal. The structure of Indian federalism thus corresponds least to the ideal model developed in Chapter Two, and India has a highly unstable federal condition. The case studies indicate that multinational federations that more closely approximate the ideal model of federalism display greater political stability. The study's independent and dependent variables are thus strongly correlated. If we accept the proposition that
the desire for sovereignty is an innate characteristic of nationalism, we have reason to believe that there is a causal relationship between the institutional structure of federalism and political stability.
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Federalism in Multinational Societies
Macro Structure versus Micro Particularity

The new institutional approach developed in this study has successfully explained the relative stability and instability in various multinational federations, but it is important to recognize the limitations of this approach. This is a structural approach; it suggests that conflict is likely when state sovereignty is not recognized or respected, especially when minority nationalities are involved. The study has demonstrated this proposition with respect to Québec and Punjab. While Kashmir and Assam have also endured separatist crises, it must be acknowledged that not every minority nationality is seeking to separate from the Indian union. Although demands for political autonomy have been raised in some other states as well, separatist conflict has flared in only a handful of states. In other words, the denial of state sovereignty does not always provoke separatist conflict. Thus, while the structure of the system is important, there are obviously internal dynamics at the state level at play as well.

The approach adopted in this study is similar to the structural theory of international relations developed by Kenneth Waltz. His argument is purely structural or systemic. "Structural concepts, although they lack detailed content, help to explain some big, important, and enduring patterns" (Waltz 1979, p.70). He argues that war is a recurring feature in an international political system characterized by anarchy. In other words, the structure of the international politics allows war to recur. "Structurally we can describe and understand the pressures states are subject to. We cannot predict how they will react to the pressures without knowledge of their internal dispositions" (1979, p.71). Thus, while a structural "theory of international relations will, for example, explain why war recurs....it will not predict the outbreak of particular wars" (1979, p.69; emphasis added). Particular wars may only be explained by an analysis at the unit level. This requires an "analytical" and
"reductionist" approach. Waltz explains that "[t]he analytical method....requires reducing the entity to its discrete parts and examining their properties and connections" (1979, p.39).

The approach adopted in this study is both systemic and reductionist. On the one hand, a structural analysis of federal systems was developed. It was suggested that stability was likely in federal systems structured according to the principle of divided sovereignty, while instability was probable in federal systems that were not structured according to the principle of divided sovereignty. This constitutes a systemic level analysis. The dissertation, however, also provided a unit level, or reductionist, analysis in an attempt to demonstrate the systemic proposition. The study demonstrated that the sovereignty accorded to the cantons in Switzerland has stifled separatist tendencies, while the denial of divided sovereignty has provoked separatist conflicts in Québec and Punjab. Just as the structure of international politics does not precipitate war everywhere, not all minority nationality states in India have sought to exit the union. But the evidence does illustrate that Sikh separatists, as with Québec sovereignists, have reacted negatively to the denial of divided sovereignty. In sum, separatist politics can only be explained with an analysis of both the macro-structural conditions of a federation and the micro political dynamics at the unit level.

Situational Variables versus Institutional Choice

The recognition of cantonal sovereignty, at least within their constitutional jurisdiction, appears to be central to Swiss stability. The cantons have always been sovereign; it was therefore imperative that their sovereignty be recognized in the federal constitution. Anything less would not have been acceptable to the cantons. The Sonderbund cantons, in fact, did not accept the constitutional solution to the civil dispute of 1847. The fact that the cantons were sovereign prior to the constitution of 1848 made it easier to recognize cantonal sovereignty in the federal bargain.
While intergovernmental cooperation has become more extensive in Switzerland over the past 150 years, the explicit recognition of cantonal sovereignty in the constitution has ensured that cantonal sovereignty has been respected in political practice.

In Canada and India, the provinces and states were not sovereign prior to independence; it was therefore a more difficult proposition to recognize provincial or state sovereignty in the federal bargain. The Fathers of Confederation, were at heart colonists; they negotiated self-government, not independence. The B.N.A. Act was statutory legislation of the British parliament, not a domestically entrenched constitution. After 1867, the government of Canada did not enjoy the sovereignty of an independent state. Canadian political leaders were content to leave Canada’s sovereignty in British hands. As such, the provinces had little chance of enjoying the trappings of provincial sovereignty under the federal constitution.

The leaders of the Indian National Congress were certain that they were negotiating their independence from Britain. They had no doubt, however, that sovereignty, once obtained, would be invested exclusively in the central government. In the Constituent Assembly, Ambedkar was emphatic that “the Federation was not the result of an agreement by the States to join in a Federation....Though the country and the people may be divided into different States for convenience of administration, the country is one integral whole, its people a single people living under a single imperium derived from a single source” (GOI 1948/9, p.43; italics original). In short, the delegates in the Constituent Assembly, who were members of a central political party not representatives of federating states, were not predisposed to recognize state sovereignty in the constitution.

The existence of cantonal sovereignty prior to independence has profoundly influenced political practice in Switzerland. As sovereign states, the cantons always had independent sources
of revenue. Fiscal sovereignty was thus incorporated into the federal bargain, and it is still respected. By contrast, the provinces and states in Canada and India have always depended upon the fiscal patronage of the central government. Swiss political parties were also initially rooted in the cantons. When the Swiss cantons confederated, like-minded parties in the various cantons also confederated to form country wide party organizations. This, of course, was diametrically opposite to India where the Congress was a centrally organized party that later operated in the states. Canadian political parties, as we have seen, were also initially integrated and centrally organized.

Does the historical ‘accident’ of cantonal sovereignty make the Swiss case sui generis? The answer is no. Whilst the historical and cultural factors may have predisposed the Swiss in certain political directions, the institutions of federalism are instrumentalities that are chosen by decision makers; decision makers have choices. Culture, sociology, and history do not determine institutional outcomes; they may influence those outcomes, but people determine them. The Swiss seem to have been more cognizant of the principles of federalism when they designed their constitution. It is quite evident that Canadian decision makers, especially Macdonald, were sceptical of federalism and the principle of divided sovereignty, while Indian political leaders nearly repudiated the federal principle. Indian federalism, as Ambedkar acknowledged, was an instrumentality of administrative devolution. In short, the element of choice is critical in the development of federal institutions.

The Swiss have developed a number of power-sharing institutions beyond federalism to allow them to live together peacefully. These institutions include consociationalism, corporatism, and international neutrality.\(^2\) However, as Steiner has argued, “[t]here is nothing special about the genes

\(^2\) Switzerland’s commitment to international neutrality helped the country survive World Wars I and II. Canada’s alliance with Great Britain severely strained English-French relations in Canada, as the conscription crises demonstrate. On the other hand, India’s policy of non-alignment does not appear to have helped the country develop domestic political stability.
of the Swiss that predisposes them to practice power-sharing. Rather, the current pattern of decision making is the result of a long learning process. The Swiss learned that if power is shared among the various groups, their country will be more stable and prosperous" (1991, p.111; emphasis added). The development of these power-sharing institutions has been the product of conscious political choice. For example, as part of the consociational experiment, the Swiss switched from a majoritarian electoral system to a proportional representation system in 1918.3

While consociationalism and corporatism are both important in their own way, federalism is arguably the foundation of Swiss success. The first three articles of the Swiss constitution provide the federal framework for the country. Consociationalism and corporatism, by contrast, are not detailed in the constitution; they are much later creations. Consociationalism was not institutionalized until after World War I, and it did not obtain its current form until 1959. Corporatism was established during the Great Depression in the 1930s. Consociationalism and corporatism have emerged from the country's highly successful experiment with federalism.

While Canada and India are not corporate democracies, they do exhibit some of the characteristics of consociationalism.4 French Canadians, for example, are usually prominent in the federal government. If the prime minister is not from Québec, he or she has almost always had

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3 Swiss power-sharing extends beyond the central political institutions. Steiner reports that power-sharing is practiced in the army, post office, and even private associations. In short, power-sharing is applies to "Swiss society as a whole" (Steiner 1991, p.108). While French Canadians were incorporated into the federal civil service, English-French power-sharing is not as extensive in other Canadian institutions. In India, the system of reservations in India for scheduled and backward castes and minority religions has been besieged by a number of problems. One of the difficulties in India is the problem of successful and over-represented minorities. The Sikhs, for example, have historically been over-represented in the military. While the Sikh community only represents about 2% of the Indian population, Sikhs formed about 25% of the military during World War II. This figure has dropped to about 12% currently, although they still represent about 20% of the officers. Many Sikhs resent their community's declining proportion in the military, and Sikh politicians have presented it as one of their main grievances; it was even included in the Anandpur Sahib Resolution (Cohen 1988, p.132-4).

important ‘lieutenants’ from Québec. The Liberal Party, which has often been referred to as the
“natural governing” party, has maintained an unofficial tradition of alternating English and French
leaders. The government of India, especially Congress governments, have similarly displayed
conspicuous representation of religious and linguistic minorities. There has thus been a significant
element of elite accommodation in both Canada and India. Both countries, however, have resisted
the establishment of grand coalition governments. This almost certainly stems from the adoption
of the Westminster form of government in both countries. The Liberal and Conservative parties in
Canada and the Indian National Congress have always preferred to win power for themselves rather
than share power. India, by necessity, is now engaged in coalitional politics but its politics are still
premised on the logic of Westminster majoritarianism. The large parties attempt to win the support
of the small parties in order to prevent the other large parties from forming the government. It would
seem that India now desperately needs a grand coalition government or a government of ‘national’
unity in order to regain some political stability.\(^5\)

It has been argued in this dissertation that institutions influence political behaviour, but
institutions do not have to be permanent. While institutional inertia can be difficult to overcome,
pathological political behaviour should generate pressure to reform or change institutions. The

\(^5\) Arend Lijphart has recently tried to argue that India in fact has always been a consociational democracy, although
he seems to be stretching the boundaries of his own theory. Lijphart states, “Indian power sharing from independence
to the present can be divided into two periods: the two decades after 1947, when consociationalism was full-fledged and
complete, and the period beginning in the late 1960s, when power sharing continued but in slightly weaker form” (1996,
p.263). Employing Rajni Kothari’s idea of the “Congress system,” Lijphart argues that “[t]he combination of the
Congress Party’s inclusive nature and political dominance has generated grand coalition cabinets with ministers
belonging to all the main religious, linguistic and regional groups” (1996, p.260). While the Congress was open
and tolerant, it would seem that a one party dominant system is the anti-thesis of consociationalism. It is ironic indeed that
Lijphart speaks of a weakening of power sharing just as India enters an age of coalitional politics. His elitism is apparent
when he writes, “[a]ll the pressures from below [now] make it especially difficult to maintain broad support for a party
explicitly committed to power sharing and minority rights” (1996, p.265). The description of India as a fully
consociational regime is, as Lijphart says, “a novel interpretation” (1996, p.262). He would have been wise to maintain
his previous characterization of India as a “semiconsociational” regime (1979, p.513).
Swiss civil war prompted a new constitution, while political gridlock in the United Province of Canada led Canadian political leaders to develop a new institutional arrangement. India faces the most profound instability among the three countries investigated in this study, but there seems to be little movement towards institutional reform. There is no evidence that the major political parties are ready 'to bury the hatchet' and move India towards a consociational regime, and separatist crises are met only with military force. In Canada, the Constitution Act of 1982 did not solve the Québec crisis, indeed it may have deepened the problem, and the Meech Lake and Charlottetown accords were similarly unsuccessful. Switzerland has had the most success with institutional reform. First, the Jura crisis was solved and now there is a good chance that Switzerland will affect a total revision of its constitution. Thus, the most stable country in this study has made the most progress on institutional reform. Canada and India must now find ways to overcome their institutional inertia.

**Liberty, Democracy, and Federalism**

Constitutions are supposed to place constraints on the state, the only social institution with a legal monopoly on coercive violence. Federal constitutions in particular are supposed to divide the powers of the leviathan between two orders of government and consequently maximize liberty. One only has to examine the American constitutional debates to discover that the constitution and federalism were intended to protect the states and individuals from central authority. Indeed, this was the *raison d'être* of the American revolution. If a federal constitution is unable to constrain the central government, one might anticipate the development of resentment towards central authority.

In Switzerland, the constitution has effectively constrained the actions of the federal government. The story of the value added tax in Switzerland is illustrative of the point. The federal government was desperate to increase its revenues but when it could not achieve that objective
within the constraints of the constitution, it did not pursue backdoor routes to that goal. In Canada, by contrast, the federal government has frequently been able to circumvent the constraints placed upon it by the constitution and the federal principle. The federal spending power is a case in point. In India, it has not been so much a question of the federal government circumventing the constitution, but rather the federal principle was circumvented in the constitution. The quasi-federal constitution allows the Indian government to be involved in almost all facets of Indian politics.

The limited Swiss state has meshed nicely with the laissez-faire capitalism of the radical German Protestants, who have dominated the Swiss confederation. While social spending in Switzerland is about the same as in Canada, the Swiss state has never been employed to develop mega-infrastructural projects, like Macdonald’s railway or Nehru’s rapid industrialization program. The level of state involvement in economic development thus negatively correlates with political stability in these three cases. The Swiss state has been least involved in economic development and Switzerland is the most stable country studied, while the Indian state has been most involved in economic development and India is the least stable country examined in this study. Canada falls between the two. A political economy analysis of these three multinational federations may thus yield important insights into the nature of political stability in multinational federations.

Military Security, Cultural Insecurity and Cultural Laissez-faire

It might be hypothesized that states with greater external security threats would be more authoritarian in domestic politics. India has faced serious military threats since Independence, but Switzerland also had to endure serious external threats, especially of course during the two world

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6 It should be noted that the federal government in Switzerland has assisted the isolated mountain cantons to develop a system of ‘national’ highways, but this is relatively minor compared to the projects undertaken by the state in Canada and India.
wars. Canada has undoubtedly enjoyed the greatest external security of the three countries examined in this study. While the Soviet Union was certainly a threat during the Cold War, it was quite abstract. While the Soviets could have attacked Canada with intercontinental ballistic missiles, there was little likelihood of a Soviet invasion. Canada, moreover, has maintained a tight social, political, economic, and military alliance with the greatest power in the world. Canadians thus did not feel particularly threatened by military enemies. External military threats, therefore, cannot explain the differing behaviour of the central government in these three federations.

Most studies of nationalism and separatism focus on the cultural insecurity of minority nationalities, but it may be more fruitful to examine the cultural security or insecurity of the dominant nationality in multinational federations. We might speculate that in the countries examined in this study the German-speaking Protestants have felt culturally more secure than English-speaking Canadians, while Hindi-speaking Indians have felt least secure. The Swiss identity is strong, while (English) Canadians continually fear Americanization. Fretting about the ‘Canadian identity’ has become a ‘national’ pastime in English-Canada. Canadians consequently have employed the state to protect and promote ‘Canadian culture,’ whereas “Bern assumes that the best way to nation-build is for the centre to be inconspicuous” (Laponce 1992, p.276). Many Indians, conditioned by a history of Moghul and British rule, feel culturally insecure in their own country. This sentiment is particularly evident among supporters of the BJP in India’s Hindi heartland. The fear of external domination and internal balkanization may have caused India’s central government to pull on the constitutional reins more tightly than either Canada’s or Switzerland’s. In sum, an examination of the cultural insecurity of the dominant nationalities in Canada and India might yield
interesting insights into the dynamics of central state behaviour and minority separatism.7

Direct Democracy

The Swiss system of direct democracy has ensured that changes to the federal constitution have a high degree of legitimacy. Swiss direct democracy is very admirable, but it is unlikely that direct democracy could be easily transferred to either Canada or India. The fundamental problem in Canada is that Québec stands alone. The general amending formula in Canada, which requires the support of seven of ten provinces representing 50% of the population, creates a higher threshold for constitutional change than the Swiss double-majority formula, but Québec can still be outvoted by the rest of Canada. It would appear that Québec can only be protected with a constitutional veto. While a constitutional veto for Québec would conform to the principles of consociationalism, a unilateral Québec veto would violate the principle of liberal equality cherished by English Canadians (Telford 1998, p.45). On the other hand, a general provincial veto would make the amending process overly rigid. It may be possible, however, to reach a compromise. The Canadian amending formula requires unanimity for certain constitutional changes.8 If, as this study has suggested, Québec’s historical concern has been the structure of Canadian federalism, perhaps the unanimity provisions of the amending formula could be expanded to include the institutions of federalism, especially the division of powers. This would effectively provide Québec, and all the other provinces, a veto over

7 Jack Granatstein has argued recently that Canadian anti-Americanism “is usually benign unless and until it is exploited by business, political, or cultural groups for their own ends” (1996, p.4). I would argue that anti-Americanism represents a more fundamental insecurity among English Canadians. Indeed, English Canadians define themselves by the fact that they are not Americans, rather than by who they are. This, of course, goes to the very origins of Canada: Canadians are British Americans who did not join the American revolution.

8 Unanimity is required for changes to the Monarchy’s relationship to Canada, altering the balance of seats in the House of Commons and Senate, official bilingualism, composition of the Supreme Court, and the amending formula itself. See, Section 41, Constitution Act 1982.
structural changes to the Canadian federalism, without making the amending process overly rigid.

While the Swiss amending system might be more compatible with the social structure of India, direct democracy is not really viable in a country as big as India. Just organizing regular general elections in India is a massive undertaking. In contrast to Switzerland and Canada, the problem with the Indian amending formula is that it has been too flexible. Parliament can approve most constitutional changes with a two-thirds majority. While some constitutional amendments additionally require the support of half the states, this was not difficult to achieve when Congress governed the centre and most state governments as well. However, now that the Indian party system has fragmented, constitutional changes might be a more difficult proposition. It has proven very difficult over the last two general elections for a coalition to produce a bare working majority in parliament. Thus, it is hard to imagine two-thirds of Parliament agreeing to even simple constitutional amendments. The federalization of the party system at the state level will similarly make significant constitutional amendments more difficult.

Democratic Freedoms

The analysis of separatist politics in Canada and India, and the Jura crisis in Switzerland as well, leads inevitably to the conclusion that there is an important relationship between federalism and democracy. “There is, however, surprisingly little reference to federalism among democratic theorists, and perhaps even less consideration of democratic theory among students of federalism” (Whitaker 1992, p.166). The history of the American revolution has led people to contemplate the

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9 Alfred Stepan (1997) has begun to explore more fully the relationship between democracy and federalism. He has argued that it is imperative to distinguish between "demos constraining" and "demos enabling" federations. This, he suggests, is the most important distinction to be made between different federal systems. See, also Robert Dahl (1986) "Federalism and the Democratic Process," and Reg Whitaker (1992) "Federalism and Democratic Theory."
relationship between federalism and liberty, but Whitaker suggests that “[i]nstead of asking what federalism does for liberal freedoms, we might start the other way around, and ask what liberal freedoms do for federalism.” He continues, “[i]t is impossible to imagine a functioning federalism in an illiberal polity” (1992, p.189-190). Democracy may be a double-edged sword: democratic freedoms permit the articulation of secessionist demands, contrary to the interests of the state, but they may also facilitate the institutionalization of secessionist movements and mitigate violent ethnic conflict. The government of Canada has had the confidence to combat Québec separatism in the democratic arena, while the Indian state has opted to fight separatism on the battlefield.

The quasi-federal Canadian constitution has given rise to numerous intergovernmental disagreements in Canada, but resolutions to these disputes are sought through negotiation, however protracted, partisan, and bitter. Even the intensely emotional politics of Québec separatism has been fought within the parameters of party politics. While the Front de Libération du Québec was forcefully repressed, the Parti Québécois has been permitted to advocate its separatist platform and hold referendums on the question of sovereignty. The Canadian state made a distinction between the legitimate democratic forces in Québec and armed insurrectionists. Political elites in Québec also repudiated the use of violence. In this manner, violence was quickly terminated in Québec, while the separatist movement in the province was coopted by the democratic party system.

The Indian experience stands in marked contrast to the Canadian case. The government of India has consistently employed the quasi-federal, as well as quasi-democratic, provisions of the constitution to repress nationalist and separatist parties and movements. The government typically

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10 See, Franz Neuman (1955) “Federalism and Freedom: A Critique.” Riker categorically rejected the notion that federalism promotes liberty: “the assertion that federalism is a guarantee of freedom is undoubtedly false” (1964, p.145). Lemco reports, that “political freedom, political rights, civil liberties, and political terror....are not strongly associated with federal stability” (1991, p.19). Lemco has thus ‘scientifically verified’ Riker’s contention.
responds to separatist movements by dismissing the elected state government and imposing President's Rule. When the government closes the legitimate political space in a state, it finds itself facing a shadowy, underground enemy that is committed to violence. The democratic party system is thus not given the opportunity to coopt these centrifugal movements. India has consequently had to endure episodic bouts of political violence. Indeed, more than 50,000 people have been killed during the Punjab and Kashmir secessionist crises in the 1980s and 1990s.

The "Indian paradox," asserts Myron Weiner, is "the puzzling contradiction between India's high level of political violence and its success at sustaining a democratic political system" (Weiner 1989, p.9). While there is a vigorous debate about the nature of Indian democracy, most scholars agree India has conformed to the basic standards of democracy: there have been regular competitive elections; power has been transferred peacefully between political parties; the rule of law is established; and the military is firmly under civilian control (Khilnani 1992, p.191). The fundamental question here does not concern the procedures of democracy, but the range of democratic freedoms.

The Indian state has drawn the boundaries of political discourse more narrowly than in

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Canada and Switzerland. In Canada, the people are free to express separatist sentiments, as long as they do not advocate or orchestrate political violence. The freedom of political action is more circumscribed in India. While one can organize and mobilize for one’s community, people are not free to advocate separatism. In other words, communalism is tolerated, or at least permitted, while separatism is not. Indeed, the constitutional basic liberties of free speech, freedom of association, and peaceful assembly are qualified by the maintenance of Indian sovereignty and territory. These limitations were added to the constitution by the sixteenth amendment, which was devised in response to the embryonic Tamil separatist movement in the early 1960s.

In short, if people are unhappy with the institutional structure of federalism in India, and want to be free of it, they cannot do so within the boundaries of democratic politics; the Indian state simply will not permit it. If the Canadian state employed the same rules as the Indian state, it is not an exaggeration to suggest that Lucien Bouchard and Gilles Duceppe would be in jail (not necessarily with any criminal conviction or even charge, just detained), and the Parti Québécois and the Bloc Québécois would be banned organizations. If this situation pertained in Québec, I dare say the province would be a great deal more unstable, even violent, but the Canadian state has skillfully channelled separatist politics into the democratic arena. In contrast to Canada, separatists in India must either quash their political aspirations or fight for them in an undemocratic way. Unfortunately, there has been no shortage of undereducated and underemployed young men, known in India as the “lumpen element,” who will step out of the democratic arena and take up arms against the state.

12 Article 19(1) states that “All citizens shall have the right a) to freedom of speech and expression; b) to assemble peaceably and without arms; c) to form associations or unions” but the Article continues, “Nothing in sub-clause[s] (a-c) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [maintaining] the sovereignty and integrity of India, [and] the security of the State...."
Myron Weiner has argued that federalism in India has actually served to maintain stability and the democratic system. He contends,

[f]ederalism, and the highly segmented social system that underlies it, also enable the central government to function when some states are in political turmoil. Conflicts that break out in one state rarely spread to neighbouring states....The centre can hold even with simultaneous disturbances in a number of states -- as long as the divisions within states do not result in divisions within the central government. The segmented character of Indian society enables the central government to intervene in crisis situations within individual states without necessarily creating a national crisis (p.83)....Social structure and constitutional forms thus combine to quarantine violent social conflict and political instability at the state level” (Weiner 1992, p.84; emphasis original).

If Indian federalism is now only about containment of conflict in discrete units rather than the promotion of diversity, it might appropriately be described as “Hobbesian federalism.”13 This highly pessimistic form of federalism would seem to be a negation of the federal spirit.

While Weiner has identified India’s democratic paradox, there is also a federal paradox. On the one hand, the institutional structure of federalism has given rise to regional separatist movements, but federalism has also prevented country wide instability. If the root of the problem is that India is not sufficiently federal, it is also the case that India is not sufficiently democratic. This is not to disparage Indian democracy. On the contrary, Indian democracy is a marvellous and

13 I am indebted to Philip Resnick for this clever phrase. Weiner could have elaborated his analysis further. After the period of Emergency Rule (1975-1977), the government of India not only resolved to contain conflict at the state level, it also developed an elaborate array of statutes to target individuals involved in 'anti-national activities' rather than revoking the rights of the general populous, as happened during the Emergency. Hardgrave and Kochanek report that “[t]he National Security Act (1980) authorizes security forces to arrest and detain without warrant people suspected of undermining national security, public order, and essential economic services. Detainees can be imprisoned without trial for three months, with as many as three subsequent three-month extensions” (1986, p.187). The Terrorist and Disruptive Activities Act (1985) “gives officials the power to tap telephones, censor mail, or raid any premises when authorities believe the people involved endanger the unity or sovereignty of the nation” (1986, p.188). Thus, they conclude, “[a]nother emergency is an unlikely prospect, [because] the government has armed itself with the legal instruments and police power to make so extreme an action unnecessary” (1986, p.188). The abuse of these extraordinary powers has led some to suggest that the government of India is experiencing a legitimacy crisis (see, Kothari 1988, Mathur 1992).
impressive accomplishment. India confounds conventional democratic theory. It is truly amazing that a very poor, largely illiterate, agrarian society has managed to maintain a democratic system. It is almost wholly unique in the third world. Extending Weiner's paradox, however, we could speculate that if India was more democratic, it might be less violent.

Will the Canadian strategy of containing separatism in the democratic arena be successful in the long run? That depends on how one defines ‘success.’ The democratic strategy may not save Canada, but it should spare lives. The preservation of life or country is a value judgement. Abraham Lincoln saved the United States at the cost of tens of thousands of lives. Canadians have decided, implicitly at least, that the preservation of life takes precedence over saving the country. The government of India has resolved to save the country at the expense of tens of thousands of lives and, to date, Indians have tacitly accepted that resolve.

Democratic Separatism and the Supreme Court of Canada

As mentioned in the introduction, secession in multinational societies has typically entailed considerable political violence. The ‘Velvet Divorce’ in Czechoslovakia is a notable exception. While theories of democratic secession are still relatively underdeveloped, the Supreme Court of Canada reference case on Québec secession, delivered in August 1998, goes a long way towards establishing a process for democratic secession. The government of Canada had already tacitly endorsed the referendum process in Québec by its participation, but, if the ‘yes’ forces had prevailed in either 1980 or 1995, the subsequent process was ill-defined. The Court’s clarification of the post-referendum process should help further institutionalize the separatist project within the democratic arena. Thus, there is a greater likelihood that Québec’s quest for independence will remain peaceful.

Harry Beran has attempted to develop a liberal theory of secession. He argues that “liberal
political philosophy requires that secession be permitted if it is effectively desired by a territorially concentrated group within a state and is morally and practically possible” (1984, p.23). While Beran wants his theory to be as liberal, or permissive, as possible, he subjects a group’s moral claim for secession to some rather restrictive practical considerations. Beran suggests, “[t]he conditions which may justify not allowing secession could include” 1) the non-viability of the seceding unit; 2) the seceding unit “is not prepared to permit sub-groups within itself to secede although such secession is morally and practically possible;” 3) the oppression of minorities in the seceding unit; 4) the seceding unit would form an enclave in the existing state; 5) the seceding unit “occupies an area which is culturally, economically or militarily essential to the existing state. 6) It occupies an area which has a disproportionally high share of the economic resources of the existing state” (1984, p.30-1; emphasis original).

Anthony Birch, in response to Beran, has thus argued “in practice most would-be separatists are likely to be left with a moral entitlement to secession which is rendered nugatory by political and economic circumstances” (1984, p.597). Birch, however, argues that a seceding group must morally justify its claim. He states, “[i]nstead of starting with the presumption that any territorially concentrated group is justified in attempting to secede if a regional majority favours this course, I start with the presumption that groups are not entitled to opt out of a democratically governed state unless very special circumstances obtain” (1984, p.598). He contends that secession is only justified if the seceding region was 1) “included in the state by force;” 2) “the basic rights and security of the citizens of the region” have been denied; 3) “the democratic system has failed to safeguard the legitimate political and economic interests of the region;” or 4) “the national government has ignored or rejected an explicit or implicit bargain between sections that was entered into as a way of
preserving the essential interests of a section that might find itself outvoted by a national majority" (1984, p.599-600). While Birch suggests that “Québec and Scotland are the regions with the most plausible case for secession” (1984, p.597), he is unable to justify the Scottish case within the parameters of his theory and Québec’s claim is weakly subsumed under the last condition.

Birch contends that “[t]he trouble with Beran’s formulation is that, because he bases the claim to secede simply on a majority vote, which is a rather slender basis for a moral imperative, he feels compelled to allow other non-moral considerations to justify opposition to secession” (1984, p.601). The problem with Birch’s theory is that it cannot handle a region that is determined to secede regardless of moral justifications. If a group of people has irrevocably decided it wants an independent country, is Birch prepared to deny this desire if it cannot be morally justified? Birch’s theory of secession has two fundamental problems, both of which were identified by Beran. First, “Birch’s alternative liberal democratic theory of secession is not sufficiently liberal because his presumption against permitting secession is inconsistent with accepting freedom as an ultimate political value” (Beran 1988, p.317). Second, as a corollary to the first point, “if liberty is a fundamental political value, what is primary is the loss of willingness of a group to maintain the unity of the state, not the adequacy of the reasons they have for wishing to secede” (Beran 1988, p.318). If a seceding group did not meet Birch’s moral standard for secession, he would seemingly have no option but to repress the aspirations of the region’s citizens.

In the reference case on Québec secession, the Supreme Court of Canada obviously concluded that there is no escaping the liberal claim for secession, if that is truly the desire of one region of the country. The Court determined, “[a] clear majority in Québec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all the
other participants in Confederation would have to recognize.” But, the Court also ruled that the
democratic principle is not supreme. The Supreme Court carefully steered a course between Birch’s
moral imperatives for secession and Beran’s practical concerns. The Court asserted that “[t]he
democratic vote, by however strong a majority, would have no legal effect on its own and could not
push aside the principles of federalism and the rule of law, the rights of individuals and minorities,
or the operation of democracy in the other provinces or in Canada as a whole.” In short, the
democratic pursuit of secession must follow other liberal norms.

The Court’s decision in the Québec reference case essentially follows the principle of no-fault
divorce. If one or both partners are not happy in a marriage, it makes little sense to continue the
arrangement. Moreover, it is not necessary to locate a justification or a fault for separation. In a
liberal society, the happiness of the individuals involved is the only justification required. Similarly,
in multinational federations, the happiness of the nations is paramount. If a nation, for whatever
reason, is not happy with the federal arrangement, it will likely seek to secede. Once this sentiment
gains momentum, it may not be possible to reverse it. The unity of the federation can only be
assured in the long term, if the happiness of a discontented nation can be reestablished. It is thus
imperative to determine what minority nationalities really want.

What do Minority Nationalities Really Want?

The history of Switzerland indicates that minority nationalities want sovereignty within their
sphere of constitutional jurisdiction so that they can pursue their political interests and preserve their
cultural heritage free from outside interference. The Jura crisis is a testimony to the success of Swiss

federalism. When the Jurassians came to feel culturally insecure in the canton of Berne, they sought to join the Swiss confederation as a full-fledged canton, rather than to separate from Switzerland. The constitutional recognition of divided sovereignty has also provided security to the culturally fragile cantons of Grison and Ticino. There are no separatist movements in Switzerland, nor are there any demands from cultural minorities for special recognition. Switzerland has not always been characterized by cooperation and consensus. Indeed, modern Switzerland was born out of civil war. Switzerland has constructed communal harmony through its federalism. From the recognition of divided sovereignty, Switzerland has thus successfully developed a multinational civisme.

"What does Québec want?" asked Pierre Trudeau (1990, p.438). He answered, "[a]s far back as memory serves, French Canadians were essentially asking for one thing: respect for the French fact in Canada and incorporation of this fact into Canadian civil society, principally in the areas of language and education, and particularly in the federal government and provinces with French-speaking minorities" (1990, p.438). This, he claimed, was accomplished with official bilingualism and the Charter of Rights and Freedoms (1982). Québec, however, has wanted more. From Confederation to the Quiet Revolution, political leaders from Québec have insisted upon the adoption of classical federalism, or sovereignty in their sphere of jurisdiction, and independent and sufficient revenues to make that sovereignty meaningful.

A majority of francophones in the province of Québec regard themselves as a nation distinct from the rest of Canada. They thus desire sovereignty, at least in their constitutional sphere of jurisdiction. Political leaders from Québec have resented the lack of sovereignty accorded to the

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15 The Swiss constitution, in fact, is highly symmetrical. It is hard to imagine the Swiss constitution granting special recognition to Ticino or Grisons as distinct societies. As these cantons are secure in their spheres of jurisdiction, especially language policy (Laponce 1992, p.275-6), there is in fact no need to grant them special recognition. The rejection of the 1977 draft constitution by the cantons also demonstrates the importance of divided sovereignty.
provinces in the constitution. Duplessis campaigned to maintain provincial autonomy in order not to create a welfare state, while Lesage later demanded autonomy so that his government could pursue its own social agenda. The former instance may be termed a quest for "negative autonomy," while the latter may be considered as the pursuit of "positive autonomy." In both instances, Québec became locked in an epic battle with the federal government to maintain its sovereignty in social affairs. More recently, the Deputy Premier of Québec stated, "[t]he Constitution is clear: Education or health, it is our jurisdiction. The federalists should practice their own doctrine and respect the Constitution." In a federal system, the provinces should be free, within constitutional limits, to determine how to utilize their autonomy. This is the federal bargain, a bargain which has been undermined in Canada over the last fifty years, primarily by the federal spending power. As such, a large number of Québécois now reject federalism in favour of independence.

The majority of Canadians outside Québec have an identity that corresponds to the Canadian state. Indeed, they rather presumptuously regard Canada as the nation, much to the consternation of the Québécois. Canada has thus not developed a multinational civisme. As nationalists, many Canadians outside Québec believe that sovereignty should be vested with the federal government. Many English Canadians have been highly suspicious of the federal principle and the concomitant notion of shared sovereignty, and they are strong supporters of federal social programs, especially


17 Provincial sovereignty is often thought to subject provincial minorities to parochial majorities. The history of Canada is replete with examples of provincial bigotry, such as the Manitoba Schools Act. Minorities have also been subjected to majority wishes at the federal level, as the conscription crises indicate, but the problem is not insurmountable. The American Bill of Rights was introduced to protect citizens from the excesses of sovereign governments. The Charter of Rights and Freedoms in Canada has gone along way to granting better protection to provincial minorities in Canada. It is thus important to win Québec's support for the Charter.

18 The Canadian Broadcast Company's flagship news program is called "The National," while the Globe and Mail describes itself as "Canada's National Newspaper." In both instances, the nation is presented as coterminous with the Canadian state. These are thus prominent examples of English Canadian nationalism.
medicare. Michael Valpy, writing recently in the *Globe and Mail*, has argued that "[t]hrough its spending power, Ottawa initiated national hospital insurance and health care...Without it, we would not have achieved what national standards exist in other social services and programs. We would not have, in short, much of a country" (March 4, 1997, p.A.19; emphasis added). Medicare seems to have become a part of the Canadian identity outside Québec.

The enforcement of "national standards" in social programs is doubly offensive to many Québécois. First, in political practice, national standards mean federal standards in areas of provincial jurisdiction. This, of course, is contrary to the federal principle. In a truly federal system, there would be federal standards in areas of federal jurisdiction, and provincial standards in areas of provincial jurisdiction. Second, ‘national standards’ are interpreted in Québec as the standards of the English Canadian nation. They are viewed as an imposition by the majority nation upon the minority nation. Québec commentators cannot even speak about "national standards" without qualifying the word national with inverted commas.

Many English Canadian nationalists are concerned that the fulfilment of provincial jurisdictions by the provinces would transform the country into a "patchwork quilt." This, of course, is precisely what federalism is supposed to do. The objective of federalism is to stitch together diverse social fragments while maintaining their cultural distinctiveness. Federalism is supposed to provide "unity with diversity." Canadians seem eager to preserve Québec’s cultural distinctiveness, but there seems to be little point to this if Québécers are not granted the freedom to determine their own social and cultural policies, at least within the sphere of provincial jurisdiction. If Québécers are distinct, they cannot be expected to make exactly the same policy choices as other

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19 The federal principle does not preclude the possibility of interprovincial agreements. Such agreements could establish minimum standards for social programs.
Canadians. The enforcement of "national standards" in areas of provincial jurisdiction is a rejection of diversity. Unity without diversity is not federalism.

Louis Balthazar, one of the leading political scientists in Québec, has argued that "Canada may be a decentralized federation but its federal government still behaves as if it were the seat of a unitary nation-state" (1998, p.110). He contends, moreover, that the high level of support for sovereignty in Québec represents a "disenchantment toward Canadian federalism" rather than "a real aspiration to complete independence" (1998, p.112). He suggests, finally, that "[t]he recognition of Québec as a distinct society along with the powers necessary to maintain this distinctiveness seems to be, for the moment, the only way to ensure the survival of Canada" (1998, p.113). The recognition of Québec as a distinct society, however, is problematic and it has proven unpopular in the rest of Canada (Telford 1998). Moreover, this prescription does not seem to flow from the diagnosis of the problem. If the problem is the institutional structure of Canadian federalism, the remedy presumably would be to restructure those institutions. A distinct society might mollify Québécois temporarily, but it would not address the structural deficiencies existent in Canadian federalism.

The dynamics of Canadian politics have led some people to advocate asymmetrical federalism.20 While the government of Québec has fought vigorously to escape the constraints of the federal spending power, "social activists in English Canada have been fighting a rearguard action against the premiers and the federal government to ensure that the federal spending power would remain the powerful tool it has historically been to generalize social programs across the country."21

20 The theory of asymmetrical federalism is still not well developed, although Charles Tarlton made an important contribution a number of years ago. See, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," Journal of Politics, 1965, v.27.

The obvious implication is that the government of Canada should have one relationship with the nine English-speaking provinces and a different relationship with Québec. But, like the distinct society clause, asymmetrical federalism is not likely to be popular in much of English Canada. There would appear to be a serious elite-mass disjuncture in English Canada. The political elite and the intelligentsia continually advocate special recognition for Québec or some form of asymmetrical federalism, while ordinary Canadians generally appear to be implacably opposed to such suggestions.

It may be argued that Canada already exhibits asymmetrical characteristics. The Canadian constitution admitted the provinces on slightly different terms, and Québec has opted out of many social programs, but these are relatively minor deviations from symmetrical federalism. It would be difficult to operationalize a ‘hard’ form of asymmetrical federalism. It is difficult to envision Québec Members of Parliament participating in debates about legislation that will not be implemented in Québec because those legislative prerogatives have been transferred to the government of Québec. On the other hand, if Québec MPs do not participate in parliamentary debates, in areas where jurisdiction has been transferred to Québec, the balance of power in parliament may be disturbed. If Québec MPs were subtracted from these debates, three of the seven majority governments since 1968 would have been reduced to minority governments.²² It would also have led to the exclusion of the official opposition (the Bloc Québécois) after the 1993 election, unless Parliament recognized two official oppositions depending on the debate. I suggest that asymmetrical federalism can only be seriously entertained if Canadians are also prepared to adopt a presidential form of government, where it is not essential for the government to maintain the

²² If the seats from Québec were subtracted from Parliament, Trudeau’s 1968 majority government of 155 seats in the 264 seat House of Commons would have been reduced to 95 seats in a 190 seat House, while his 1974 government would have been reduced from 141 of 264 to 85 of 189. Similarly, Mulroney’s 1988 majority government of 169 seats in a 295 seat House of Commons would have been reduced to 106 seats in a 220 seat House.
confidence of the legislature. It has long been thought that a presidential form of government is more compatible with federalism, and it would seem to be the only viable form of government for a strongly asymmetrical form of federalism. I suspect, however, this is more than Canadians want to contemplate.23

While many Québécois have now rejected federalism in favour of independence, public opinion polls in Québec continue to indicate that "renewed federalism" is still the preferred constitutional solution for a majority of Québécois. It would seem that what Québécois really want is Swiss style federalism. Thus, instead of recognizing Québec as a distinct society, Canadians might want to consider giving constitutional recognition to the principle of divided sovereignty. A multinational civisme cannot emerge in Canada until the principle of divided sovereignty is accepted by Canadians outside Québec. The more Canadians resist the principle of divided sovereignty, the more they concede to Québec separatists that federalism cannot work in Canada.24 Canadians have a stark choice to make: they can have federal social programs with "national standards" or Québec. They cannot continue to have both indefinitely.

What do minority nations in India want? Minority nationalities in India are careful not to speak of sovereignty or even divided sovereignty. The central government is highly suspicious of

23 Although I do not wish to push this point vigorously, the virtues of asymmetrical federalism have not been evident in Kashmir. The problem in Kashmir is not asymmetrical federalism per se, but rather that the federal government has not respected the terms of Article 370, which describe Kashmir’s asymmetrical relationship with India. While asymmetrical federalism may theoretically be a useful instrumentality to appease differential regional concerns, it might also generate regional rivalries, jealousies and animosities. In short, differential treatment of one state might be perceived as preferential treatment by another state. This has been evident in India as various regional parties have campaigned to obtain the ‘special’ provisions of Article 370 for their states as well. In Canada some of the provinces have objected to Québec’s ‘special’ status. In this regard, it is interesting to note the very high level of symmetry that exists in Switzerland.

24 Many of the people who argue that "water-tight" compartmentalization of federalism is impossible want to create "water-tight" international borders to protect Canada's cultural industries from globalization, especially the American cultural behemoth. It is hard to accept the proposition that Canadians could effectively control their external borders, but not their internal boundaries.
'fissiparous tendencies' and it has equipped itself with a considerable array of constitutional, although not terribly democratic, powers to suppress even nascent separatism. The Akali Dal, the party of Sikh nationalism, thus delicately phrases its demands in terms of political "autonomy." In the short term, the Akali Dal, and other parties representing minority nationalities, would probably accept what Québec already has but, in the long term, these parties will likely want sovereignty in areas of state jurisdiction. They will want to govern their nations free from interference by the central government. This was the objective of the Akali Dal's Anandpur Sahib Resolution and, especially, its submission to the Sarkaria Commission on Centre-State Relations in the mid-1980s.

India's central leaders, however, have resisted the federal principle even more forcefully than Canadian leaders. After the searing experience of partition, India's central leaders were not willing to divide and share sovereignty with the minority nationalities situated on the periphery of the country. The sovereignty of the central government was an article of faith for the Congress party, and it remains a deeply entrenched conviction in the post-Congress era. The Congress and the BJP tend to equate the 'Indian nation' with the Indian state. There is consequently a belief that sovereignty should reside exclusively in the centre. There is thus a deep schism between 'Indian nationalists' and minority nationalities in India. 'Indian nationalists' seem incapable of conceptualizing a multinational civisme. Conflict is thus likely to be a recurring feature in the Indian federation.

In sum, there seems to be an intrinsic connection between nationalism and the desire for sovereignty. This is partly normative and partly political. There has been a long-standing belief in international politics that nations should form states. Indeed, the term nation-state has been a common misnomer for decades, if not centuries. This, of course, has encouraged dominant
nationalities to conflate their national identity with the state, while at the same time it has caused minority nationalities to seek statehood. The truth, however, is that most nations are not states and most states comprise more than one nation.

The nationalist desire for sovereignty is also political. For nationalists, the nation is the most important form of political association. By international norms, sovereignty is supposed to prevent external interference. Sovereignty is thus regarded by nationalists as a source of protection for the nation. In theory, sovereignty should allow a nation's language, culture, and identity to flourish. Without sovereignty, minority nationalities often feel vulnerable to the actions of their own state, a state they cannot control by virtue of being a minority. Minority nationalities will likely not feel secure in a multinational society unless they are provided with some form of internal sovereignty. This, of course, is the federal project. Divided sovereignty allows each order of government to make autonomous political decisions within its constitutionally allocated sphere of jurisdiction. This study has demonstrated that shared sovereignty is what minority nationalities really want. The relationship between the institutional structure of federalism and the federal condition outlined in Figure 12.1 is thus causal, not coincidental.25

The prescriptive remedy offered here is simple but it is not facile. In fact, the simplicity of this prescription is its greatest virtue. A recognition of divided sovereignty would alter the structure of federalism. It is thus more likely to have a more profound impact on the practice of federalism than a recognition of cultural distinctiveness of a single province or state. Furthermore, the assumption that complex problems require complex solutions is misguided. As the diversity of a

25 John Stuart Mill reached a similar conclusion in his Considerations on Representative Government. He argued, "if there is a real desire on all hands to make the federal experiment successful, there needs seldom be any difficulty in not only preserving these diversities, but giving them the guarantee of a constitutional provision against any attempt at assimilation, except by the voluntary act of those would be affected by the change" (1972, p.409).
society increases the number of things people will agree about decreases. Thus, in more complex societies, simpler solutions must be devised. This is Rawls' "theory of an overlapping consensus." People in Canada and India may wish to bear this in mind as they struggle to find solutions to their separatist crises.  

The Study of Federalism

The behavioral revolution, launched with much fanfare in the 1950s, obscured the essence of federalism. In their quest to measure federalism, political scientists like William Riker ignored the importance of sovereignty. While his endeavour to measure federalism was a spectacular failure, he advocated his approach so forcefully that the terminology of centralization and decentralization continues to permeate the study of federalism. A generation of scholars has thus pursued the study of federalism without acknowledging its core concept. The behavioral revolution is now being challenged by post-modernism and other romantic approaches, but they too miss the point. Charles Taylor has argued that statehood provides an "expression, realization, and recognition" of a national identity (Taylor 1993, p.48). But Québec politics is not just a quest for recognition as Taylor would lead us to believe. It is about power and security. Sovereignty provides minority nationalities with the power to feel secure among larger nations.  

The classical approach to federalism, on the other hand, was always cognizant of the location of sovereignty. While Riker was scathing in his condemnation of Wheare, the latter judged the

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26 While the United States is not as socially complex as either Canada or India, people may also wish to remember that the beauty of the American constitution is its simplicity and brevity, not its complexity. This elegant document has also proven to be the most durable written constitution in the world.

27 Taylor, a self-professed romantic but not a post-modernist, has rejected the proposition that nations should become states "because sovereignty is the key to republican self-rule" (Taylor 1993, p.53). He claims this "is generally understood to be irrelevant for Québec (by all except the minority with an insatiable taste for self-dramatization)" (Taylor 1993, p.56). That nations may desire republican self-rule is evidently too crass for Taylor to contemplate.
operation of federalism in particular federations by how closely they followed the principle of divided sovereignty. If the division of sovereignty was not respected entirely, he described the system as quasi-federal. This admittedly is not an exact science; legal studies are necessarily interpretative. Federalism is quintessentially a legal arrangement, and it ought to be studied as such.

While the classical study of federalism focuses our attention on the location of sovereignty, it was frequently a rather static description of institutional arrangements. If this approach had an explanatory component, it was usually to explain why particular arrangements were adopted. The objective of the present study has been to marry the classical approach to federalism with the new institutional approaches to politics to create a dynamic institutional approach to the study of federalism. This approach retains a focus on sovereignty, but it situates the institutions of federalism as independent variables in order to explain political outcomes. The intention was not to explain why particular institutional arrangements were adopted, but to examine the effects of these institutions in the politics of federal societies. The problem of secession in multinational federations was thus explained in this dissertation as a consequence of the institutional arrangements of federalism in a given federation.

This study has demonstrated that the institutions of federalism must respect the principle of divided sovereignty, at least in multinational federations. In multinational federations, each nation desires sovereignty. There are thus contending loci for sovereignty. In multinational federations, sovereignty cannot be vested in one government, as in unitary states or even federations like the United States and Australia. The United States and Australia do not have minority nationalities intervening in the federal equation, therefore the institutional structure of federalism is not as significant. Without the sociological imperative, the continuation of federalism in these countries
is now a function of institutionalized political practice.

Respect for the principle of divided sovereignty has certain costs. Most significantly, it places constraints on the power of the central government. In a federal political system, the central government does not have the range of powers of a unitary government. We have seen in Switzerland that the federal government has been constitutionally constrained in the areas of taxation and social policy. It has been unable to initiate new policies in these areas without first obtaining the consent of the cantons and the people. This can be frustrating for majority nationalities, who tend to equate their national identity with the state. Majority nationalities reflexively regard the central government as the proper locus of sovereignty, and they frequently resent the constraints placed on the central government's freedom of action. This, however, is the price that must be paid for political stability in multinational federations and it is probably a lower price than enduring decades of political uncertainty. It is surely preferable to protracted political violence.

The politics of separatism in multinational federations is not about centralization and decentralization, nor is it about cultural recognition. It is about the institutional structure of federalism; it is about the division of sovereignty. Political discourse in Québec makes this clear. If dominant nationalities are not willing to divide and share sovereignty in multinational federations, minority nationalities will seek to exit the federation and claim complete sovereignty as an independent state. Switzerland has accepted the principle of divided sovereignty and its associated costs, and it has enjoyed 150 years of multinational harmony. If Canada and India refuse to embrace the spirit of the federal principle, they may not get the opportunity to celebrate a 150th anniversary.
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Appendices
Appendix 1: Names of the Swiss Cantons

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Appendix 2: Federal Revenue Sources in Switzerland (Article 42)

"In order to cover its expenses, the Confederation shall have the following resources:

a. The income from federal property;

b. the net revenue from posts and from the monopoly on gunpowder (Article 41);

c. the net receipts from the privilege tax on exemption from military service (Article 18, paragraph 4);

d. the receipts from customs duties (Article 30);

e. the Confederation's share of the net receipts from taxes on distilled spirits (Article 32 bis and 43 quater, paragraph 7) as well as of the gross receipt from gambling (Article 35, paragraph 5);

f. the Confederation's share of the net profits of the bank entrusted with the monopoly of issuing bank-notes (Article 39, paragraph 4);

g. the receipts from federal taxes (Article 41 bis and ff.);

h. the receipts from fees and other revenues provided for by law."

1 Christopher Hughes comments that "[t]his Article mentions some of the main sources of income for the Confederation, but it does not include all the constitutional sources....and the list has no juristic meaning. Nor does the Federation rely upon this Article for its constitutional right to moneys, but upon the separate sources granted to it in other Articles" (1954, p.48).
Appendix 3: Division of Public Expenditure in Switzerland

<table>
<thead>
<tr>
<th>Division of tasks between the three levels of government</th>
<th>Government in the narrow sense</th>
<th>Public enterprises and undertakings</th>
<th>Government in the broad sense</th>
<th>Federal government</th>
<th>Cantons</th>
<th>Communes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal government</td>
<td>SF 18,585 % 29</td>
<td>29,623 SF 48,208 % 49</td>
<td></td>
<td></td>
<td></td>
<td>1100</td>
</tr>
<tr>
<td>Foreign policy</td>
<td>1,113 SF 1113</td>
<td>1,113 SF 100 % 12</td>
<td></td>
<td></td>
<td></td>
<td>1100</td>
</tr>
<tr>
<td>Telecommunications</td>
<td></td>
<td>8,077 SF 100 % 12</td>
<td></td>
<td></td>
<td></td>
<td>1100</td>
</tr>
<tr>
<td>National defence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1100</td>
</tr>
<tr>
<td>Military</td>
<td></td>
<td>4,932 SF 97 % 2</td>
<td></td>
<td>49,212 SF 100 % 1,1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil</td>
<td></td>
<td>555 SF 41 % 20</td>
<td></td>
<td>5,55 SF 100 % 1,1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agriculture</td>
<td></td>
<td>379 SF 82 % 13</td>
<td></td>
<td>17,244 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social insurance</td>
<td></td>
<td>2,911 SF 88 % 10</td>
<td></td>
<td>23,959 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Railways</td>
<td>6,715 SF 79 % 12</td>
<td></td>
<td></td>
<td>6,245 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Air traffic</td>
<td>2,322 SF 39 % 5</td>
<td>416 SF 39 % 5</td>
<td></td>
<td>416 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint tasks of the federal government and cantons</td>
<td>2,740 SF 58 % 42</td>
<td>2,740 SF 58 % 42</td>
<td></td>
<td>2,740 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Universities, research</td>
<td></td>
<td>2,495 SF 58 % 18</td>
<td></td>
<td>2,495 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waterway management, avalanches</td>
<td>245 SF 35 % 40</td>
<td>245 SF 35 % 40</td>
<td></td>
<td>245 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cantons</td>
<td>10,412 SF 13 % 71</td>
<td>3,356 SF 13 % 71</td>
<td></td>
<td>13,768 SF 100 % 14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secondary education</td>
<td>1,497 SF 3 % 93</td>
<td>1,497 SF 3 % 93</td>
<td></td>
<td>3,93 SF 100 % 4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Health</td>
<td>7,197 SF 1 % 66</td>
<td>7,197 SF 1 % 66</td>
<td></td>
<td>7,197 SF 100 % 3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Churches</td>
<td>214 SF 80 % 20</td>
<td>214 SF 80 % 20</td>
<td></td>
<td>214 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice</td>
<td>1,504 SF 11 % 72</td>
<td>1,504 SF 11 % 72</td>
<td></td>
<td>1,172 SF 100 % 17</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property insurance</td>
<td>592 SF 0 % 99</td>
<td>592 SF 0 % 99</td>
<td></td>
<td>592 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Staff insurance</td>
<td>2,764 SF 38 % 49</td>
<td>2,764 SF 38 % 49</td>
<td></td>
<td>2,764 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint tasks of the cantons and communes</td>
<td>11,100 SF 11 % 11</td>
<td>11,100 SF 11 % 11</td>
<td></td>
<td>11,100 SF 100 % 11</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Police, fire services</td>
<td>1,949 SF 3 % 61</td>
<td>1,949 SF 3 % 61</td>
<td></td>
<td>1,949 SF 100 % 3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State schools</td>
<td>6,263 SF 1 % 44</td>
<td>6,263 SF 1 % 44</td>
<td></td>
<td>6,263 SF 100 % 5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Forestry, hunting, fishing</td>
<td>502 SF 15 % 39</td>
<td>502 SF 15 % 39</td>
<td></td>
<td>502 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Land use planning</td>
<td>181 SF 16 % 45</td>
<td>181 SF 16 % 45</td>
<td></td>
<td>181 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social service</td>
<td>2,205 SF 0 % 43</td>
<td>2,205 SF 0 % 43</td>
<td></td>
<td>2,205 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communes</td>
<td>4,419 SF 6 % 7</td>
<td>2,370 SF 6 % 7</td>
<td></td>
<td>6,789 SF 100 % 7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Culture, leisure, sport</td>
<td>2,022 SF 8 % 26</td>
<td>2,022 SF 8 % 26</td>
<td></td>
<td>2,022 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water pollution and waste management</td>
<td>1,553 SF 10 % 21</td>
<td>1,553 SF 10 % 21</td>
<td></td>
<td>1,553 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water supply</td>
<td>558 SF 0 % 3</td>
<td>558 SF 0 % 3</td>
<td></td>
<td>558 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Industrial enterprises</td>
<td>2,370 SF 36 % 64</td>
<td>2,370 SF 36 % 64</td>
<td></td>
<td>2,370 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slaughterhouses, cemeteries, etc.</td>
<td>286 SF 1 % 9</td>
<td>286 SF 1 % 9</td>
<td></td>
<td>286 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint responsibilities of all three levels of government</td>
<td>15,517 SF 15 % 36</td>
<td>15,517 SF 15 % 36</td>
<td></td>
<td>15,517 SF 100 % 16</td>
<td></td>
<td></td>
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<tr>
<td>Housing</td>
<td>325 SF 19 % 36</td>
<td>325 SF 19 % 36</td>
<td></td>
<td>325 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Business development</td>
<td>487 SF 49 % 10</td>
<td>487 SF 49 % 10</td>
<td></td>
<td>487 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vocational training</td>
<td>1,708 SF 20 % 61</td>
<td>1,708 SF 20 % 61</td>
<td></td>
<td>1,708 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Administration</td>
<td>4,051 SF 16 % 35</td>
<td>4,051 SF 16 % 35</td>
<td></td>
<td>4,051 SF 100 % 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roads and traffic</td>
<td>4,238 SF 42 % 20</td>
<td>4,238 SF 42 % 20</td>
<td></td>
<td>4,238 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Various</td>
<td>4,708 SF 47 % 30</td>
<td>4,708 SF 47 % 30</td>
<td></td>
<td>4,708 SF 100 % 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>98,122 SF 100 % 23</td>
<td></td>
</tr>
<tr>
<td>Government in the narrow sense</td>
<td>62,773 SF 35 % 34</td>
<td>35,349 SF 83 % 11</td>
<td></td>
<td>98,122 SF 100 % 23</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public enterprises</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>47,350 SF 100 % 23</td>
<td></td>
</tr>
<tr>
<td>Government in the broad sense</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>47,350 SF 100 % 23</td>
<td></td>
</tr>
</tbody>
</table>

1. After deduction for double-counting of expenditure between levels of government. Transfers of SF 3,078 million between public enterprises and undertakings and government in the narrow sense could not be deducted for statistical reasons.

Sources: Administration fédérale des finances, Finances publiques en Suisse en 1985, Berne 1987, Division of tasks between the three levels of government according to the table compiled by R. Frey (Zwischen föderalismus und Zentralismus, Lang, Berne 1977, p. 39) for 1974. Major changes are indicated in the text.

## Appendix 4: Division of Tax Sources in Switzerland

### Taxes in Switzerland, 1977

<table>
<thead>
<tr>
<th>Fiscal sovereignty</th>
<th>Taxes on income and wealth</th>
<th>Taxes on consumption</th>
<th>Taxes on ownership and expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Poll tax</td>
<td>Income and wealth</td>
<td>Estate gains</td>
</tr>
<tr>
<td>Confederation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Zurich</td>
<td>Cm</td>
<td>CmCm</td>
<td>Cm</td>
</tr>
<tr>
<td>Berne</td>
<td>Cm</td>
<td>CmCm</td>
<td>Cm</td>
</tr>
<tr>
<td>Lucerne</td>
<td>Ct</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Uri</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Schwyz</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Obwalden</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Nidwalden</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Glarus</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Zug</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Fribourg</td>
<td>(Cm)</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Schaffhausen</td>
<td>CmCm</td>
<td>CmCm</td>
<td>Cm</td>
</tr>
<tr>
<td>Basle-City</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Basle-Country</td>
<td>CtCm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Appenzell 0 RA</td>
<td>Ct</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Appenzell I RA</td>
<td>Ct(Cm)</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Glarus</td>
<td>CmCm</td>
<td>CmCm</td>
<td>Cm</td>
</tr>
<tr>
<td>Aargau</td>
<td>Ct</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Thurgau</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Ticino</td>
<td>Ct</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Vaud</td>
<td>(Cm)</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Valais</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Neuchatel</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
<tr>
<td>Genue</td>
<td>Cm</td>
<td>CmCm</td>
<td>Ct</td>
</tr>
</tbody>
</table>

*Cf = Confederation; Ct = Canton; Cm = Commune; (Cm) = Optional communal tax.

Source: Federal Fiscal Administration.

### Appendix 5: Taxation in Switzerland

#### Taxes levied in Switzerland 1970-87

<table>
<thead>
<tr>
<th></th>
<th>SF million, rounded</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1970</td>
<td></td>
<td>1987</td>
</tr>
<tr>
<td></td>
<td>As % of taxes</td>
<td>As % of revenue</td>
<td>As % of taxes</td>
</tr>
<tr>
<td><strong>Confederation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income and wealth taxes</td>
<td>2 275 31.4 28.3</td>
<td>9 677 41.5 38.9</td>
<td>4 455 90.6 48.0</td>
</tr>
<tr>
<td>Income and wealth taxes</td>
<td>745 10.3 9.3</td>
<td>3 808 16.3 15.3</td>
<td>3 094 62.9 33.3</td>
</tr>
<tr>
<td>Taxes on profits and capital</td>
<td>482 6.7 6.0</td>
<td>1 641 7.0 6.6</td>
<td>863 17.6 9.3</td>
</tr>
<tr>
<td>Federal stamp duties</td>
<td>308 4.2 3.8</td>
<td>2 267 9.7 9.1</td>
<td>- -</td>
</tr>
<tr>
<td>Withholding tax</td>
<td>740 10.2 9.2</td>
<td>1 961 8.4 7.9</td>
<td>162 3.3 1.7</td>
</tr>
<tr>
<td>Capital gain taxes</td>
<td>- -</td>
<td>- -</td>
<td>101 2.0 1.1</td>
</tr>
<tr>
<td>Transfer taxes</td>
<td>- -</td>
<td>- -</td>
<td>202 4.1 2.2</td>
</tr>
<tr>
<td>Inheritance taxes</td>
<td>- -</td>
<td>- -</td>
<td>33 0.7 0.4</td>
</tr>
<tr>
<td>Property taxes</td>
<td>- -</td>
<td>- -</td>
<td>- -</td>
</tr>
<tr>
<td><strong>Consumption taxes</strong></td>
<td>4 966 68.6 61.7</td>
<td>13 637 58.5 54.8</td>
<td>462 9.4 5.0</td>
</tr>
<tr>
<td>Turnover tax</td>
<td>1 688 23.3 21.0</td>
<td>7 912 33.9 31.8</td>
<td>- -</td>
</tr>
<tr>
<td>Customs duties</td>
<td>2 364 32.6 29.4</td>
<td>3 774 16.2 15.2</td>
<td>- -</td>
</tr>
<tr>
<td>Special taxes1</td>
<td>914 12.6 11.3</td>
<td>1 664 7.2 6.7</td>
<td>- -</td>
</tr>
<tr>
<td>Road charges1</td>
<td>- -</td>
<td>- -</td>
<td>395 8.0 4.3</td>
</tr>
<tr>
<td>Tax on motor vehicles</td>
<td>- -</td>
<td>- -</td>
<td>4 0.0 0.0</td>
</tr>
<tr>
<td>Tax on dogs</td>
<td>- -</td>
<td>- -</td>
<td>21 0.4 0.2</td>
</tr>
<tr>
<td>Tax on entertainments</td>
<td>- -</td>
<td>- -</td>
<td>42 0.9 0.5</td>
</tr>
<tr>
<td>Miscellaneous2</td>
<td>- -</td>
<td>- -</td>
<td>- -</td>
</tr>
<tr>
<td><strong>Total tax revenue3</strong></td>
<td>7 241 100.0 90.0</td>
<td>23 314 100.0 93.6</td>
<td>4 917 100.0 53.0</td>
</tr>
<tr>
<td>of which: Shares in tax revenue</td>
<td>461 6.4 1814</td>
<td>7.8 111</td>
<td>- -</td>
</tr>
<tr>
<td>Total revenue</td>
<td>8 044 111.1 100.0</td>
<td>24 902 106.8 100.0</td>
<td>9 287 188.9 100.0</td>
</tr>
<tr>
<td>of which: Transfers received</td>
<td>18 - 0.2</td>
<td>23 - 0.1</td>
<td>2 721 - 29.3</td>
</tr>
<tr>
<td>Own revenue4</td>
<td>8 026 - -</td>
<td>24 879 - -</td>
<td>6 566 - -</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td></td>
<td>1987</td>
</tr>
<tr>
<td></td>
<td>As % of taxes</td>
<td>As % of revenue</td>
<td>As % of taxes</td>
</tr>
<tr>
<td><strong>Communes</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income and wealth taxes</td>
<td>3 700 99.3 57.7</td>
<td>12 404 99.5 50.1</td>
<td>10 430 65.7 52.6</td>
</tr>
<tr>
<td>Income and wealth taxes</td>
<td>2 674 71.8 41.7</td>
<td>9 779 78.5 39.5</td>
<td>6 512 41.0 22.9</td>
</tr>
<tr>
<td>Taxes on profits and capital</td>
<td>643 17.3 10.0</td>
<td>1 610 12.9 6.5</td>
<td>1 988 12.5 10.0</td>
</tr>
<tr>
<td>Federal stamp duties</td>
<td>- -</td>
<td>- -</td>
<td>308 1.9 1.6</td>
</tr>
<tr>
<td>Withholding tax</td>
<td>- -</td>
<td>- -</td>
<td>740 4.7 3.7</td>
</tr>
<tr>
<td>Capital gain taxes</td>
<td>219 5.9 3.4</td>
<td>492 3.9 2.0</td>
<td>381 2.4 1.9</td>
</tr>
<tr>
<td>Transfer taxes</td>
<td>46 1.2 0.7</td>
<td>218 1.7 0.9</td>
<td>147 0.9 0.7</td>
</tr>
<tr>
<td>Inheritance taxes</td>
<td>19 0.5 0.3</td>
<td>50 0.4 0.2</td>
<td>222 1.4 1.1</td>
</tr>
<tr>
<td>Property taxes</td>
<td>98 2.6 1.5</td>
<td>254 2.0 1.0</td>
<td>131 0.8 0.7</td>
</tr>
<tr>
<td><strong>Consumption taxes</strong></td>
<td>25 0.7 0.4</td>
<td>62 0.5 0.2</td>
<td>5 453 34.3 27.5</td>
</tr>
<tr>
<td>Turnover tax</td>
<td>- -</td>
<td>- -</td>
<td>1 688 10.6 8.5</td>
</tr>
<tr>
<td>Customs duties</td>
<td>- -</td>
<td>- -</td>
<td>2 364 14.9 11.9</td>
</tr>
<tr>
<td>Special taxes2</td>
<td>- -</td>
<td>- -</td>
<td>914 5.8 4.6</td>
</tr>
<tr>
<td>Road charges1</td>
<td>- -</td>
<td>- -</td>
<td>287 0.5 0.4</td>
</tr>
<tr>
<td>Tax on motor vehicles</td>
<td>- -</td>
<td>- -</td>
<td>995 1.8 1.4</td>
</tr>
<tr>
<td>Tax on dogs</td>
<td>- -</td>
<td>- -</td>
<td>17 0.0 0.0</td>
</tr>
<tr>
<td>Tax on entertainments</td>
<td>- -</td>
<td>- -</td>
<td>62 0.1 0.1</td>
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<tr>
<td>Miscellaneous2</td>
<td>- -</td>
<td>- -</td>
<td>61 0.1 0.1</td>
</tr>
<tr>
<td><strong>Total tax revenue3</strong></td>
<td>3 725 100.0 58.1</td>
<td>12 465 100.0 50.3</td>
<td>15 883 100.0 80.1</td>
</tr>
<tr>
<td>of which: Shares in tax revenue</td>
<td>- -</td>
<td>- -</td>
<td>- -</td>
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<tr>
<td>Total revenue</td>
<td>6 412 172.1 100.0</td>
<td>24 766 198.7 100.0</td>
<td>23 723 - 25.8</td>
</tr>
<tr>
<td>of which: Transfers received</td>
<td>1 112 - 17.3</td>
<td>4 373 - 17.7</td>
<td>3 903 - -</td>
</tr>
<tr>
<td>Own revenue4</td>
<td>5 300 - -</td>
<td>20 393 - -</td>
<td>19 820 124.8 100.0</td>
</tr>
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</table>

1. For the Confederation: direct federal tax, including the tax on exemption from military service; for the cantons and communities: including fire service taxes.
2. Tax on tobacco, tax on beer, supplementary tax.
3. Continental stamp duties (8 cantons), registration fees (3), taxes on hydro-power (4), tax on playing-cards (2), tax on lottery winnings (3), residence tax (various cantons and communities).
4. Excluding parish (church) taxes.
5. After deduction of double-counting of transfers received for public authorities (shares in revenue and contributions of authorities). Transfers between cantons are not deducted from revenue; the own revenue of the different authorities therefore does not correspond to the difference between total revenue and "transfers received".

Appendix 6: The Major Political Parties in Switzerland

1. The Radical (Democratic) Party (a.k.a. the radicals)
   Freisinnig-demokratische Partei (FDP)
   Parti-radical démocratique (PRD)

2. The Christian Democratic (Peoples) Party (a.k.a. the Catholic conservatives)
   Christlichdemokratische Volkspartei (CVP)
   Parti Démocrate-Chrétien (PDC)

3. The Swiss People's Party (known formerly as the farmers)
   Schweizerische Volkspartei (SVP)
   Union démocratique du Centre (UDC)

4. The Social Democratic Party (a.k.a. the socialists)
   Sozialdemokratische Partei der Schweiz (SPS)
   Parti Socialiste suisse (PSS)

2 All the major parties also have official Italian and Romansh names as well.
Appendix 7: Responsibilities of the Federal Government Departments in Switzerland

Department of Foreign Affairs: foreign politics, diplomatic and consular representation abroad, peace, security and disarmament policies, relations with the EU and the international organizations, development cooperation and humanitarian aid.

Department of the Interior: culture, public buildings, the environment, health, statistics, social security, science and research, sport.

Department of Justice and Police: law enforcement, police, supervision of aliens, federal prosecutor's office, private insurance supervision, patents and copyrights, civil defense, regional planning, weights and measures, refugees.

Military Department: All matters relating to security and defense.

Department of Finance: federal finances, federal civil service, federal tax administration, customs, communication technology, banking supervision.

Department of Political Economy: foreign trade, industry and trade, labour, agriculture, control of the economy, economic administration of land, housing.

Department of Transport and Energy: transport by road, rail and air, water supply, energy, road construction, media and telecommunications, federal railways, post and telephone office.

Source: Oswald Sigg (1997) Political Switzerland, Zurich: Pro Helvetia, the Arts Council of Switzerland; p.33-35.
Appendix 8: The Social Structure of Switzerland (1980)\(^1\)

<table>
<thead>
<tr>
<th>Language</th>
<th>Population</th>
<th>Citizens</th>
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<tbody>
<tr>
<td>German</td>
<td>65.0%</td>
<td>73.5%</td>
</tr>
<tr>
<td>French</td>
<td>18.4%</td>
<td>20.1%</td>
</tr>
<tr>
<td>Italian</td>
<td>9.8%</td>
<td>4.5%</td>
</tr>
<tr>
<td>Romansh</td>
<td>0.8%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Protestant</td>
<td>44.4%</td>
<td>50.4%</td>
</tr>
<tr>
<td>Catholic</td>
<td>47.6%</td>
<td>43.6%</td>
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</table>

<table>
<thead>
<tr>
<th>Religion</th>
<th>Population</th>
<th>Citizens</th>
</tr>
</thead>
<tbody>
<tr>
<td>German Protestant</td>
<td>35.4%</td>
<td>40.6%</td>
</tr>
<tr>
<td>German Catholic</td>
<td>26.0%</td>
<td>29.0%</td>
</tr>
<tr>
<td>French Protestant</td>
<td>7.8%</td>
<td>9.0%</td>
</tr>
<tr>
<td>French Catholic</td>
<td>9.0%</td>
<td>9.5%</td>
</tr>
<tr>
<td>Italian Catholic</td>
<td>9.1%</td>
<td>4.1%</td>
</tr>
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</table>

\(^1\) Source, Kenneth D. McRae (1983) *Conflict and Compromise in Multilingual Societies: Switzerland*, Waterloo: Wilfrid Laurier Press; chapter two, various pages. This chapter is an excellent overview of the Swiss social structure and cross-cutting cleavages. Note that the data starkly reveal the large influx of migrant Italian Catholic workers.
Appendix 9: The Social Structure of the Swiss Cantons

<table>
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<th>No.</th>
<th>Canton</th>
<th>Official Language(s)</th>
<th>Religion</th>
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<tbody>
<tr>
<td>1.</td>
<td>Aargau</td>
<td>German</td>
<td>Protestant (57%), Catholic (43%)</td>
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<tr>
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</tr>
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<td>German</td>
<td>Catholic</td>
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<td>4.</td>
<td>Basle Country</td>
<td>German</td>
<td>Protestant</td>
</tr>
<tr>
<td>5.</td>
<td>Basle Town</td>
<td>German</td>
<td>Protestant</td>
</tr>
<tr>
<td>6.</td>
<td>Berne</td>
<td>German (84%)/French (8%)</td>
<td>Protestant</td>
</tr>
<tr>
<td>7.</td>
<td>Fribourg</td>
<td>French (61%)/German (32%)</td>
<td>Catholic</td>
</tr>
<tr>
<td>8.</td>
<td>Geneva</td>
<td>French</td>
<td>Protestant (51%), Catholic (49%)</td>
</tr>
<tr>
<td>9.</td>
<td>Glaris</td>
<td>German</td>
<td>Protestant</td>
</tr>
<tr>
<td>10.</td>
<td>Grisons</td>
<td>German (60%), Italian (13%)</td>
<td>Protestant (51%), Catholic (49%)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Romansh (22%)</td>
</tr>
<tr>
<td>11.</td>
<td>Jura</td>
<td>French</td>
<td>Catholic</td>
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<tr>
<td>12.</td>
<td>Lucerne</td>
<td>German</td>
<td>Catholic</td>
</tr>
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<td>13.</td>
<td>Neuchâtel</td>
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<td>German</td>
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<tr>
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<td>Protestant</td>
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<tr>
<td>17.</td>
<td>Schwytz</td>
<td>German</td>
<td>Catholic</td>
</tr>
<tr>
<td>18.</td>
<td>Solothurn</td>
<td>German</td>
<td>Catholic (56%), Protestant (44%)</td>
</tr>
<tr>
<td>19.</td>
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<td>German</td>
<td>Catholic (60%), Protestant (40%)</td>
</tr>
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<td>French</td>
<td>Protestant</td>
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<td>24.</td>
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<td>French (60%), German (32%)</td>
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<td>25.</td>
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Note: Small linguistic minorities reside in most cantons, but the breakdown has been presented only for the officially bilingual cantons.


1. German/Catholic

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2. German/Protestant

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3. French/Catholic

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4. French/Protestant

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5. Bilingual/Catholic

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6. Bilingual/Protestant

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7. German/Bi-denominational

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1. Rich Cantons

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2. Middle Cantons

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3. Poor Cantons

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The fiscal classification of the cantons has been taken from Dafflon (1977, p.136). Electoral data is from the Federal Assembly web-site (www.parliament.ch).