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Intergovernmental Bargaining in the U.S. and Australia: Who Wins and Who Loses



Fulbright Flinders University Lecture Series 6

Carol S. Weissert

Distinguished Chair in American Political Science



Professor Colin J Stirling
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I am very pleased to present the lecture delivered by Professor Carol Weissert as part of Flinders commitment to hosting the Fulbright Flinders University Distinguished Chair 2016 in American Political Science.

The Distinguished Chair enhances Flinders strong international links with universities and research institutions across North America and Asia.

Professor Weissert's lecture Intergovernmental Bargaining in the U.S. and Australia: Who Wins and Who Loses looks at federalism and the definition for U.S. and Australia. She provided a detailed look at the commonalities and differences between the two countries and leverage used to progress with policy.

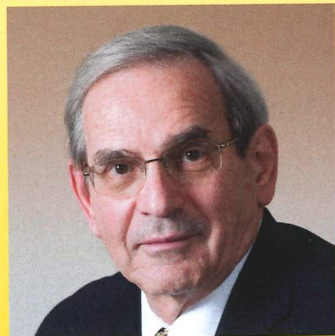


Professor Phyllis Tharenou
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Professor Don DeBats
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As a renowned expert in the field of federalism, Professor Weissert reminds us of the shared power relationship that is at the heart of federal-state relations in Australia and the United States. In both nations the federal government needs the states to implement programs and in both nations the states have some weapons with which to shape the programs that will operate in their jurisdiction. In 1992 Australia invented a new forum for this negotiated governance: the Council of Australian Governments, an institutional arrangement of prime-movers (prime minister and state premiers) that is not available in the US. On the other hand, American states raise about twice the total tax revenue (30%) of Australian states (15%) and thus possess less positive leverage. Nevertheless, Professor Weissert reminds us of the importance of the states, particularly in Australia, showing the courage (and developing the tools) with which to advance their interests. As a key contributor to democratic governance, federalism matters, here and there, now and always.



Thomas Dougherty
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Professor Weissert's research examines why the U.S. and Australia have a strong connection, and mutual respect for the democratic process. This publication is valued and highly regarded resource written by a Fulbright Scholar who has a depth of knowledge on Federalism and the bargaining it entails.

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Carol's research is focused on federalism, health politics and policy. As Fulbright scholar in Australia, she conducted a comparative analysis of organisations representing state governments in Australia and the United States through the lens of health policy – an important and highly salient issue in both countries. While Australian and U.S. federalism are different in important ways (Australia is a parliamentary system and the U.S. is a presidential one, for example), there are many commonalities between the systems and health policy is designed and implemented by states AND the national government in both countries.

Carol's Ph.D. is from the University of North Carolina, Chapel Hill. She was on faculty at Michigan State University in East Lansing, MI, fourteen years prior to moving to Florida State. At Michigan State, she headed the Institute of Public Policy and Social Research; at Florida State, she heads the LeRoy Collins Institute for Public Policy. She has also served as staff of the premier intergovernmental groups in the United States—the National Governors Association and the National Conference of State Legislatures.

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US Federation



Australian Federation

Federalism and Bargaining

Though states of course have their own source of sovereign authority, state power in federal systems also flows from the states' important role in implementing federal laws. In the US and Australia, the delivery of virtually all domestic services is generally left in the hands of local and state governments. In this role in the US states have what Haider (1974) calls a type of informal "veto power" over federal policies. As Nugent (2009) puts it, "states may simply refuse or neglect to comply with the requirements or mandates of federal law and take their chances in terms of consequences." He notes that states' resistance to federal law can be viewed as irresponsible shirking, or as the responsible actions of governments who simply see the world differently (also see Hill and Weissert 1995; Bednar 2009)

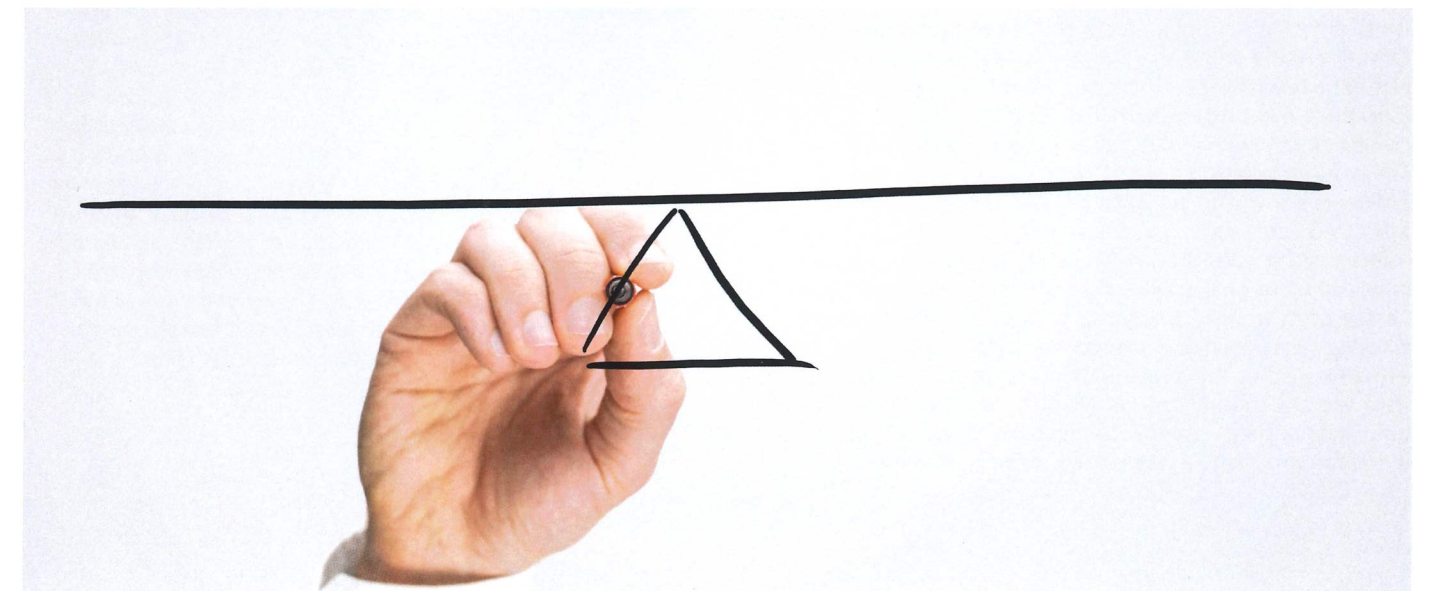
Similarly, Australian states can and do refuse to join partnerships with the Commonwealth and other states. For example, Western Australia refused to sign the Health and Hospitals National Agreement in 2010 which called for the Federal Government to take full funding responsibility for primary health and aged care and becoming the major funder of public hospitals (while holding back a portion of the GST revenue to do so) (Fenna and Anderson 2012). The agreement was later replaced by another one without the functional/GST swap under a new prime minister and this time Western Australia joined.

Over the years, U.S. and Australian states have sometimes resisted federal "intrusion," but more often have cooperated (Grodzin 1960, Elazar 1962). Seldom are they merely passive tools, however. Particularly in recent years, they have "bargained" with federal officials over implementing national policy. Nugent (2009) calls this "participation" where states compel or encourage federal officials to include state officials in deliberations. In the US this process is informal; in Australia it is much more formal through organizations representing parliamentarians and officials.

Derthick (1987) notes that in the US "bargaining and negotiation, not command and obedience, appear to characterize the practice of intergovernmental programs now as in the past..."¹ Similarly, Painter (1998) finds that the last few decades in Australia have seen more cooperation on joint schemes of policy and administration but that bargaining is the norm in seeking and achieving this cooperation.

Ryan (2012) calls this bargaining negotiated governance. She points out that bargaining occurs over time in an interactive process. It also frequently involves federal and state bureaucrats who are knowledgeable of the policy and often of each other in what Wright (1988) calls picket fence federalism. In the US, bargaining is not limited to these bureaucrats but includes governors, state legislators or members of Congress, and the president. In Australia, bureaucrats or officials play a pivotal role in the day-to-day negotiations but elected officials—specifically premiers and the prime minister—have in-person negotiations over policy through the Council of Australian Governments (COAG). COAG provides a forum for bargaining on both large and small federalism issues not available in the U.S.

Ryan concludes that in bilateral negotiations, the party with the most leverage is best positioned to secure its preferred terms, assuming the leverage is effectively deployed. She notes that the federal negotiators are more likely to hold negative leverage, which is power that one side holds that the other side does not want them to use (in the U.S. the supremacy clause and in both countries it is withholding of federal funds). States, on the other hand, are more likely to have positive leverage which is power or resources the other side wants it to use (in this case staffing and expertise to implement policy). She posits that negative federal leverage is often balanced by positive state capacity leverage. The more capacity an actor has, the more power it may have in the bargaining. Politics may play a role as well. In both the U.S. and



1 While negotiation and bargaining are often used interchangeably, strictly speaking bargaining can be viewed as a subset of negotiation. Bargaining is typically distributive where there is a winner and a loser; negotiation is more integrative and is more win-win. Another difference is that bargaining is competitive; negotiation is cooperative. While political science scholars model bargaining games, we think it is more appropriate in the federalism context to refer to negotiations since the results are not win-loss games but rather can result in agreement where both the Federal Government and states win (see Ruger 2015 for support for this conclusion.)



Council of Australian Governments

Australia, in cases where presidents/prime ministers need state support to achieve a campaign promise or legacy, they are more likely to accommodate state concerns (Dinan 2014).

But there is another type of important bargaining that is multi-lateral, not bi-lateral. In Australia, this takes place through the COAG where the prime minister and state premiers and territory chief ministers, along with the head of the local government association, meet regularly on intergovernmental issues. COAG is chaired by the prime minister and staffed from his office. COAG was launched in 1992 following a series of premiers' conferences involving the prime minister and the premiers. Early COAG achievements included national competition policy, a mutual recognition scheme regarding barriers to interstate trade, and vocational education and training (Painter 1998). What is noteworthy from a US scholar's perspective is that instead of having the Federal Government set uniform guidelines and perhaps providing funding, in Australia, the governments sit down and talk through the issues, with each government getting some of what they want. As Painter put it, COAG is "clearly a vehicle for imposing an alternative, cooperative model." (p. 114).

The U.S. doesn't have any such peak intergovernmental association with the national government represented. The closest comparison to COAG is the National Governors Association (NGA) and perhaps the National Conference of State Legislatures (NCSL). The U.S. did have a more comparable group that operated from 1959 to 1996 called the U.S. Advisory Commission on Intergovernmental Relations which had as members U.S. Senators, House members, cabinet officials, governors, state legislators, mayors, county officials and three representatives of the general public. The commission made recommendations from highly respected research on issues ranging from federal grants to local financial emergencies, from federal mandates on states to indexation of the federal income tax. When it lost its funding from the Federal Government, it closed its doors. With the exit of ACIR, the Federal Government's last resource for addressing broad intergovernmental issues - beyond the confines of individual programs - was gone (McDowell 2016).

Australia's Long History of Bargaining

The Australian federation is defined by multi-lateral agreements called intergovernmental agreements—well over 160 since 2002 (Council of Australian Governments 2016). The agreements are signed commitments of the jurisdictions to implement decisions that have either been reached or confirmed by COAG. They are political agreements and have no legal effect. Kildea (2012) notes that perhaps the most important activity in which the various ministers and officials are involved is the negotiation and formulation of these agreements.

Under the 2016-2017 budget, states received \$18.7 billion for specific health purposes. (Commonwealth 2016). Nearly \$18 billion is public hospital funding through National Health Reform (NHR) negotiated in 2011 after four years of meeting with states. Commonwealth and state contributions are pooled into a national funding board and COAG through multi-level negotiations works out agreements as part of the NHR.

Once that is done, the Commonwealth works with individual states on bilateral agreements. If COAG doesn't agree to a change in agreements, the old agreement is left in place. The bilateral agreements can reflect individual state concerns. For example, in a recent NHR agreement, Victoria did not want funding to be paid to local networks and the Commonwealth agreed. As a Commonwealth officials put it, "Sometimes states are concerned about issues the Commonwealth isn't concerned about." A state staffer described the bilateral negotiations as "tortuous and painful but we know what we are getting and sort it out with the Commonwealth." Ministers sign both multi-lateral and bilateral agreements; rarely do they go to the parliaments.

COAG negotiations can also be extended. An agreement to consolidate regulation of health professionals is a case in point. It took two to three years to do this, but the case is one where the states worked out a state-based solution. The Commonwealth might have taken over the registration given the problem, where professionals in one state who lost their credentials set up shop in another state. The states argued that the Commonwealth had no authority and the states would reach a solution. Queensland developed a law and other states adopted the Queensland law separately (two states made small changes).

But the shared federal-state responsibilities also play into political blame-casting—almost an art in Australia and certainly something that politicians feel resonate with the public. A 2006 report for the House of Representatives Standing Committee on Health and Ageing was titled, "The Blame Game: Report on the Inquiry into Health Funding" (Parliament of Australia 2006). "Blame Game" was highlighted in a similar 2008 report from the National Health and Hospital Reform Commission. Prime Minister Kevin Rudd promised to hold a summit of premiers to end the blame game if he was elected leader (McQuestin 2012). He obviously didn't succeed since one of his successors, Tony Abbott, described the blame-casting as a "constant game of pass-the-parcel with each level of government blaming the other for the system's shortcomings" (Abbott 2014).

In Australian federalism, cooperation or partnerships are watchwords. For example, in expressing their dismay at the income tax proposal proposed at the April 2016 COAG meeting with little to no warning to the premiers, Daniel Andrews, Premier of Victoria, highlighted the political aspects of the proposal and said "we will get more done if we work together. A partnership is what we need to get things done" (Andrews 2016).



The American President

US: Informal Negotiation in Many Venues

US intergovernmental funding is primarily through federal grants to states. In 2015, some \$624 billion went in grants to states; more than half went to Medicaid—the federal-state program for poor children, the disabled and elderly (2017 Budget).

The intergovernmental system in the US is bigger and more diverse than in Australia. There is no counterpart to COAG; the president meets with the governors once a year when the NGA has its annual winter meeting. The meeting doesn't attempt to reconcile policy and in recent years partisanship has limited the impact of the NGA on federal intergovernmental policy (Dinan 2011).

Most of the states' elected officials have their own meetings and staff (i.e. state legislators, Secretaries of State, Attorneys General, Lieutenant Governors) as well as the states' appointed officials (including state Medicaid and welfare directors, insurance commissioners among others). There is some coordination among the groups - but only some. The governors have no formal sway over any of the elected officials and may not be consulted in policy positions of the appointed officials' groups. So the state voice in Washington is multiple and varied.

However, bilateral negotiations are frequent and probably more successful through the implementation of federal grants—particularly through waivers. In this process, federal and state officials work together on an agreement to waive provisions in the federal law. States may define provisions in the federal law in ways they find most appropriate to their needs, they may negotiate with federal officials in the state plan they write to implement laws or amendments to it, or they may seek waivers of federal law. Waivers are exemptions from federal statutory requirements and are put in place by congressional legislation (or executive order) but implemented by federal and state appointed officials (and increasingly state legislatures and governors). State legislatures must also approve any waivers; they can and do make changes even to agreements reached by federal and state officials.

While Medicaid waivers have been available to states for decades, they have become increasingly important since the passage of the ACA in 2010.² States can negotiate with federal officials to extend Medicaid—a high priority goal of the Obama Administration. We have seen states push the limits of the Medicaid program, including such areas as co-payments and work requirements—areas where previously federal officials absolutely drew the line.

² Another component of the ACA also provided an opportunity for negotiation. The law offered states the ability to set up insurance exchanges where individuals and families with incomes above the expanded Medicaid program; if the states chose not to set up these exchanges, the Federal Government would do so. Some states negotiated components of setting up their own exchanges.

The Politics and Product of Bargaining

In this section I will examine three components of bargaining identified by Ryan (2012) with examples from the US and Australia: leverage, capacity, and party congruence. In short, I find that leverage and capacity do play a role in these negotiations across the two countries; party congruence is more mixed.

Negative Leverage

The threat of withholding federal funding to states is an example of negative leverage. Prime Minister Gillard threatened to revoke \$450 million in reward payments to states and territories if they stalled on introducing agreed upon productivity reform. But in the end, the minority government felt it couldn't afford continuing conflict with the states and settled on a new health agreement (Gallup 2011). In Australia, states can lose federal dollars if they do not meet certain performance standards.

In the US, the Federal Government's "negative leverage" of withholding or failing to allocate federal dollars was undermined in a 2012 Supreme Court decision, *NFIB v. Sebelius*. Until this decision, states generally had to act in ways the Federal Government approved or risk losing the federal dollars for Medicaid—a program that is one of the largest in every state's budget (and the very largest in a few states' budgets). The ACA expanded the scope of the Medicaid program, substantially increasing the number of individuals covered under the program. If a state did not comply, it lost not only that funding, but all of its Medicaid funding. Twenty-six states joined by the National Federation of Independent Business argued that this was essentially coercion where states were commandeered by the Federal Government and thus unconstitutional. In *NFIB*, the court agreed, saying that "[T]he Constitution simply does not give Congress the authority to require the States to regulate." The impact of this decision may be primarily targeted to the Medicaid program, but given that it is by far the largest grant, accounting for over half of federal grant funding, the effect is a major one. And it provides states with a 'new tool' to use in negotiations with Washington (Bagenstos 2013).

States also have negative leverage when they refuse to comply with the preferences of the national government. This is particularly important where the issues are ones desired by the president/prime minister. Where the states must buy into or otherwise implement a program near and dear to the president or prime ministers' policy agendas, they have positive leverage on their side. And they usually know it (Dinan 2014). Similarly, the Commonwealth under Rudd wanted states to revise their health commissions. South Australia had already revised its boards and didn't want to do it again. The state refused to act, and the Commonwealth staff never bothered them again.

In the US, state leverage has increased in the implementation of the Medicaid expansion under the ACA, President Obama's signature program. With barely more than a quarter of the states having chosen to expand their Medicaid programs, the Obama Administration loosened the strings on what it would waive. The Secretary of Health and Human Services, Sylvia Mathews Burwell, told a meeting of state Medicaid directors that expansion was a top priority and that she was "eager and willing to work with states that have yet to expand" (Burwell 2014). She recognized that states have different needs and emphasized that the law allows for flexibility on issues including new payment and delivery systems.

Positive Leverage

In both the US and Australia, federal funding has been the primary positive leverage. In the US this funding is provided by the Congress so the negotiation, in the form of lobbying, occurs there. In Australia's executive federalism, negotiation occurs between Commonwealth and state officials, largely over funding. But the Commonwealth has the upper hand because of their checkbook, according to one state health official. "They have the money; state politicians can't say no." Prime Minister Paul Keating once warned against getting between premiers and a pot of money, and the aphorism apparently remains applicable today.

Australian states also can strike deals bilaterally with the Commonwealth to their advantage. Intergovernmental agreements do differ from state to state to reflect individual situations in the states but the policy intent is consistent, according to a Commonwealth health official.

In another example of where states can win, New South Wales wanted to establish a medically supervised drug injecting center. The Commonwealth government was adamant that it should not proceed and proposed a carrot (funding for drug education and rehabilitation if the injecting center was scrapped) and a stick (legislation to override the state law setting up the center). The state rejected the funding and disputed the Commonwealth's legislative power to override the state. The Commonwealth backed down and the center was established. Premier Keneally got an extra \$1.7 billion in health funding for NSW and negotiated additional conditions that allowed Victoria to participate in the health deal as well (Twomey 2012).

Finally, states can organize formally to utilize their positive leverage. In 2006, following lackluster engagements in COAG, the premiers banded together to form the Council for the Australian Federation (CAF), designed to put pressure on the Commonwealth following its reluctance to extend a state financing deal. However, despite early successes (Menzie's 2012), CAF has not met regularly and has not contributed to policy development, perhaps illustrating how difficult it is to sustain separate horizontal relationships when there is a horizontal and vertical institution available.

Capacity

In the US, bureaucrats or officials play a pivotal role in negotiations because of their expertise. States, in the implementation of the ACA, used their expertise—and the fact that they could not easily replace them with other administrative agents—to derive “considerable influence” or leverage (Thompson and Gusmano 2014, 441).

Callaghan and Jacobs (2014) argue that the knowledge and experience that states gain from bargaining and negotiating with Washington help them develop strategic bargaining tools and learn that federal agency implementation of laws is rather malleable. States also witness the costs of inaction and the back and forth involved in waiver negotiations creates a process in which bargaining and mutual accommodations become the norm. They examine states’ use of Medicaid waivers in the ACA and find that the states’ experience with waivers was a determinant of the state’s use of that waiver process.

In Australia, bureaucrats play an important role in negotiating intergovernmental agreements, settling intergovernmental issues, and providing informed studies on subjects of interest to COAG. For example, COAG may consider positions on health policy that have migrated up from the health ministers meetings with their counterparts in the Commonwealth or COAG may send an issue “down” to this group for study. In addition, the chief executives of state health agencies and the Commonwealth—the Australian Health Ministers’ Advisory Council or AHMAC—meet regularly to deal with technical or detailed issues that generally would not be on the COAG agenda. AHMAC is a place where details can be hashed out. For example, one of the Commonwealth’s targets included the size of waiting lists in public hospitals. However, states were using different ways of measuring those ‘waiting’ that seemed unfair. AHMAC invited clinicians in, and developed a common metric that all the states agreed to. In spite of the imperfect ‘hierarchy,’ health officials or bureaucrats worked out problems across the states and with the Commonwealth in an informal but largely effective manner.

There are more public servants serving the Commonwealth than in individual state bureaucracies, and the Prime Minister’s office generally provides staffing for COAG. But Commonwealth staff often move or change positions and are generalists, not specialists. Prime Minister Abbott favored using central agency and treasurers, even in staffing health policies and issues. At the state levels similar shifts occurred where Premier’s staff and treasurers are key players. However in negotiations over health agreements, health officials often hold sway. For example, health staff negotiated the two dozen NPA bilateral agreements and it is that staff that negotiate coordinated care pilots.

In Australia, size of the states matters. The larger states—particularly New South Wales and Victoria—have more staff than the smaller ones and those staff tend to volunteer for writing and research tasks that give them more leverage in intra-state agreements. They tend to have more clout in negotiations. In signing agreements—and even in sitting around the COAG table—state premiers are ordered by size of the state. In the US there are differences in size of staffs between large and small states but even the smallest states can succeed in bi-lateral negotiations. For example, in the US, Arkansas was the first to implement a waiver, setting up a system where the state pays monthly premiums to a qualified health provider and charges a modest premium for recipients. Three more states submitted similar waivers following Arkansas.

Party Congruence

Finally, there is the politics of political party congruence. In both the US and Australia, state elections are independent of national elections, but state elected officials are more likely to support a national policy if they are of the same party as the president/prime minister and to oppose it if they are of a different party.

In Australia, Painter notes an interstate agreement involving the Commonwealth on barriers to trade stalled after a change in government in Western Australia, Victoria and South Australia when these states refused to abide by a provision in the agreement allowing the Commonwealth power to amend the act (with approval of the states), saying they would amend it with their own legislative processes. Nevertheless, a few years later the plan was implemented as originally designed. In the US, Barrilleaux and Rainey (2014) find that partisanship is a key determinant of which states will expand Medicaid and that the level of need of citizens and state economic condition have little effect.

There may be grandstanding before the press or at NGA or COAG meetings (Painter says that several premiers use the opportunity to spar with the PM as a way to enhance their own popularity ratings). For example, in April 1995, the Commonwealth Government saw no advantage in scheduling a meeting for fear of providing a forum for liberal premiers to score tactical points that might advantage the federal Liberal party opposition (Painter 1998). Sometimes the politics at COAG overshadow the policies. For example, in April 2016, the prime minister’s aborted proposal for state takeover of part of the income tax garnered most of the attention, while progress was quietly made on health reform issues including coordinated care and pricing of safety and quality in hospitals.

However, in the end state politicians often do what is best for their states—regardless of the party of the president or prime minister. As one former state (Labor) health minister put it, “I got along with Liberal ministers in some states and not so well with Labor ministers in other states. This had little to do with party positions. It had to do with the way that they looked at issues.” Another state official noted that under Prime Minister Rudd, the state that was the toughest on his health proposal was Victoria where the Premier shared the political party of the Prime Minister.

Menzies (2012) argues that federalism concerns in Australia frequently override party allegiances and agreements are formed across party political lines. The job of premier is to “promote and defend your jurisdiction before all others,” she says (54). A state official echoed the point, saying “it is not party politics; it is the states against the Commonwealth.” Premiers are particularly likely to come together when facing unwanted Commonwealth proposals such as the \$80 billion proposed cut to health and education funding for states in the 2014-2015 budget—cuts made without consultation or the cooperation of the states (Tiernan 2015).

Conclusion

Although there are many important differences between Australian and US federalism, one of the essential commonalities inherent in any federation is the need for negotiation. The national governments in both countries have the positive leverage of additional funding and the negative leverage of withholding funds which helps them to 'win' in the negotiations. But states are not without power.

In both countries, the Federal Government needs states to implement programs and policies and therein lies the importance of states' leverage in negotiations. States can refuse to participate in the program and can bargain for a desired project for their benefit. In the US, states recognize this power (along with the ability to sue the Federal Government when it acts in ways they do not like).

Ramamurthy (2012, 118) argues that Australian "states can be highly persistent in their bargaining over time, actively and passively defying and delaying Commonwealth goals until an agreeable compromise is reached." But they have been somewhat reluctant to do this. In fact, Painter's (1998) description of the strength of the Commonwealth in these situations—that only the national government can "tailor the payoff rules" to incentivize the reaching of agreement (p. 95) seems more a more appropriate description of Commonwealth-state negotiations. There are examples of Commonwealth-state agreement over important policy issues through COAG but in many cases, COAG decisions are in the "weeds" or occurring at the margins rather than with major system-wide reforms. As one former state official put it, they are more "in the café" rather than "in the cathedral" decisions. Even the 2008 reforms, which were hawked as highly significant, have evolved into more of the marginal variety. While the examples in the US of Federal Governmental leeway on the Medicaid program through waivers are important and can lead some delivery and access changes, they also do not evidence significant functional changes.

Interestingly in the U.S. the trend is more toward executive federalism and bilateral negotiations. The Congress is so polarized that it is unable to reach agreement even on issues that both parties support. President Obama has stepped up his use of unilateral executive orders and his administration has worked with governors through waivers, grants, and loosening up of requirements to get things done, often through bilateral negotiations. The Congress is a back-bencher, with its leadership encouraging states to resist participation in federal programs (Bulman-Pozen and Metzger 2014).

In Australia intergovernmental relations, like politics more generally, has been roiled by recent changes in party leadership at the Commonwealth level. Five prime ministers in six years (with one serving twice) and in-party coups in both parties has left policies in limbo and federalism in flux.

Federalism—and the bargaining it entails—remains both dynamic and politically pivotal. States in both countries can take advantage of the instability by pushing forward on their own preferences—often on a bilateral basis. For Australia, multi-lateral negotiations through COAG remain a mechanism for change. The bottom line is that bargaining is a mainstay in federal systems but clearly one that needs more attention and perhaps more political courage on the part of states—especially in Australia.

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